THE NTER REDESIGN CONSULTATION PROCESS: NOT VERY SPECIAL

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I Introduction

It is now uncontroversial to observe that the measures of the Northern Territory Emergency Response (commonly called the 'Northern Territory Intervention') are racially discriminatory. This is the conclusion drawn by numerous international and domestic human rights bodies, including the United Nations Committee on the Elimination of Racial Discrimination,[1] the Human Rights Committee,[2] the Committee on Economic, Social and Cultural Rights,[3] the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Special Rapporteur)[4] and the Aboriginal and Torres Strait Islander Social Justice Commissioner.[5] The Northern Territory Intervention also arguably violates a range of other human rights obligations under international law.[6]

The Special Rapporteur has condemned the Intervention in the strongest possible terms for having an overly interventionist architecture, with measures that undermine Indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy.[7] Professor Anaya noted reports of indignity and stigmatisation brought about by the scheme, which heightened racist attitudes among the public and media against Aboriginal people, and animated perceptions of Indigenous peoples as somehow being responsible for their present disadvantaged state.[8]

The Special Rapporteur concluded that measures of the Intervention, as they are currently configured, are racially discriminatory, unable to qualify as special measures, and neither proportionate nor necessary to any legitimate objectives of the Intervention.[9]

Indeed, the discriminatory nature of the Intervention was acknowledged in the legislation that introduced it, which suspended the operation of the *Racial Discrimination Act 1975* (Cth) (*RDA*)[10] and declared its measures to be special measures for the purposes of the *RDA*.[11] Special measures are forms of favourable or preferential treatment, necessary to advance substantive equality for particular groups or individuals facing persistent disparities. They reflect an acknowledgment that formal equality before the law will not suffice to eliminate discrimination and will not achieve effective equality.[12]

Notwithstanding its initial confidence that the measures of the Intervention could properly be characterised as special measures,[13] the Government committed, after one year of operation, to ensuring that the Intervention measures are either non-discriminatory or more clearly justified as special measures.[14] The Australian Parliament has recently enacted legislation that is intended to achieve these two aims.[15] In 2009, the Government undertook an ambitious and extensive consultation process with Aboriginal people across the Northern Territory in relation to a number of Intervention measures (Redesign Consultations), which ostensibly shaped the amendments.

Special measures have specific characteristics. A vital precondition is that they are designed and implemented with the *prior* consultation of the affected group. Additional characteristics include that they are temporary, goal-directed and carefully tailored initiatives, which are based on assessed need, and encompass an appropriate system of monitoring. They are also legitimate, proportionate and necessary. This paper will not explore whether the individual measures fulfil these specific criteria; instead, it will examine whether the Redesign Consultation process fulfils the criterion of 'prior consultation' necessary to justify the characterisation of the proposed amended measures of the Intervention

as special measures. Part II provides an overview of the implementation and continuation of the Northern Territory Intervention, focusing on the events that led to the Redesign Consultations. Part III considers the characteristics of special measures under the *Convention on the Elimination of All Forms of Racial Discrimination*[16] and the *RDA*, giving particular consideration to whether negative measures can qualify as special measures, and also the State's duty to consult with Indigenous peoples. Part IV critiques the Redesign Consultations process in relation to compliance with criteria of best practice for consultation with Indigenous peoples. Part V concludes that flaws in the consultation process preclude the measures from being characterised as special measures.

II Background to the Northern Territory Intervention and the Redesign Consultations

In June 2007, six days after the findings of 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'),[17] the Howard Government announced a 'national emergency intervention' into Aboriginal communities in the Northern Territory.[18] Within seven weeks of its announcement, the Howard Government passed a legislative package[19] with bi-partisan support, imposing blanket application of non-discretionary measures with profound effects. The provisions of the Northern Territory Intervention legislation were targeted directly at Aboriginal people, and the operation of the *RDA* was excluded in respect of all acts or omissions made for the purposes of the Northern Territory Intervention.[20] Relevantly, the legislation also characterised the measures of the Northern Territory Intervention as 'special measures'.[21]

Two of the defining features of the Intervention's implementation were its lack of consultation with affected Aboriginal communities, and the astonishing haste with which the legislation was passed, which precluded the crafting of a community-based response. Such haste was contended to be necessary to avoid 'red tape' and 'talkfests'.[22] As one of the authors of the *Little Children Are Sacred* Report noted, the only consultation that did take place was with the Canberra bureaucracy.[23]

By contrast, the explicit and repeated message of the *Little Children Are Sacred* Report was the urgent need for radical change in the way government and non-government organisations consult, engage with and support Aboriginal people.[24] The report found that previous approaches had left Aboriginal people 'disempowered, confused, overwhelmed, and disillusioned.'[25] The weakening of communities was observed to be due 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.[26]

The report's first recommendation was central to all of its 97 recommendations, and emphasised the critical need for sincere consultation with Aboriginal people in designing initiatives for Aboriginal communities.[27] The repeated emphasis throughout the report was on 'genuine partnerships', 'immediate and ongoing effective dialogue with Aboriginal people', and 'genuine consultation in designing initiatives that address child sexual abuse'.[28] The required approach was not of imparting information or undertaking token consultation, but one of facilitating voluntary engagement and community consent for policy.[29]

Similar themes emerged from the report of the Northern Territory Emergency Response Review Board ('Review Board').[30] The Review Board had been 'established to conduct an independent and transparent review'[31] of the Intervention after its first year of operation. Notwithstanding its observations of definite gains and widespread, if qualified, community support for many measures,[32] the Review Board reported vehement opposition to the racially discriminatory nature of the Northern Territory Intervention:

> Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.
>
> There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief. Resistance to its imposition undercut the potential effectiveness of its substantive measures.[33]

Nonetheless, it concluded that the situation in remote Northern Territory communities and town camps remained 'sufficiently acute to be described as a national emergency' and that the Northern Territory Intervention should continue.[34] In supporting 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 Racial Discrimination Act. [35]

The Rudd Government acknowledged that the suspension of the *RDA*, combined with a lack of prior consultation, left Aboriginal people feeling hurt, betrayed and less worthy than other Australians.[36] It recognised that reinstatement of the *RDA* is a fundamental prerequisite for achieving long-term outcomes and that, in order for these long-term outcomes to be effective, they must be created through meaningful engagement with Indigenous peoples.[37] Thus, the Rudd Government committed to revising the core measures (such as compulsory income quarantining and compulsory five-year leases) so that they are either non-discriminatory, or more clearly justified as 'special measures' in conformity with the *RDA*.[38] It then released the *Future Directions for the Northern Territory Emergency Response Discussion Paper* ('*Future Directions* Discussion Paper'),[39] which outlined the Government's proposals to amend a number of the Northern Territory Intervention measures, and formed the basis for the Redesign Consultation process in 2009.

Recently enacted legislation that amends a number of Intervention measures allegedly emerged from the Redesign Consultation process, and is designed to bring the measures into conformity with the *RDA*. The Government intends that the amended income quarantining scheme will be independent of race and, as a result, non-discriminatory.[40] It intends that other amended measures – namely alcohol restrictions, pornography restrictions, five-year leases, community store licensing and the powers of the Australian Crime Commission ('ACC') – will remain as special measures under the *RDA*.[41] The object provisions of the legislation make the intention explicit, other than in relation to the ACC powers.[42] Other measures remain unchanged. Under the amending legislation, the *RDA* and other anti-discrimination laws will be reinstated at the end of 31 December 2010.[43]

After initially expressing its intention to oppose the Bills, and despite the Coalition Senators' dissenting report to the Senate Community Affairs Legislation Committee inquiry,[44] the Opposition supported the enactment of the legislation.[45]

III Special Measures

Non-discrimination and equality are fundamental to human rights law,[46] such that non-discrimination is a peremptory norm of international law.[47] It is one of the guiding principles of the United Nations Charter, which mandates 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'.[48] It is embodied in numerous international instruments, including the *Universal Declaration of Human Rights*,[49] the *International Covenant on Civil and Political Rights* ('ICCPR'),[50] the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),[51] the *Convention on the Elimination of All Forms of Racial Discrimination* (*Race Convention*)[52] and the *Declaration on the Rights of Indigenous Peoples* ('DRIP').[53]

Non-discrimination is a *jus cogens* norm and differential treatment is permissible in only the most compelling of circumstances. Differential treatment constitutes racial discrimination if

> the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention [Against Racial Discrimination], are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[54]

Conversely, substantive equality does not necessarily entail uniform treatment, and differential treatment will not constitute discrimination if the criteria for such differentiation (judged against the objectives and the purposes of the relevant convention) are proportionate, reasonable, objective, and are designed to achieve a legitimate purpose.[55] Indeed, the UN Committee on the Elimination of Racial Discrimination ('CERD'), which oversees compliance with the Convention Against Racial Discrimination, clarifies that to 'treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect,

as will the unequal treatment of persons whose situations are objectively the same.'[56]

The *Race Convention* embodies the principles of dignity and equality of all human beings, combining 'formal equality before the law with equal protection of the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights'.[57] To promote the attainment of de facto equality, 'special measures' constitute a form of permissible differentiation under the *Race Convention*. They are permitted under art 1(4), and indeed *required* 'when the circumstances so warrant' under art 2(2).[58] Special or positive measures are forms of favourable or preferential treatment described by CERD as 'affirmative measures', 'affirmative action' or 'positive action'[59] intended to ensure the adequate advancement of certain racial groups who require support to enjoy their human rights and fundamental freedoms in full equality.

In incorporating the *Race Convention* into Australian domestic law, the *RDA* also makes provision for 'special measures'.[60] Reflecting art 1(4) of the *Race Convention*, s 8 of the *RDA* allows for differential treatment that would otherwise breach ss 9 and 10 of the *RDA*. Section 8(1) provides:

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

The starting point for analysing special measures under the *RDA* is obtained from their meaning under the *Race Convention*. The High Court clarified in *Gerhardy v Brown*[61] that the 'true meaning of the Act is ascertained by reference to the meaning in international law of the corresponding Convention provisions'.[62] To assist in interpreting the treaty provisions, CERD publishes 'General Recommendations' as authoritative statements of the interpretation of the rights, duties and standards contained within the *Race Convention*. Thus, the content of State party obligations is discerned from reading the *Race Convention* together with these general recommendations.

CERD recently published General Recommendation 32 to provide guidance to State parties on the meaning of special measures under the *Race Convention*. The committee identified a number of specific characteristics of special measures relevant to an assessment of whether the existing and amended measures of the Northern Territory Intervention can legitimately be characterised as special measures. Relevantly, special measures:

- are designed and implemented on the basis of *prior* consultation with affected communities and the active participation of such communities [emphasis added];[63]
- are appropriate to the situation to be remedied, legitimate and necessary in a democratic society;[64]
- respect the principles of fairness and proportionality;[65]
- are temporary;[66]
- are designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned;[67]
- are goal directed programs which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms;[68]
- are carefully tailored to meet the particular needs of the groups or individuals concerned;[69] and
- require a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal.[70]

Appraisals of the need for special measures should incorporate a gender perspective, and be based on accurate data relating to the socio-economic and cultural status and conditions of the various groups in the population, as well as their participation in the social and economic development of the country.[71]

CERD clarified that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as the rights of persons belonging to minorities to enjoy their own culture, the rights of Indigenous peoples to traditional lands, or the rights of women to non-identical treatment with men.[72] Such rights are distinct and permanent rights, recognised as such in human rights instruments.[73]

Additionally, CERD identified specific reporting requirements of governments intending to implement special measures. Governments should identify articles of the *Race Convention* to which the special measures are related and report on specific issues, including:

- justifications, including statistical and other data on the situation of beneficiaries, how disparities have arisen and what results are expected;
- intended beneficiaries;
- range of consultations undergone;
- nature of measures and how they promote the advancement, development and protection of affected groups and individuals;
- envisaged duration of measures;
- mechanisms for monitoring and evaluating the measures;
- participation by the targeted groups and individuals in implementing institutions and in monitoring and evaluation process; and
- results, provisional or otherwise, of the application of the measures. [74]

Commencing from the construction of arts 1(4) and 2(2) of the *Race Convention*, Brennan J in *Gerhardy v Brown* identified the indicia of a special measure permissible under the *RDA* in similar terms:

> A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.[75]

Satisfaction of these four indicia is not sufficient for an initiative to be classified as a special measure. The provisos in the latter part of art 1(4) must also be satisfied, namely that the 'measure must not "lead to the maintenance of separate rights for different racial groups" nor "be continued after the objectives for which [it was] taken have been achieved".'[76]

Significantly, his honour cautioned that the question of what constitutes 'advancement' requires evaluation from the perspective of the affected group:

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group 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.[77]

Put simply, special measures are specifically targeted, narrowly focused and measurable initiatives that can be clearly justified by State parties based on evidence of need, which is ascertained by reference to the group concerned, rather by external policy makers purporting to act in the best interests of the target group.

A Can Negative Measures Be Special Measures?

The orthodox conception of special measures is as forms of preferential or favourable treatment. As the Special Rapporteur observes:

> it would be quite extraordinary to find, consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.[78]

Furthermore, Indigenous peoples throughout the world and in Australia have faced systematic dispossession from their land and resources; destruction of their traditional ways of life and economies; devastating impact on their cultures, spiritual practices and languages; undermining of their governing institutions and authority; and marginalisation from mainstream civil, political, social and economic life. The entrenched disadvantage faced by Australian and other Indigenous peoples can arguably be attributed to the legacies of colonisation and continuing discrimination, such that the norm of non-discrimination has specific implications as it applies to Indigenous peoples. Affirmative action to overcome such legacies is mandated. It would be entirely inconsistent if, in addressing circumstances arising from notions of superiority and exclusion, negative initiatives (which curtail rights of Indigenous peoples, including inherent rights to land) could lawfully or legitimately constitute special measures, particularly if imposed without consent.

Nonetheless, the Government's position from the outset has been that negative measures can qualify as special measures,

seemingly on the basis of balancing positive and negative effects. At the time the Northern Territory Intervention was introduced, Darryl Melham claimed 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.'[79] Jonathon Hunyor has observed that there has been a degree of acceptance in Australia of measures that curtail rights as special measures; for example, alcohol bans in Aboriginal communities supported by symbolic 'special measures certificates' issued by the Race Discrimination Commissioner.[80] Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner has posed the possibility of such community-led initiatives as special measures but *only* when enacted with the consent of the affected people.[81]

An alternative approach, aligned with the more orthodox interpretation of special measures, is to approach negative measures as potentially fulfilling the criteria for limitations on human rights permissible under international law – and therefore not as special measures at all. It is well accepted that limitations on some human rights are permissible, but the justification for such limitations must be extremely robust and occur in very limited circumstances: they must fulfil a legitimate and pressing purpose; be reasonable, necessary and proportionate; and be demonstrably justified and evidence-based.[82] They will be impermissible if on a discriminatory basis.[83] As the Special Rapporteur clarifies:

> The proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis.[84]

CERD has clarified that, whenever a State party purports to impose a restriction on one of the civil, political or economic, social and cultural rights and freedoms listed in art 5 of the *Race Convention*, it must ensure that neither in purpose nor effect is the restriction incompatible with art 1 of the Convention.[85] CERD is obliged to specifically inquire to make sure that any such restriction does not entail racial discrimination.[86]

To the same effect, art 4(1) of the ICCPR provides that, even in circumstances of an officially proclaimed 'public emergency which threatens the life of the nation', derogation from treaty obligations to the 'extent strictly required by the exigencies of the situation', is permissible 'provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'[87] In similar terms, DRIP provides that any limitations 'shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.'[88]

Within the context of the Northern Territory Intervention, the debate surrounding restrictions of rights is often framed as encompassing a hierarchy of rights, treating rights protected by one international treaty as inconsistent with and to be pitted against rights protected by another.[89] In particular, the implicit narrative is that protecting women and children against violence has justified racially discriminatory measures. This is an impermissible approach that fails to conceptualise a human rights framework of complementary rights.[90] As the Review Board notes:

> The indivisibility and interdependence of human rights in this context means that addressing issues of violence and abuse … cannot be done by enacting racially discriminatory measures. Indeed, the critical point to be made here is that addressing the safety and wellbeing of children, women and families requires a strengthening of human rights frameworks. Such strengthening cannot occur in the context where different categories of rights are considered to be inherently inconsistent – which is not the case.[91]

Australian jurisprudence is yet to definitively settle the question of whether measures that remove or restrict rights may qualify as special measures. In *Bropho v WA*[92] Nicholson J held that the *Reserves (Reserve 43131) Act* 2003 (WA), which empowered an administrator to direct all persons to leave the Swan Valley Community Reserve and prohibited re-entry, were *not* racially discriminatory and were, in any event, special measures. On appeal, the Full Court similarly held that there had been no discrimination but, in doing so, observed that Nicholson J may have misapprehended aspects of the operation of the *RDA*.[93] The Full Court held that the interference with property rights was justified as affecting a legitimate public purpose, and that it did not need to consider the question of special measures.[94] In coming to this conclusion, the Full Court commented that it will be a question of degree in determining the extent to which the content of universal human rights (in this case property

rights) are modified or limited by legitimate laws. However, the Full Court did not intend to imply that basic human rights can be compromised by laws that have an ostensible public purpose, but are, in truth, discriminatory.[95] Thus, the Full Court did not need to consider the question of whether the limitations on property rights were special measures, but instead took the approach of viewing the restrictions as permissible limitations to affect legitimate objectives – as countenanced by international law.

Against this background, Northern Territory Intervention measures limiting the human rights of Indigenous people on a differential basis could only be legitimate in very narrow circumstances, following appropriate consultation. They would otherwise constitute impermissible discrimination. The Special Rapporteur observed:

> To find the rights-limiting, discriminatory measures of the NTER to be justified would require a careful assessment that they are strictly necessary to the achievement of the legitimate NTER objectives, that those objectives somehow override the rights and freedoms being limited, and that there is an absence of suitable alternatives.[96]

Professor Anaya continued:

> Being racially discriminatory on their face, the rights-impairing aspects of the NTER measures should be presumed to be illegitimate. That presumption *might possibly* be overcome only if there is a strong showing that the measures are proportional and necessary in regard to a valid objective, and that adequate consultations have been undertaken (emphasis added).[97]

Despite some ambiguity, the preferential approach to measures that curtail or limit rights in domestic and international law is, not as special measures, but as potentially permissible against robust criteria. As the Special Rapporteur notes, purported justification of the Intervention measures against such criteria is likely to be unsustainable.

B States' Duty to Consult with Indigenous Peoples

An essential precondition for special measures is that they are designed and implemented on the basis of prior consultation with, and the active participation of, affected communities. In any event, an obligation on States to consult with Indigenous peoples is enshrined in a number of international instruments, including DRIP and *ILO Convention No 169*,[98] and is also fundamental to United Nations human rights treaties such as the *Race Convention* and the ICCPR.[99]

The Special Rapporteur has clarified that, as a general rule, decisions of the State will be made through democratic processes in which the public interest – including Indigenous peoples' interests – is adequately represented.[100] However, special differentiated consultation procedures are required when State decisions affect Indigenous peoples' particular interests, even when those interests do not correspond to a recognised right to land or other legal requirement, and when State decisions may affect Indigenous peoples in ways not felt by others in society.[101]

Importantly, in the context of evaluating the broad social and economic initiatives of the Intervention now conceived within the *Closing the Gap* strategy,[102] compliance with the duty to consult has the practical benefit of avoiding potentially detrimental outcomes in addition to fulfilling human rights obligations. As the Special Rapporteur has observed:

> without the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programs, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust[.][103]

There are two essential conditions for compliance with the duty to consult. First, a duty to consult requires confidence building initiatives conducive to building a consensus. Good faith consultations towards consensual decision-making require a climate of confidence, which is especially relevant to Indigenous peoples, 'given their lack of trust in State institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events'. Additionally, Indigenous people are 'typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education'.[104] Noting that, in many instances, ineffective consultation procedures result from inadequate involvement in the design and implementation of the consultation procedures, the Special Rapporteur has observed that central to the development of a climate of confidence is a

process where the consultation procedure is itself a product of consensus.[105] Further, the power imbalance between the parties must be addressed by ensuring that financial, technical and other assistance is provided to Indigenous people without using such assistance to leverage or influence Indigenous positions in the consultations. The second condition for compliance with the duty to consult is good faith negotiations with the object of achieving agreement or consent. The requirement does not provide a veto power to Indigenous peoples, but emphasises negotiations towards a mutually acceptable agreement prior to decisions being made, rather than mechanisms for imparting information that do not provide the ability to genuinely influence the decision-making process.[106]

C Consent

Special measures require prior consultation with the affected group and, in any event, there is a duty on States to consult with Indigenous peoples in relation to decisions that affect them. However, 'consultation' covers a broad spectrum of activity and it is therefore appropriate to consider the standard that would fulfil that precondition in relation to Indigenous peoples. Although viewed by States, including Australia,[107] as contentious, in international law, the requirement that States consult with Indigenous peoples in relation to decisions that affect them has evolved over the last 20 years into the requirement for free, prior and informed consent identified in international treaties and declarations, general recommendations and jurisprudence.[108]

CERD has identified specific obligations of State parties, including Australia, as they apply to Indigenous peoples in General Recommendation 23.[109] Relevantly, States have an obligation to ensure that:

> members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their *informed consent* (emphasis added)[.][110]

Similarly, the obligation is stated in art 19 of DRIP in that consultations are to be carried out in 'good faith … in order to obtain their *free, prior and informed consent* (emphasis added)'.

In identifying the criteria of special measures in *Gerhardy v Brown*, Brennan J expressed a similar sentiment. Although his honour did not have the benefit of General Recommendation 23 to assist his analysis of the *Race Convention* and *RDA*, his honour observed that:

> [t]he wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[111]

The International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples developed a comprehensive overview of elements of free, prior and informed consent as it applied to Indigenous peoples, reflecting common understanding. In summary, 'free' required the absence of coercion, intimidation or manipulation; 'prior' necessitated respect for Indigenous consultation and consensus processes; and 'informed' required information about scope of, reasons for, duration and likely economic, social, cultural and environmental impact of the proposal.[112] Consent entailed, among other things, 'good faith', 'mutual respect', 'full and equitable participation', and 'dialogue allowing for appropriate solutions'.[113] Consultation requires time and an effective system of communication and consent should be interpreted as Indigenous peoples have reasonably understood it.[114] Accurate, accessible information was essential with procedures and mechanisms that facilitated equal access to financial, human and material resources.[115]

Whilst CERD has, on numerous occasions, reminded State parties of the requirement for informed consent as a precursor to decisions affecting Indigenous peoples, the standard is somewhat contentious and was opposed by the former Coalition Government as 'inconsistent with Australia's democratic system if Parliament's ability to enact and amend legislation was subject to the consent of a particular subgroup of the population.'[116] However, this approach misunderstands the obligation.

The Special Rapporteur expressed frustration that, in many situations, the discussion surrounding the duty to consult and the related principle of free, prior and informed consent has been framed in terms of whether Indigenous people have a 'veto power' that could be wielded to halt development projects.[117] Rather, the focus should be on building dialogue towards consensus. Necessarily, the

strength or importance of consent will vary according to the Indigenous interests involved, but there is the possibility it could crystallise into a presumption that proposals should not be advanced without consent.[118]

The question of 'consent' and, in particular, how and from whom it is to be ascertained, raises complex issues beyond the scope of this paper. However, it is self-evident that there cannot be prescriptive rules, and that the appropriate methodology will vary in differing circumstances, especially when it is argued that competing rights are involved. Consultations where the rights of adults and children may differ, where group rights may contrast with individual rights, or where the rights of one section of a group are curtailed for protection of another, raise complex issues but do not negate the need for proper consultation.[119]

Consultation will inevitably reflect a variety of opinions and there will seldom be consensus, which necessitates the involvement of Indigenous people in planning and implementing the process, and in identifying the mechanisms and procedures to confirm informed consent.[120] The question of consent also inevitably highlights the necessity of effective representative bodies that are considered legitimate by those who they represent, that are an expression of Indigenous self-determination, and that are a vehicle for engagement with governments.

IV The NTER Redesign Consultations

Between June and August 2009, the Rudd Government conducted a large-scale consultation process about future directions for the Northern Territory Intervention with Indigenous individuals, families and communities across the Northern Territory.[121] The NTER Redesign Consultation process was extensive, with over 500 meetings conducted in all 73 prescribed areas targeted for intensive application of the Northern Territory Intervention measures, other Northern Territory communities and town camps.[122] It involved several thousand people, most of whom were Indigenous.[123] Four tiers of consultation were adopted, ranging from meetings with individuals and families, to community meetings, to intensive workshops. There were:

- 444 meetings in which individuals, families and small groups in communities met with General Business Managers (GBM) in their communities on an open-door basis (Tier 1);
- 109 whole-of-community meetings led by Indigenous Coordination Centre (ICC) managers and GBMs (Tier 2);
- six regional workshops of two to three days duration involving 176 different people from NTER communities and Indigenous leaders (Tier 3); and
- five workshops with major Indigenous stakeholder organisations in the Northern Territory involving 101 different people – Indigenous and non-Indigenous (Tier 4).[124]

As a 'starting point for discussion', the *Future Directions* Discussion Paper set out how the Government intended to meet the three overarching recommendations of the Review Board, reiterating its commitment to resetting its relationship with Indigenous peoples and reinstating the *RDA*.[125] The *Future Directions* Discussion Paper highlighted eight Northern Territory Intervention measures, set out proposals for improving the selected measures, and posed a number of questions to be raised during the consultation process. The Government claimed that it was

> open to ideas and proposals. It will listen to ideas put forward in consultations. The NTER Review Board said that many of the NTER measures were not as effective as they should have been because Aboriginal people were not involved in their original design. There was no consultation or engagement. This Government is committed to real consultation with Aboriginal people in the Northern Territory so the NTER measures can be improved.[126]

Examples cited of the Government's responsiveness to feedback arising from the Redesign Consultations include amended proposals in relation to income quarantining, police powers relating to alcohol laws, the pornography measure and the business management area powers.[127]

However, the content of the *Future Directions* Discussion Paper and the conduct of the Redesign Consultations belie this expansive interpretation of the process, which should be more properly described as providing a forum for comment on the proposed changes.[128] The two overarching objectives of the 'engagement and communication strategy' themselves illustrate the limited scope of the consultation process. The first objective

> is to reset the relationship between the Government and the Indigenous people in the NT. It will do this by:

- reiterating the original purpose of the NTER;
- reiterating the major achievements to date;
- reiterating this Government's commitments including what it has delivered to date;
- explaining the Government's current position on the NTER, in particular, its position on each of the specific measures;
- explaining why the Government is conducting these consultations; and
- explaining the longer term agenda.

The second objective is to collect and record feedback from stakeholders on the benefits of the various NTER measures, and how they could be made to work better.[129]

The 'key messages' to be emphasised by facilitators during consultations are similarly framed. They focus on the seriousness of problems that warranted the continuation of the Intervention, significant additional funding and government effort resulting in 'considerable benefits' and action taken to improve the Northern Territory Intervention to date.[130] The need to move the Northern Territory Intervention to a sustainable phase, building on 'improvements already achieved', was emphasised in the *Future Directions* Discussion Paper. The next stage was outlined in the Government's statement that:

> [b]ecause of the improvements made so far, the Government believes that the key NTER measures should continue. As a starting point for discussion the Government proposes that a number of the individual measures should be continued along similar lines to how they are currently operating. For some measures, proposals for possible change are presented to assist the consultation process.
>
> The Government will work closely with Aboriginal people to re-design the various measures because it believes the ongoing success of the NTER depends on individuals and communities having a strong say in how the measures should work.[131]

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) contracted the Cultural & Indigenous Research Centre Australia (CIRCA) to review the engagement and communication strategy and oversee the consultations. CIRCA reviewed the engagement strategy and communication products; it attended a two-day training session for Government Business Managers ('GBMs'), Indigenous Engagement Officers ('IEOs') and Indigenous Coordination Centre staff; and it observed 15 Tier 2 community meetings and one regional workshop in Katherine.[132] It was contracted to assess whether the consultations were undertaken in accordance with the engagement and communication strategy, rather than in accordance with best practice indicia for consultation with Indigenous communities, and it concluded that they were.[133]

A Government Reporting on the NTER Redesign Consultations

Government reporting of the NTER Redesign process praised the consultations as occurring in the 'spirit of genuine consultation with Indigenous people', and resulting in the proposed amendments contained in the *RDA* Reinstatement Bill. It was stated that:

> [t]he Government has listened to what people had to say and carefully weighed up the feedback given to it during the consultations and the other evidence in reaching its position.[134]

The Government's account of the process (Redesign Consultations Report) reports support for the continuation of each of the eight measures. In each section, the report identifies key themes and messages, and then summarises the views expressed in the consultations (divided into Tier 1/ Tier 2 and Tier 3/Tier 4 consultations). It is difficult to discern consistency of support for, or opposition to, the measures but it appears that assessment of the levels of support was weighted in some sense. For example, few people in the Tier 1/Tier 2 consultations were aware of business management area powers, and support for their retention largely came from regional community leaders and stakeholder organisation representatives, who 'could be expected to have a more detailed understanding of the provisions'.[135] Conversely, support for compulsory income quarantining was stronger in Tier 1/Tier 2 consultations (and stronger in Tier 1 than Tier 2) than in Tier 3/Tier 4, where there was a strong and consistent view that income quarantining should be voluntary or trigger based.[136]

Citing the CIRCA review of the consultations, the Government concluded that the process was 'open and fair', that 'facilitators encouraged open discussion and emphasised the importance of people having their say', and that feedback reports reflected the content of consultations.[137] However, in

refraining from expressly acknowledging CIRCA's criticisms, the Government alters the tone of CIRCA's report and overstates positive elements of the consultations.

Specifically, CIRCA raised serious concerns in relation to the openness and fairness of the meetings and workshops, and the content covered during those meetings. It also made observations and recommendations relating to FaHCSIA's reporting of the meetings that may, in turn, raise queries about the accuracy of the Government's analysis of issues arising from the process. CIRCA reviewed FaHCSIA's summaries from all Tier 2 meetings and the Tier 3 regional workshops to assess the accuracy of the meeting records. While concluding that, in most cases, the FaHCSIA reports accurately reflected the content, it also noted 'opportunities for improvement'.[138]

Importantly, some FaHCSIA summaries of the Tier 2 community meetings did not describe the level of anger and frustration at the meetings, such that it was not possible to determine the extent of opposition from those summaries.[139] According to CIRCA, reports should have indicated whether consultations were dominated by men or women, Indigenous or non-Indigenous people, and should have described whether participants were engaged or conversations were forced.[140] A few reports did not clearly indicate the level of negativity towards income quarantining that CIRCA's consultants observed in the meeting and implied a preference for the opt-out option, whereas CIRCA had observed that voluntary income quarantining was preferred.[141]

Similar issues were reported in relation to the Tier 3 report. This would also have been improved by providing information on the attendees (gender, age profile), level of engagement and level of emotion expressed during the meeting.[142] Similarly, the FaHCSIA report oversimplified the level of discussion relating to income quarantining, stating that the preferred option was a voluntary model with triggers for those not managing their money, whereas CIRCA had observed that a trigger model was acceptable as an alternative option and was not preferred.[143]

Unfortunately, given limited access to primary materials, it is not possible to assess whether claims of levels of support in relation to individual measures are warranted, or analyse the conclusions drawn and issues raised in the Redesigns Consultations Report. However, given CIRCA's misgivings, assertions by FaHCSIA that the Redesigns Consultations Report was 'frank and balanced'[144] may not withstand close scrutiny. In fact, in light of CIRCA's observations, the *Will They Be Heard?* Report, and the Government's own summary of issues, the Redesign Consultations Report contains some surprising observations and apparent anomalies. For example, despite previous research conducted by the Central Land Council and the University of Newcastle indicating that people overwhelmingly opposed five year leases (85–95 per cent),[145] it was said that support for continuing the measure was higher than discontinuing the measure.[146] The Redesign Consultations Report also claimed that the 'strongly prevailing view from those who commented' on controls on publicly funded computers, and that a 'consistent theme from the consultations[,] was that people valued the confidentiality protection available under [the ACC powers]'.[147] This does not accord with CIRCA's observations that the measures were unknown. Similarly, claimed support for the pornography bans and controls on publicly funded computers should be tempered against CIRCA's observation that the measures were highly sensitive and in some cases participants did not want to discuss them.[148] However, it should be acknowledged that the report sought merely to summarise issues and was not representative of all the opinions of those affected by the Northern Territory Intervention measures.[149]

Ironically, a detailed reading of the Redesign Consultations Report illustrates an 'absence of evidence of broad or even substantial acceptance by indigenous communities of the rights-impairing aspects of the NTER measures.'[150] As the Special Rapporteur noted:

> While indicating that many indigenous individuals who were consulted on an individual basis or in open community meetings supported the NTER measures, the Government's report reveals a general pattern of criticism, emanating from workshops with indigenous leaders and representative organizations, of the NTER measures in their current form in regard to income management, leasing and alcohol restrictions.[151]

B The Inadequacy of the NTER Redesign Consultation Process

The Northern Territory Intervention consists of a comprehensive suite of legislative measures and related initiatives. These have extraordinary gravity, and address a range of social and economic issues that impact on

almost every aspect of the lives of Indigenous people in the Northern Territory. The measures encompass those that impact on Indigenous people individually (including income quarantining and interaction with the criminal justice system); to control of Aboriginal organisations' assets and land by government employees; to the undermining of land rights, native title rights and rights of traditional owners; to the removal of the permit system and CDEP, albeit reinstated; to coercive Australian Crime Commission powers; and to limitations on Administrative Appeals Tribunal review or removal of oversight by the Public Works Committee.[152] Of the numerous measures, eight were chosen for discussion in the consultation process as the main Northern Territory Intervention measures affected by the *RDA*.[153]

The consultation process was conducted on a large scale and involved many participants, which, according to the Government, provided support for the continuation of the measures of the Northern Territory Intervention.[154] However, the credibility of this support is questionable when the inadequacy of the consultation process is understood.

As Annie Kennedy observes, informed decision-making is underpinned by 'understanding'.[155] Understanding, in terms of what people are being asked to participate in, requires comprehension of, or familiarity with, the concepts that sit behind the language and an ability to assess the implications of what people are agreeing to.[156] By contrast, analysis of the consultation process suggests that such high level comprehension was not capable of being achieved. First, given the requirement for informed consent or at the very least meaningful support, 'understanding' required an express appreciation of the purpose of the consultations. FaHCSIA's contention that the Tier 1 and Tier 2 consultation meetings provided 'occasions to ask about the purpose of the consultation and the measures if people did not understand them'[157] does not fulfil this obligation.

Second, the *Will They Be Heard?* Report concluded that serious flaws in the consultation process undermined its credibility and rendered reliance on the process unsafe. In particular, the process was criticised for a range of fundamental flaws; some procedurally based, others of a substantive nature. These included:

- lack of independence;
- absence of Aboriginal input into design and implementation;
- insufficient notice in some communities;
- absence of interpreters or qualified interpreters at some meetings;
- consultation limited to existing government proposals;
- inadequate explanations and description of measures;
- failure to explain complex legal concepts; and
- concerns about the government's motives in undertaking the consultation. [158]

It must be acknowledged that, in evidence to the Senate Community Affairs Legislation Committee Inquiry, FaHCSIA responded to a number of specific criticisms of the process raised in the *Will They Be Heard?* Report, claiming that the Redesign Consultations Report was a 'substantial refutation of a number of the statements'.[159] However, the most serious substantive failings of the consultation process were not addressed, including the failure to explain complex legal concepts, the failure to describe measures in their entirety and their potential effects, and the fact that only a small number of the measures of the Northern Territory Intervention were discussed during the consultation process. The Senate Committee Report reviewed criticisms of the consultation process made by the Central Land Council, NAAJA, Australian Council of Social Services and the *Will They Be Heard?* Report and concluded that the consultation process had been generally successful, and that its integrity had been improved by CIRCA's involvement.[160]

Notwithstanding CIRCA's conclusion that the consultations complied with the engagement and communication strategy, it also reported that a range of factors impacted upon the openness of the meetings and the appropriateness of their content, including:

- domination at large public meetings by a few senior community members;
- no option in some instances to separate into smaller male and female groups;
- limited numbers of young people in attendance;
- practicalities of larger meetings that naturally inhibit feedback, such as having to use microphones or having to speak loudly in a group setting;
- lack of available interpreters even though the bulk of the discussion took place in English;
- discussion in English that limited the participation of those less confident English speakers and limited the appropriateness of the material;
- emphasis on the positive outcomes of the NTER in

defense of the Government, rather than providing a balanced view; and

- lack of understanding or knowledge of the majority of the measures.[161]

CIRCA also highlighted the centrality of the Tier 1 meetings to the credibility of the process as vehicles for gathering feedback from a broad cross-section of the community and for understanding a diversity of views.[162] Similarly, FaHCSIA emphasised their importance in engaging the vulnerable, shy and hard to reach.[163] The meetings were also apparently given significant weight in providing support for some measures (for example, the continuation of income quarantining). However, no comment can be made about their effectiveness, because no primary materials are available in relation to these meetings.

(i) Lack of Indigenous engagement in design and implementation

The difficulties in conducting a consultation process on such a large and unprecedented scale should not be underestimated. However, from the outset, it was apparent that the process was going to be problematic given the absence of Indigenous involvement in its design and implementation. Best practice mandates Indigenous engagement in design to ensure adequate consideration is given to community norms and protocols, that all relevant stakeholders are identified, and that a region-specific approach is adopted that accommodates the diversity of Indigenous communities and maximises accessibility.[164] Limited engagement with Indigenous people was also reflected in the training of facilitators; CIRCA, for example, noted that there could have been more opportunities to engage IEOs in the training, and that the process could have been enhanced by asking IEOs to consider their roles and responsibilities as facilitators.[165]

This lack of meaningful engagement was also manifest in the absence of qualified interpreters in some consultations. One of the asserted strengths of the consultation process was that it incorporated strategies to provide opportunities for vulnerable, shy and hard-to-reach people to convey their views in a way that was comfortable, safe and flexible.[166] Yet, while FaHCSIA attempted to engage interpreters and on some occasions was advised they were not necessary,[167] using qualified interpreters would seem to be a minimum requirement for genuine consultation in remote Indigenous communities where English is a second or third language. A number of consultations were seemingly conducted with a presumption of English proficiency or with the co-option of attendees to interpret proceedings, which included discussion of complex legal concepts.[168] CIRCA observed that the bulk of discussion being conducted in English limited participation to those more confident in speaking English, who were better educated and more familiar with government processes,[169] and that the lack of interpreters limited the appropriateness of material covered.[170]

Vitally, the absence of Indigenous involvement has the potential to reinforce the perceived alienation from the rest of the Australian community. This has been demonstrated in evidence that the Northern Territory Intervention has profoundly undermined the relationship between the Indigenous people of the Northern Territory and the Australian Government, and has resulted in distrust, hostility and suspicion.[171] This relationship will potentially be further undermined by the failure to meaningfully engage Indigenous people in formulating the revised Northern Territory Intervention measures.

(ii) Inadequate knowledge or understanding of Northern Territory Intervention measures

Perhaps the most serious substantive failing of the consultation process was that participants were asked to comment on measures about which they had no knowledge or limited understanding. Despite their significant potential impact, many Northern Territory Intervention measures are little known or understood, if at all, by those they are going to affect. This greatly impacts on participants' ability to participate in discussion and meaningfully articulate support, let alone give informed consent.

CIRCA observed at Tier 2 community meetings that there was little knowledge or variable understanding of five of the eight Northern Territory Intervention measures, as well as inadequate time to explain the measure and obtain feedback.[172] Similar limitations were identified for the two-day Tier 3 regional workshop, where there was 'not the time needed to fully explain and workshop all measures'.[173] For example, 'the workshop on the special powers of the [ACC] was difficult for many participants, as there was little awareness and understanding, so people found it difficult to discuss whether this measure should continue.'[174]

CIRCA observed that a natural prioritisation of community interests took place in every meeting. This meant that reinstatement of the *RDA* and income quarantining – the issues which community members were most passionate about – dominated discussion.[175] Less time was spent discussing measures that had less significance for participants. However, CIRCA's conclusion that this was not a 'significant issue as the relevance and significance of these measures [publicly funded computers, business management powers, and law enforcement measures] was minimal',[176] is not supported by its own observations that participants did not understand those measures. It is not possible to assess perceptions of significance when the potential impact of individual measures is not understood. It is apparent from the reports of the process that the *only* two measures that people understood well enough to elicit comment were income quarantining and the suspension of the *RDA*.

It is essential to consultations in Indigenous communities that appropriate materials be developed to facilitate awareness of measures and understanding of their potential impact. The *Future Directions* Discussion Paper formed the basis for the consultations[177] but had several limitations that impinged on its effectiveness as a communication tool: it was not accessible to those with limited English language skills, it did not have any visual imagery to assist understanding or engage the audience, and it used formal 'government' language.[178] It is self-evident that there has been inadequate preparation for a consultation process where participants are not aware of the existence of some measures, are given inadequate explanation of others, and only have limited time for feedback during consultations.

(iii) Inadequate information as to potential impact of powers

The Australian Human Rights Commission's observation that '[c]onsent cannot be considered valid unless affected communities have been presented with *all* of the information relevant to a proposed measure (emphasis in original)'[179] is especially pertinent to the Redesign Consultation process where minimal information concerning the impact of some measures was provided.

The *Future Directions* Discussion Paper and subsequent consultations minimised the potential impact of particular measures, which necessarily undermined the level of understanding and the quality of the consultation process. One FaHCSIA officer interpreted allegations that the information provided was not clear and could not be understood as suggesting that the *Future Directions* Discussion Paper was not written in plain English or should have been translated into Indigenous languages.[180] However, this interpretation is to misunderstand or misstate the concern. The concern is not that the words of the *Future Directions* Discussion Paper, as it stands, were incapable of being understood, but that it failed to describe the powers encompassed by some measures in their entirety or their potential effect. It is self-evident that consultation is inadequate when the powers contained within the measures are not fully described and their potential impact is not explained. Two stark examples of such measures are those of the coercive powers of the National Indigenous Violence and Child Abuse Intelligence Task Force ('NIITF') and the powers of the Minister for Indigenous Affairs to intervene in Indigenous organisations and councils, yet each has been described as being supported by the consultation process.[181]

a. ACC coercive powers

Notwithstanding the Government's claim for their continuation, the CIRCA review highlights the ACC powers as one measure little understood by participants in the Tier 2 community meetings and Tier 3 regional workshops. Worryingly, while these coercive powers are of potentially profound effect, only a bare description was provided in the *Future Directions* Discussion Paper.

The *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*') amended the *Australian Crime Commission Act* 2002 (Cth) to expand the mandate of the ACC to include 'Indigenous violence or child abuse',[182] which allowed for the grant of coercive powers to the ACC's NIITF in February 2008. This created the extraordinary circumstance of coercive powers granted in relation to criminal offences defined by race.

These coercive powers allow an examiner to summon a person to give evidence or produce such documents or other things as referred to in the summons.[183] A person who is served with a summons must attend the examination,[184] take an oath or affirmation if required, answer questions as required by the examiner, and produce documents required by the summons.[185] A person who does not comply with these requirements is guilty of an offence and is liable for a fine or imprisonment for up to five years.[186]

The examiner has the power to prohibit the disclosure of information about the summons or notice, or any official matter connected with it.[187] Where a person has received a summons with notice of the disclosure prohibition, it is an offence to disclose the existence of the summons, the notice or any information about it, or the existence of any information about any official matter connected with the summons or notice, except to obtain legal advice or in other limited circumstances.[188]

Adopting a minimalist approach, the NIITF's powers are described in the *Future Directions* Discussion Paper, without reference to coercion, in the following terms:

> The powers include strong secrecy provisions, which provide witnesses with confidentiality and protection against incrimination. The secrecy provisions protect people who may otherwise be reluctant to provide information or testimony for fear of retribution from people they know, or in some instances from their employer.
>
> This is important to ensure that people have the confidence to take appropriate action against perpetrators of violence and abuse.[189]

While perhaps not intentionally misleading, the impression of benign 'special powers' designed exclusively for the protection of witnesses was reinforced by the public servants conducting the consultations. For example, during the Ampilatwatja consultation the following comments were made:

> But it's about trying to build up better intelligence and being able to get more information from people if things are not being done, if there is somebody doing the wrong thing and trying to find a way for them to stop it. It is done very quietly.
>
> … Not that it's secret but if they do it quietly and let people know what they are doing, those that are guilty that are doing the wrong thing find out and start to cover their tracks.
>
> … some of the other powers that they have is about people who are providing information to them can do it in secret. The witnesses are protected. Whereas in a normal police investigation, eventually those witnesses are dragged into court but under some of the special powers that this mob have people can give their evidence and they are never going to have to appear in court.[190]

The Redesign Consultations Report claimed support for retaining the measure from half of the Tier 2 community meetings where 'people generally were prepared to support its retention and to see how it worked out'[191] and where 'people valued the confidentiality protection … because it made people feel safer and more confident about disclosing information about possible criminal activity.'[192]

When added to *Future Direction's* failure to refer to the coercive nature of the ACC powers and the benign description of protective powers at meetings, CIRCA's reporting of the ACC powers as one measure little known about or understood in the Tier 2 community meetings or Tier 3 regional workshops indicates that the Government's claim of support cannot be sustained.

b. Minister's powers to intervene in the operation of Aboriginal organisations and councils

A second example of inadequately described invasive powers are the Minister for Indigenous Affairs' powers to intervene in the operation of Indigenous organisations and councils.[193] The Northern Territory Intervention vests extensive powers in the Minister to intervene in the operation of 'community services entities' in 'business management areas', which are forms of Indigenous tenure.[194] Community service entities include Indigenous councils and organisations, and other organisations providing services to Indigenous people.[195]

The Minister's powers over community organisations are enormously broad, including powers to unilaterally vary or terminate funding agreements between the Commonwealth and a 'community services entity' that is funded to provide services in a 'business management area'; to direct how funds may be spent, appoint a person to control funds, and direct reporting requirements; to direct how and what kind of services are to be provided; to direct the use and management of assets and even transfer possession and ownership of assets; to appoint observers to attend any or all meetings of the community services entity; and to take over management of community, government, council and incorporated associations.[196]

The powers allow complete control over the operation of Indigenous councils and organisations, but exhibit some unusual features.[197] There was no suggestion that the powers were introduced to deal with allegations of illegality, incompetence, mismanagement, corruption or fraud, which

could already be dealt with under existing governing legislation and regulation. Underlying justifications for the measure were not described, other than to facilitate control of Indigenous community organisations by General Business Managers in the event of failed negotiations, or unwillingness on the part of affected Indigenous people to accede to externally defined 'necessary' benefits.[198] Further, the powers are apparently to be exercised regardless of whether negotiations are being conducted in good faith. This concern has particular resonance after the Government unilaterally ended negotiations with the Tangentyere Council, which had refused to accept the Government's ultimatum in relation to tenancy management, culminating in the Government's threat to compulsorily acquire the Alice Springs town camps.[199]

The only reference to this array of powers in the *Future Directions* Discussion Paper relates to the power to 'stop funding an organisation in a community if it felt the organisation was not properly doing its job of delivering services.'[200] The Government had proposed to remove the power from the legislation 'because the Government has other ways to ensure its funds are managed properly';[201] however, due to supposed support from the consultation process, the powers will remain.[202] Again, the extent to which there was genuine support for the measure is in doubt given CIRCA's observation that there was little awareness or understanding of the measure. Support for the measure was said to arise from regional community leaders and stakeholder organisation representatives in Tier 3 and Tier 4 meetings, who expressed support for allowing the 'Government to cease funding non-performing community organisations and to bolster their governance.'[203]

It is not contended that informed consent must be obtained in relation to every aspect of every measure. Not only would such a requirement be impractical, but it is also too literal for sensible interpretation. However, as Annie Kennedy observes,[204] informed decision-making requires an understanding of the implications of the decision. Inadequate or misleading information, such as the complete absence of reference to the coercive powers of the NIITF or the extent of the business management powers, renders any participant incapable of assessing the potential impact of their support and invalidates the process.

(iv) Failure to explain complex legal concepts

It was inevitably going to be a major undertaking to provide sufficient explanation of the complex legal concepts underpinning, and consequences of, the measures of the Northern Territory Intervention to satisfy requirements of genuine consultation. There is no more obvious example of this difficulty than that of the consultations surrounding the concept of 'special measures'.

Unquestionably, a most profound concern underlying every consultation was the perception of injustice, anger and shame at the racially discriminatory treatment handed down to Indigenous people in the Northern Territory. Persistent, vehement demands for reinstatement of the *RDA* occupied the majority of meetings, not merely as a vehicle to challenge discriminatory laws but as a platform for security, equality, self-worth and entitlement to equal citizenship.[205]

It is apparent from the Minister's comments, the *Future Directions* Discussion Paper and the consultations themselves that compliance with the *RDA* is reliant on the classification of some measures as special measures. Given the unanimous acknowledgment that reinstatement of the *RDA* is essential for any 'resetting of the relationship' between the government and Indigenous people of the Northern Territory, understanding that the effective reinstatement of the *RDA* is contingent on the measures being special measures was therefore crucial to any genuine communication between the parties.

The *Future Directions* Discussion Paper defines 'special measures' as measures that help people of a particular race to enjoy human rights equally with others and identifies their key features, albeit without reference to the precondition of prior consultation.[206] However, explanations of the nature of special measures and their relationship to the *RDA* during the consultation process were patently inadequate. This is particularly notable given that the measures of the Northern Territory Intervention are not forms of positive or affirmative action but discriminate *against* Indigenous people, and are supposedly justified on the basis of long-term benefit.

Special measures were described as 'laws just for Aboriginal people' designed to 'help Aboriginal people have the same rights as everybody else',[207] which is true of special measures in orthodox terms but quite distinct from this circumstance where rights of Aboriginal people are removed or restricted, allegedly for their benefit. Similarly, the example given of a special measure was that of land rights legislation. While it is acknowledged that the High Court in 1985 held that a South Australian land rights act was a special measure in *Gerhardy*

v Brown, CERD has since clarified that Indigenous land rights are one species of right that explicitly cannot be characterised as a special measure.

> Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as … the rights of indigenous peoples, including rights to lands traditionally occupied by them … Such rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.[208]

To describe special measures during the meetings in such positive terms is to give potentially misleading reassurance to Indigenous people in circumstances where their aspirations for the reinstatement of the *RDA* may not be fully realised.[209]

(v) Consultations on existing government proposals

Borne out by the objectives of the consultation process, the key messages for facilitators, the *Future Directions* Discussion paper and the transcripts of the consultations included in the *Will They Be Heard?* Report, the Redesign Consultation process was constituted around previously formulated government proposals in a context of asserted benefit. The starting point for the consultation was that the Northern Territory Intervention was going to continue, that it had been beneficial, and that people could comment on aspects of the operation of measures. At Bagot, a government official explained:

> The Government has said that it wants to keep the intervention as it sees that the measures that were brought in, this is what the government is saying, the measures that were brought in have some positive benefits and the government wants to keep on trying to build on some of those positive benefits. They want to talk with people about it and to try and work with people to try and get some of these things right.[210]

In relation to income quarantining, people were asked to make a choice between two specific options:

> So, the government's thinking, at the moment, at the moment, is that we should keep going. In its discussion paper, in a paper that it's put out to all the communities, it says, two ways. One way is not to make any change. Keep it as it is, try and find a way to fix up the problems with Basics Cards. The other way is that individuals, a person, could go to Centrelink, or someone else, they could go to Centrelink and say, 'I don't need income management' and they can – ultimately - the Centrelink can say, 'Yes, you don't need income management.' It's what they call, 'being exempted.'... from income management.[211]

The suggestion is not that participants were incapable of, or prevented from, criticising Northern Territory Intervention measures or raising concerns related to other issues such as housing or government delivery of programs.[212] Indeed, the CIRCA *Will They Be Heard?* Report and the Government's own Redesign Consultations Report document vehement anger, frustration and opposition to some measures. People certainly took the opportunity to vent their concerns. Rather, the process is criticised for not engaging Indigenous people in an open and transparent exercise in order to design important social and economic initiatives. It did not constitute a framework adhering to indicia of best practice, was not undertaken in good faith with the objective of achieving agreement or consent, and did not provide a genuine opportunity for Indigenous communities to influence decision-making.[213] Such an approach continues the longstanding practice of 'consulting' Indigenous peoples on plans and decisions already made. It does little to reset the relationship between the government and Indigenous people.

V Conclusion

The starting point for classification of initiatives as special measures is the design and implementation on the basis of *prior* consultation with, and the active participation of, affected communities. It is strongly arguable that the requisite standard for fulfilling this requirement is informed consent, whether as the appropriate international standard for decision-making on matters affecting Indigenous peoples or as required when implementing initiatives that restrict or remove rights. However, in the case of the Redesign Consultation process, it is simply not credible to claim that consent has been given by the affected communities. The lack of explanation of the complex legal concepts under discussion, the lack of Aboriginal participation in designing and conducting the consultations, and the lack of knowledge and understanding of the selected measures all fundamentally undermine any such claim.

The Rudd Government apparently adopted the Howard Government's approach of rejecting informed consent as the requisite standard. In reply to a direct question as to whether the Government's purpose in undertaking the consultations was to get prior, fully-informed consent to these special measures, one FaHCSIA officer stated:

> The answer is no.
> …
> The discussion paper that formed the basis for the consultations does not use the expression 'consent' or 'prior informed consent' and the government's position in relation to the measures in the bill is that they are designed to be special measures, the RDA will be restored, and people will have the opportunity should they choose to challenge.[214]

Even if consent were not the requisite standard to be achieved, and even if it were possible to retrospectively fulfil the requirement for consultation with the affected beneficiaries, the consultation process, while extensive, was flawed to such a degree that it cannot be described as facilitating Indigenous participation in design and implementation.

Despite the rhetoric and the very large number of meetings, the Redesign Consultation process was in fact a mechanism for providing information about decisions already made or in the making. It did not give Indigenous communities a meaningful opportunity to influence the decision-making process, and was therefore incapable of fulfilling the special measures criterion of prior consultation.

If the opportunity had been taken for genuine and comprehensive discussions, the process could have been revolutionary. Instead, the process appears to have been a formality.

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1 UN Committee on the Elimination of Racial Discrimination, *Urgent Action Letters to the Australian Government* (13 March 2009) and (28 September 2009) <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm> at 28 March 2010 ('CERD').

2 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [14].

3 UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [15].

4 Special Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. The Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15/ (4 March 2010) [16] <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> at 28 March 2010. See also Special Rapporteur, *Preliminary Note On The Situation Of Indigenous Peoples In Australia,* A/HRC/12/34/Add.10 (24 September 2009) <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> at 28 March 2010.

5 Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008).

6 The Special Rapporteur contends that the Intervention violates a range of human rights including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity: Special Rapporteur, above n 4, [16]. While not specifically expressing disagreement with the Special Rapporteur's conclusion that the Intervention is racially discriminatory, the Government rejected that there has been a denial of all of the rights identified by the Special Rapporteur: See Special Rapporteur, above n 4, [58]–[59].

7 Ibid [13].

8 Note that in this paper, the term Indigenous will be used in reference to obligations to Indigenous peoples generally in international law. The majority of Indigenous people in the Northern Territory are Aboriginal and will be referred to as Aboriginal people or peoples.

9 Special Rapporteur, above n 4, [14]–[29].

10 Each of the three statutes explicitly excludes the operation of Part II of the *RDA*: *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(3) and 6(3). Part II of the *RDA* prohibits direct and

indirect discrimination and provides for rights to equality before the law in the enjoyment of rights, regardless of race, colour, national or ethnic origin. Northern Territory anti-discrimination laws were also suspended from operation: *Northern Territory National Emergency Response Act 2007* (Cth) ss 133(1) and 133(2); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ss 5(1) and 5(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 5(2) and 5(3). Despite the recommendations of the Committee on the Elimination of Racial Discrimination (CERD, *Concluding Observations: Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (2005) [11]; CERD, *Concluding Observations: Australia*, 56th sess, UN Doc CERD/C/304/Add.101 (2000) [9]), there remains no entrenched guarantee against racial discrimination in Australia that would override a law of the Commonwealth. The *Racial Discrimination Act* can be, and in this instance was, overridden by the Federal Parliament.

11 *Northern Territory National Emergency Response Act 2007* (Cth) s132(1); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(1); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(2) and 6(2).

12 Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of Special Measures' (2009) 13(1) *Australian Indigenous Law Review* 78, 78.

13 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).

14 Jenny Macklin, 'Compulsory Income Management to Continue as Key NTER Measure' (Press Release, 23 October 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm> at 28 March 2010 ('Compulsory income management to continue').

15 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2010* (Cth).

16 *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).

17 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *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).

18 Mal Brough MP, 'National emergency response to protect Aboriginal children in the NT' (Media release, 21 June 2007) <http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/emergency_21june07.aspx> at 10 June 2010.

19 *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

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

21 *Northern Territory National Emergency Response Act 2007* (Cth) s 132(1); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(1); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(2) and 6(2).

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 18 (Mal Brough).

23 Rex Wild QC, *The First Anniversary of The Report* (26 June 2008) <http://www.getup.org.au/blogs/view.php?id=1341> at 28 March 2010.

24 Northern Territory Board of Inquiry, *Little Children Are Sacred Report*, above n 17, 50.

25 Ibid.

26 Ibid.

27 The first half of the first recommendation was cited as justification for the emergency measures. See Brough, above n 18.

28 Northern Territory Board of Inquiry, *Little Children Are Sacred Report*, above n 17, 50.

29 Ibid 52.

30 Northern Territory Emergency Response Review Board, *Report of the Northern Territory Emergency Response Review Board* (2008) <http://www.nterreview.gov.au/report.htm> at 23 March 2010.

31 Jenny Macklin, 'NT Emergency Response Review Board' (Press Release, 6 June 2008) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nt_emergency_reponse_06jun08.htm> at 30 June 2010.

32 Northern Territory Emergency Response Review Board, above n 30, 34.

33 Ibid Foreword.

34 Ibid 10.

35 Ibid 12.

36 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009) 1 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Documents/discussion_paper.pdf> at 23 March 2010.

37 Jenny Macklin, Press Release, above n 14; Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 3; Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations* (November, 2009) 5, 7 <http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx> at 24 March 2010 ('NTER Redesign Consultations Report').

38 Jenny Macklin, Press Release, above n 14; Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, above n 37, 7; Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 1–3.

39 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 3.

40 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009) 6 <http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/NTER_REPORTS/POLICY_STATEMENT_NTER/Pages/default.aspx> at 23 March 2010 ('Landmark Reform Policy Statement').

41 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), 32, 40, 44, 50, 85.

42 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) sch 1, cl 6A; sch 4, cl 98A; sch 5, cl 30A; sch 6, cl 91A.

43 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 2.

44 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report of the Inquiry into the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010) 69 ('Senate Committee Report').

45 Tony Abbot MHR, Leader of the Opposition (Doorstop Interview, Parliament House, Canberra, 16 March 2010) <http://www.tonyabbott.com.au/Pages/Article.aspx?ID=3988> at 28 March 2010.

46 UN Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, U.N. Doc. HRI/GEN/1/Rev.6 (1989) [1]; CERD, *General Recommendation No 14: Definition of discrimination*, 42nd sess, UN Doc A/48/18 (1994) [1]; UN Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights,* UN Doc E/C.12/GC/ 20 (10 June 2009) [2] ('CESCR').

47 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 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; Aboriginal and Torres Islander Social Justice Commissioner, above n 5, 239.

48 *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 1(3).

49 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

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

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

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

53 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 149, UN Doc A/RES/47/1 (13 September 2007) ('DRIP').

54 CERD, *General Recommendation 30: Discrimination Against Non-Citizens*, 64th sess, UN Doc CERD/C/64/Misc.11/rev.3 (2004) [4] ('General Recommendation 30').

55 CERD, General Recommendation 14, above n 46, [2]; HRC, UN Human Rights Committee, General Recommendation 18, above n 46, [13]; CESCR, General Recommendation 20, above n 46, [13].

56 CERD, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [8] ('General Recommendation 32').

57 Ibid [6].

58 Note that CERD has clarified that special measures are not an exception to the principle of non-discrimination and that the term 'positive discrimination' should not be used. See General Recommendation 32, ibid [20]. Special measures are also permissible under art 4(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1248 UNTS 13 (entered into force September 1981) ('CEDAW') and art 5(4) of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/RES/61/106 (entered into force 3 May 2008). The Human Rights Committee has also observed that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR: See General Recommendation 18 [10].

59 CERD, General Recommendation 32, above n 56, [12]. See also Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (1970) 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* (Federation Press, 1998) 171; Alexandra Xanthaki, *Indigenous Peoples and United Nations Standards: Self-determination, Culture, Land* (Cambridge University Press, 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* (Hart Publishing, 2007) 759–62.

60 The Race Convention was incorporated into Australian domestic law on 30 October 1975 by the commencement of the *RDA*.

61 (1985) 159 CLR 70.

62 Ibid 124 (Brennan J).

63 CERD, General Recommendation 32, above n 56, [18].

64 Ibid [16].

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid [22].

69 Ibid [27].

70 Ibid [35].

71 Ibid [17].

72 Ibid [15].

73 Ibid.

74 Ibid [37].

75 *Gerhardy v Brown* (1985) 159 CLR 70, 133, 139 (Brennan J).

76 Ibid 139.

77 Ibid 135.

78 Special Rapporteur, above n 4, [21].

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

80 Jonathon Hunyor, 'Is it Time to Re-Think Special Measures under the Racial Discrimination Act? The Case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 49–52.

81 Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), above n 5, 261; Human Rights and Equal Opportunity Commission, Submission No 67 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills*, 10 August 2007, [20]–[21], references omitted.

82 For an overview of permissible limitations on human rights see Human Rights Law Resource Centre, Submission No 18 to Senate Community Affairs Committee, Parliament of Australia, *Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*, 1 February 2010.

83 Human Rights Law Resource Centre, above n 82.

84 Special Rapporteur, above n 4, 49 [18].

85 CERD, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms*, 48th sess, UN Doc A/51/18 (1996) annex VIII (Art. 5) at [2].

86 Ibid.

87 *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4(1).

88 *Declaration on the Rights of Indigenous Peoples*. GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007) art 46 ('DRIP').

89 Thus, for example, the Government notes that the measures of the Intervention must be altered to conform with the Convention Against Discrimination but, at the same time, the Government has important obligations under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women: Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper,* above n 36, 3. It is acknowledged that the humans rights framework allows the limitation of some rights when balanced against others. For example, it may be argued that freedom of speech may be curtailed to protect against racial vilification.

90 Vivian and Schokman, above n 12, 85.

91 Northern Territory Board of Inquiry, *Little Children Are Sacred Report*, above n 17, 46–47.

92 *Bropho v Western Australia* [2007] FCA 519. For a discussion of the decision at first instance and the Full Court appeal see Hunyor, above n 80, 39, 52–58.

93 *Bropho v State of Western Australia* [2008] FCAFC 100 [63] ('*Bropho*').

94 Ibid [83].

95 Ibid [82].

96 Special Rapporteur, above n 4, 52 [26].

97 Ibid 50–51 [23].

98 *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989, 72 ILO Official Bulletin 59 (entered into force 5 September 1991).

99 Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* UN Doc A/HRC/12/34 (15 July 2009) <http://www2.ohchr.org/english/issues/indigenous/rapporteur/annualreports.htm> at 28 March 2010.

100 Ibid [42].

101 Ibid [42]–[44].

102 The *Closing the Gap in the Northern Territory National Partnership Agreement* was agreed between the Commonwealth and the Northern Territory Government in July 2009, effectively continuing the Northern Territory Intervention.

103 Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, above n 99, 12 [36].

104 Ibid 17–18 [50].

105 Ibid [51].

106 Ibid [36].

107 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Press Release, 4 April 2009) <http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx> at 13 August 2010.

108 For a comprehensive list see Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples,* 4th sess, UN Doc E/C.19/2005/3 (January 2005) ('FPIC Workshop'). See also, UN Economic and Social Council ('ECOSOC'), Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, *Standard Setting: Legal Commentary on the principle of free, prior and informed consent,* 23rd sess, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (2005).

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

110 CERD, *General Recommendation 23: Rights of Indigenous Peoples*, 51st sess, [3], UN Doc A/52/18 (1997) art 4(d).

111 *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J). Note that Nicholson J in *Bropho* [2008] FCAFC 100 concluded that Brennan J was not supported by the other Justices and was not consistent with the general principles expressed in the case. However, as Hunyor identifies, the other justices did not disagree with Brennan J. Indeed, they did not consider the issue of consent. See Hunyor, above n 80, 52–58.

112 Permanent Forum on Indigenous Issues, above n 108, 12.

113 Ibid.

114 Ibid.

115 Ibid 13.

116 *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 16 May 2006, CERD/C/AUS/CO/14/Add.1 [20] <http://daccess-ods.un.org/TMP/224071.8.html> at 26 March 2010.

117 Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, above n 99, [48].

118 Ibid [47].

119 Hunyor, above n 80, 49; Human Rights and Equal Opportunity Commission, above n 81, [22].

120 Various government and non-government entities have addressed the question of best practice community consultation, including the Australian Human Rights Commission ('AHRC') that has recently published *Draft Guidelines for ensuring income management measures are compliant with the Racial Discrimination Act'* ('Draft Guidelines'). The publication distils best practice guidelines for community consultations based on the Government's *Best Practice Regulation Handbook* encompassing pre-consultation, consultation and post-consultation phases and key elements of free, prior and informed consent. See Australian Human Rights Commission, 'Draft Guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*' (2009) 29 <http://www.hreoc.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html> at 23 March 2010.

121 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 7.

122 The measures that constitute the Northern Territory Intervention apply only to Prescribed Areas. Defined under s 4(2) of the *Northern Territory National Emergency Response Act 2007* (Cth), prescribed Areas are forms of Aboriginal tenure, covering an area of over 600 000 square kilometres and encompassing 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.

123 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), Outline.

124 Senate Community Affairs Legislation Committee, above n 44, 27; Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37*,* 7.

125 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 3.

126 Ibid.

127 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 26 February 2010, 52 (Rob Heferen, Deputy Secretary, FaHCSIA) ('Heferen evidence').

128 The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michelle Harris, *Will They Be Heard? A Response to the NTER Consultations: June to August 2009* (Report, Jumbunna House of Learning, November 2009), 10 ('*Will They Be Heard?*').

129 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation* (Report, Cultural & Indigenous Research Centre Australia, September 2009) 7 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_strat_implement.aspx> at 23 March 2010. (CIRCA Report). The specific goals of the Tier 2 and Tier 3 consultations mirror these broad objectives.

130 Ibid 9.

131 Ibid 10.

132 Ibid 3–4.

133 Ibid 5.

134 Australian Government, Landmark Reform Policy Statement, above n 40, 3.

135 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37*,* 58, 12.

136 Ibid 9, 21–29.

137 Ibid 18.

138 Cultural & Indigenous Research Centre Australia, above n 130, 21.

139 Ibid.

140 Ibid.

141 Ibid.

142 Ibid 22.

143 Ibid.

144 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 26 February 2010, 52 (Dr Bruce Smith, Branch Manager, FaHCSIA).

145 Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities* (2008) <http://www.clc.org.au/Media/issues/intervention/CLC_REPORTweb.pdf> at 20 June 2010, 58; Claire Smith and Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (Report, Institute of Advanced Study for Humanity, University of Newcastle, August 2008) 121.

146 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37*,* 11.

147 Ibid 12, 52.

148 Cultural & Indigenous Research Centre Australia, above n 129, 6.

149 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37*,* 19.

150 Special Rapporteur, above n 4, 55 [34].

151 Ibid 55–56.

152 For a detailed list of the Intervention measures, see Vivian and Schokman, above n 12, 80.

153 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 9.

154 See Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37.

155 Annie Kennedy, 'Understanding the "Understanding": Preliminary Findings on Aboriginal Perspectives on Engagement with Governments' (Paper presented at the Centre for Remote Health Monthly Seminar Series, Alice Springs, 29 May 2009).
Heferen evidence, above n 127, 53.

156 Annie Kennedy, above n 155.

157 Heferen evidence, above n 127, 53.

158 The Hon Alastair Nicholson, Alison Vivian, Nicole Watson and Michelle Harris*,* above n 128, 3–36.

159 Dr Bruce Smith, FaHCSIA, as cited in Senate Community Affairs Legislation Committee, above n 144, 31. See also Heferen evidence, above n 127, 51–54.

160 Senate Community Affairs Legislation Committee, above n 144, 67.

161 Cultural & Indigenous Research Centre Australia, above n 129, 11–14.

162 Ibid 4.

163 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 17.

164 Australian Human Rights Commission, above n 120, 29.

165 Cultural & Indigenous Research Centre Australia, above n 129, 15.

166 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 17.

167 Heferen evidence, above n 127, 53.

168 The Hon Alastair Nicholson, Alison Vivian, Nicole Watson and Michelle Harris above n 128, 11.

169 Cultural & Indigenous Research Centre Australia, above n 129, 12.

170 Ibid 13.

171 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 8, 40; Australian Indigenous Doctors Association, *Submission to the Northern Territory Emergency Response Review Board* (2008)

[9]–[10] <http://www.aida.org.au/pdf/submissions/Submission_8.pdf> at 29 October 2009 ('AIDA Submission'); Claire Smith and Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (Report, Institute of Advanced Study for Humanity, August 2008).

172 Cultural & Indigenous Research Centre Australia, above n 129, 13.

173 Ibid 6.

174 Ibid 6.

175 Ibid 14.

176 Ibid 13.

177 Ibid 17-18.

178 Ibid 18.

179 Australian Human Rights Commission, above n 120, 31.

180 Heferen evidence, above n 127, 53.

181 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37*,* 12, 54–59.

182 The definition of a 'federally relevant criminal activity was extended to include Indigenous violence or child abuse.' Schedule 7 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) amends the definition of Indigenous violence or child abuse to clarify that the powers now only relate to serious violence or child abuse committed *against* an Indigenous person.

183 *Australian Crime Commission Act* 2002 (Cth) s 28.

184 *Australian Crime Commission Act* 2002 (Cth) s 30(1).

185 *Australian Crime Commission Act* 2002 (Cth) s 30(2).

186 *Australian Crime Commission Act* 2002 (Cth) s 30(6).

187 *Australian Crime Commission Act* 2002 (Cth) s 29A.

188 *Australian Crime Commission Act* 2002 (Cth) s 29B.

189 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 22.

190 The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michelle Harris, above n 128, Transcript of Ampilatwatja Consultation, Appendix C.

191 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 12.

192 Ibid.

193 For a discussion of whether these specific powers, as currently configured, can be characterised as special measures see Vivian and Schokman, above n 12, 94–95.

194 Business management areas 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: *Northern Territory National Emergency Response Act 2007* (Cth).

195 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: *Northern Territory National Emergency Response Act 2007* (Cth) s 3.

196 *Northern Territory National Emergency Response Act 2007* (Cth) s 65.

197 Vivian and Schokman, above n 12, 94.

198 Ibid 94-95.

199 The Alice Springs Town Camps' Housing Associations, represented by the Tangentyere Council, had previously agreed to enter into 40 year subleases subject to satisfactory negotiations on tenancy management to be undertaken with mutual goodwill. The Government ended negotiations when the Council rejected the Government's ultimatum that tenancy management be undertaken by the Northern Territory Government or Northern Territory Housing Association, which the same ultimatum that was rejected when pressed by the former government two years earlier.

200 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 22.

201 Ibid.

202 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations,* above n 37, 12.

203 Ibid.

204 Annie Kennedy, above n 155.

205 The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian and Michelle Harris*,* above n 128, 17.

206 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper*, above n 36, 7.

207 The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michelle Harris*,* above n 128, Ampilatwatja transcript, 21.

208 CERD, General Recommendation 32, above n 56, 5 [15]. It is in fact well settled that inherent or positive rights cannot be special measures.

209 There is widespread concern among legal practitioners and commentators that the 'reinstatement of the RDA' may not render all the provisions of the Intervention open to challenge. This concern was raised by a number of submissions to the Senate Community Affairs Committee. See for example the submission by the Australian Human Rights Commission: 'If the [Intervention] legislation cannot be read so as to be consistent with the RDA, the [Intervention] legislation, being the later legislation,

will prevail. In other words, if [Intervention] measures remain discriminatory, they will not be altered by the 'reinstatement' of the RDA': Australian Human Rights Commission, *Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills, Australian Human Rights Commission Submission to the Senate Community Affairs Committee* (10 February 2010) 14 <http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sublist.htm> at 13 August 2010.

210 The Hon Alastair Nicholson, Larissa BehrendtAlison Vivian Nicole Watsonand Michelle Harris, above n 128, 4.

211 Ibid.

212 Heferen evidence, above n 127, 51–52.

213 Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* above n 99, [46].

214 Heferen evidence, above n 127, [2.51].