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**Submission to the
Northern Territory
Emergency Response Review Board**

**Practical Implications of the Northern Territory
Emergency Response**

15 August 2008



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Contents

Introduction	2
1.1 Scope of this Submission	2
1.2 About the Human Rights Law Resource Centre	3
1.3 Recommendations	4
2. Background to the NTER	7
2.1 Little Children are Sacred Report	7
3. A Human Rights Framework	8
3.1 Human Rights	8
3.2 Recommendations	10
4. The Right to Non-Discrimination	11
4.1 Right to Non-Discrimination	11
5.2 The NTER and the right to non-discrimination	13
5.3 Right to non-discrimination - Special measures	15
5.4 Exemption of the NTER from domestic anti-discrimination legislation	16
5.5 The practical implications of the NTER and the right to non-discrimination	16
5.6 Recommendations	17
6. The Right of Self-Determination	18
6.1 The right of self-determination	18
6.2 The Australian Government's approach to self-determination	19
6.3 The practical implications of the NTER and the right to self-determination	20
8. The Rights of the Child	27
8.1 Stated rationale for the NTER legislation	27
8.2 Children's Rights	28
8.3 Developing a children's rights framework	29
8.4 Protection of children from other children	30
9. The Right to an Effective Remedy	32
9.1 Right to an effective remedy	32
9.2 Practical implications of the NTER and the right to an effective remedy	33
9.3 Exclusion from RDA	34
9.4 Exclusion of external merits review	34
9.5 Recommendations	36
10. The Right to Social Security	37
10.1 The right to social security	37
10.2 Practical implications of the NTER and the right to social security	38
10.3 The Income Management Regime	38
10.4 Impact of the Income Management Regime on the right to social security	39
10.5 Abolition of the CDEP scheme	42
10.6 Interference with other human rights	43
10.7 Recommendations	44
11. The Right to Privacy, Family and Home	45
11.1 The right to privacy, family and home	45
11.2 Practical implications of the NTER legislation on the right to privacy, family and home	46

12. The Right to Freedom of Movement	49
12.1 Right to freedom of movement	49
12.2 The practical implications of the NTER and the right to freedom of movement	49
12.3 Alcohol bans	49
12.4 Land reforms	50

Acronyms

<i>Convention on the Elimination of All Forms of Discrimination against Women</i>	CEDAW
Human Rights and Equal Opportunity Commission	HREOC
Human Rights Committee	HRC
Human Rights Law Resource Centre	HRLRC
<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>	CERD
<i>International Covenant on Civil and Political Rights</i>	ICCPR
<i>International Covenant on Economic, Social and Cultural Rights</i>	ICESCR
Northern Territory Emergency Response legislative package	NTER
<i>Racial Discrimination Act 1975 (Cth)</i>	RDA
<i>Universal Declaration of Human Rights</i>	UDHR

Introduction

1.1 Scope of this Submission

1. This submission is provided by the Human Rights Law Resource Centre (**HRLRC**) to the Northern Territory Emergency Response Review Board in relation to the practical implications of the Northern Territory Emergency Response legislative package and related implementation measures (**NTER**).¹
2. This submission draws substantial information from the Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities (**CAALAS/NAAJA Joint Submission**).² The HRLRC submission was researched and written with the pro bono assistance of Mallesons Stephen Jaques.
3. The purpose of this submission is to identify particular human rights issues arising from the NTER and to recommend that a human rights approach be taken in the review and reform of the NTER.
4. The HRLRC is particularly concerned about the following human rights issues in respect of the NTER, which are discussed in further detail throughout this submission:
 - (a) the right to non-discrimination;
 - (b) the right of self-determination;
 - (c) the rights of the child;
 - (d) the right to an effective remedy;
 - (e) the right to social security;
 - (f) the rights to privacy, family and home; and

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

² Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities, June 2008, available at http://www.aph.gov.au/Senate/committee/indig_cte/submissions/sub24.pdf

- (g) the right to freedom of movement.

1.2 About the Human Rights Law Resource Centre

5. The Human Rights Law Resource Centre is an independent community legal centre.
6. The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:
 - (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
 - (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
 - (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.
7. The four 'thematic priorities' for the work of the HRLRC are:
 - (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
 - (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
 - (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
 - (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

1.3 Recommendations

8. The HRLRC makes the following recommendations:

Recommendation 1:

Proposed reforms to the NTER must be consistent with Australia's international human rights obligations.

Recommendation 2:

The recommendations contained in the *Little Children are Sacred Report* should be implemented as a matter of priority.

Recommendation 3:

The HRLRC recommends the immediate reinstatement of the application of the *Racial Discrimination Act 1975* (Cth) and the Northern Territory and Queensland anti-discrimination laws to the NTER.

Recommendation 4:

Measures that relate to Indigenous communities must be culturally sensitive and conscious of the meaningful connection that Indigenous people have to the land. This requires the recognition of the right of self-determination of Indigenous peoples and the need for a high level of consultation with and participation of Indigenous people about matters which directly affect them.

Recommendation 5:

It is recommended that Part IV of the *Northern Territory National Emergency Response Act 2007* (Cth) be amended so as to require a court or bail authority to consider any customary law or cultural practice in determining either sentencing or bail applications.

Recommendation 6:

Systems and training should be implemented to ensure that policing occurs in a manner that is human rights compatible, culturally sensitive and appropriate.

Recommendation 7:

The land reforms implemented by the NTER legislation should be repealed.

Recommendation 8:

It is recommended that a process of consultation with Indigenous peoples in relation to the Income Management Regime be entered into and changes to the regime made in response to the concerns raised.

Recommendation 9:

The revised Income Management Regime should be culturally appropriate and non-discriminatory.

Recommendation 10:

The CRC and the notion of children as “rights bearers” should be used as a determinative framework for the NTER. A child rights framework should be used to set benchmarks against which to develop, implement and monitor laws and policies aimed at protecting children in Indigenous communities from sexual abuse, and for promoting and protecting the rights of Indigenous children generally.

Recommendation 11:

Affected individuals must have available to them effective remedies to be able to review decisions under the NTER that impact on the human rights of Indigenous peoples. All provisions under the NTER which deny individuals the right to have decisions reviewed should be repealed and replaced with provisions that explicitly enable access to external merits review processes.

Recommendation 12:

It is recommended that the NTER legislation be amended to ensure that adequate protections are provided to protect the privacy of persons in relation to their family, home and personal information.

Recommendation 13:

It is recommended that, where necessary and appropriate, programmes be implemented to assist affected Indigenous people to recover from alcohol and drug dependency issues.

Recommendation 14:

The provision for alcohol bans and the compulsory acquisition of land under NTER should be reviewed and revised to ensure that these provisions do not directly or indirectly infringe the right to freedom of movement, the right to freedom from discrimination and other relevant human rights.

2. Background to the NTER

2.1 Little Children are Sacred Report

9. In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Indigenous communities, entitled *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred (Little Children are Sacred Report)*.³ The report detailed the “extent, nature and factors contributing to sexual abuse of Aboriginal children” and the obstacles and challenges associated with effective child protection mechanisms.⁴ The report made 97 recommendations to the Northern Territory Government on how best to support and empower communities to prevent child sexual abuse now and in the future. The recommendations spanned a wide range of areas, including in relation to education, awareness campaigns, improving family support services and the empowerment of Indigenous communities.
10. In response, the former Australian Government announced a 'national emergency intervention' into Indigenous communities in the Northern Territory and passed the NTER legislative package which raises significant concerns in relation to Australia's obligations to respect and promote the human rights of Indigenous Australians. The NTER consists of a range of extraordinary measures, including:
- (a) the compulsory acquisition of Indigenous land;
 - (b) the quarantining of social security payments;
 - (c) the banning of alcohol in Indigenous communities; and
 - (d) the deployment of military and police in traditional lands.
11. The recommendations to the Northern Territory Government contained in the *Little Children are Sacred Report* are not generally reflected in the former Australian Government's “national emergency intervention”.

³ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007), available at: http://www.nt.gov.au/dcm/inquiry/saac/pdf/bipacsa_final_report.pdf.

⁴ *Ibid* 5.

3. A Human Rights Framework

3.1 Human Rights

12. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. They include freedom of speech, the right to privacy, freedom of movement, the right to vote, the right to a fair trial and the right to be free from discrimination. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value.
13. The HRLRC considers that the NTER raises certain issues that relate to Australia's international human rights obligations, including in particular the responsibility to respect and promote the human rights of Indigenous peoples. These obligations are found in a number of the major international human rights treaties to which Australia is a party, including:
 - (a) the International Covenant on Civil and Political Rights (**ICCPR**);⁵
 - (b) the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);⁶
 - (c) the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);⁷ and
 - (d) the Convention on the Rights of the Child (**CRC**).⁸
14. Australia's ratification of these instruments has created international law obligations that require all Australian governments – federal, state and territory – to act to respect, protect and fulfil human rights.
15. In addition, Australia should act compatibly with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples (**Declaration on the Rights of Indigenous Peoples**).⁹

⁵ The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

⁶ The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

⁷ The CERD was signed on 13 October 1966 and ratified on 30 September 1975.

⁸ The CRC was signed on 22 August 1990 and ratified on 17 December 1990.

⁹ UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007). As a UN organ resolution, the Declaration on the Rights of Indigenous Peoples has 'significant moral force and may contribute to emerging customary international law on Indigenous rights': M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

16. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:¹⁰
- (a) a “significant, but beneficial, impact on the development of policy”;
 - (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of “consumer” satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) “new thinking”, as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers “see seemingly intractable problems in a new light”;
 - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
 - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
17. The HRLRC supports measures that are intended to protect the human rights of Indigenous peoples, particularly Indigenous children and women, that relate, directly or indirectly, to family violence and sexual abuse issues. However, such measures must be consistent with, and indeed promote the furtherance of, Australia's human rights obligations.
18. At the time that the NTER legislative package was passed, the Human Rights and Equal Opportunity Commission urged the Australian Government to adopt an approach that is consistent with Australia's international human rights obligations and, particularly, with the *Racial Discrimination Act 1975 (Cth) (RDA)*.¹¹ More recently, the *Social Justice Report*

¹⁰ See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

¹¹ Human Rights and Equal Opportunity Commission, ‘A human rights based approach is vital to address the challenges in Indigenous communities’, *Press Release*, 26 June 2007, available at www.humanrights.gov.au/about/media/media_releases/2007/45_07.html.

2007, released earlier this year by the Human Rights and Equal Opportunity Commission, stated that:¹²

Aside from Australia's international obligations, these issues are important because measures that violate human rights are more likely to work in ways that undermine the overall well-being of communities in both the short and long term.

19. The HRLRC submits that a human rights approach to the development of law, policy and practice in relation to the NTER will not only ensure that Australia's international obligations are fulfilled, but will also assist to develop laws and policies that will best promote the ends that are sought to be achieved by the NTER legislation.

3.2 Recommendations

Recommendation 1:

Proposed reforms to the NTER must be consistent with Australia's international human rights obligations.

Recommendation 2:

The recommendations contained in the *Little Children are Sacred Report* should be implemented as a matter of priority.

¹² Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (11 February 2008) 3, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/index.html.

4. The Right to Non-Discrimination

20. NTER legislation breaches the right to non-discrimination and itself sanctions discriminatory measures.
21. The right to non-discrimination operates as a general and basic principle relating to the protection of all human rights,¹³ and as such is an integral component of the broader international human rights framework.
22. The NTER singles out a particular group of Australians for differential treatment by the law, and differential treatment from state authorities acting in administrative capacities, on the basis of their race. As such the NTER necessarily engages the right to non-discrimination.
23. International law does permit derogations from the right to non-discrimination in certain, limited circumstances. However, the HRLRC consider that the NTER does not constitute such an exception.

4.1 Right to Non-Discrimination

(a) ICCPR and ICESCR

24. Both the ICCPR and the ICESCR contain comprehensive prohibitions on discrimination.
25. Article 2(2) of the ICESCR provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
26. Article 2(1) of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
27. Article 26 of the ICCPR provides for a general right to non-discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as

¹³ Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989), [1].

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5. The UN Human Rights Committee has held that this Article establishes a free-standing right to non-discrimination.¹⁴ It is not a right that is restricted to the enjoyment of rights that are contained in the ICCPR — as is its analogue Article 2(1) of the ICCPR and 2(2) of the ICESCR — but prohibits discrimination, in law or in fact, in all aspects of public life.¹⁵

(b) *CERD*

28. The dedication of an entire convention, the CERD, to the right to non-discrimination, demonstrates its significance. Article 1 of the CERD defines the right to non-discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

29. The Committee on the Elimination of Racial Discrimination makes particular reference to the rights of Indigenous peoples by recommending that States party:¹⁶

ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.

(c) *Declaration on the Rights of Indigenous Peoples*

30. The Declaration on the Rights of Indigenous Peoples specifically addresses the obligation of States to ensure that indigenous peoples can fully enjoy their human rights free from discrimination. Article 2 of the Declaration on the Rights of Indigenous Peoples provides:

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

31. Article 15(2) of the Declaration on the Rights of Indigenous Peoples provides:

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote

¹⁴ Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989), [12].

¹⁵ Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989), [1].

¹⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples* (1997), [4].

tolerance, understanding and good relations among indigenous peoples and all other segments of society.

32. Article 17(1) of the Declaration on the Rights of Indigenous Peoples provides:

Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

(d) *RDA*

33. The RDA is Australia's legislative response to the ratification of CERD and is the means by which Australia gives effect to the right to be free from racial discrimination in Australia. The RDA protects persons against discrimination and provides a remedy where such discrimination occurs.

34. Section 8 of the RDA provides an exception to the prohibition on racial discrimination, providing that it does not apply to "special measures".

5.2 The NTER and the right to non-discrimination

35. On the face of it, all the measures adopted in the NTER legislation are discriminatory. While the measures are not directly discriminatory because they do not apply to all Aboriginal peoples, they are indirectly discriminatory because the measures "disproportionately affect"¹⁷ Aboriginal peoples by applying to areas in which Aboriginal communities live.

36. The Centre acknowledges that not all differential treatment will constitute discrimination. The Human Rights Committee has stated that:¹⁸

Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

37. In determining whether differential treatment is permissible under this test, the Committee has adopted a case by case approach.¹⁹ Hence any consideration of whether differential treatment rises to the standard of discrimination will turn on the facts.

¹⁷ Lord Lester of Herne Hill QC and Joseph, S, (1995) "Obligations of Non-Discrimination" in Harris, D and Josephs, S (eds.) *The International Covenant on Civil and Political Rights and United Kingdom Law*, 575.

¹⁸ Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989), [13].

¹⁹ See further Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary*, [23.40].

38. The Social Justice Commissioner of HREOC noted, if a government fails to act to address violence and abuse when there is compelling evidence that such abuse exists, then the government would be in breach of its human rights obligations under the CRC, the *Convention on the Elimination of All Forms of Discrimination against Women* and CERD.²⁰
39. However, the HRLRC is of the view that the goal of eliminating child abuse in remote communities, which provided the rationale for the NTER, could be achieved by less punitive and more consultative and participatory measures.²¹ For example:
- (a) sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007* (Cth) expressly remove the right of Indigenous peoples to compensation on just terms upon the compulsory acquisition of their property. Instead the government is obliged to pay only “reasonable compensation”;
 - (b) the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) provides for the quarantining and control of up to 100% of welfare income payable to Indigenous peoples in prescribed Northern Territory communities for a period of 12 months, with the potential for extensions for up to 5 years. The Social Justice Commissioner notes that human rights require that “governments are obliged to consider less intrusive or [a] voluntary option as a first response before moving to options as broad-reaching as compulsory income management”,²² and
 - (c) there are far-reaching bans on the possession and consumption of alcohol in prescribed communities which have been shown to exacerbate existing social problems — for example, the displacement of violent offenders to locations where alcohol is more readily available and the increased use of drugs as substitutes.²³
40. In such circumstances, it has not been established that the differentiation in respect of Indigenous people in remote communities as a result of the NTER is reasonable and objective — even if the aim of restoring law and order, or preventing child abuse, is a legitimate aim under the ICCPR. The HRLRC therefore considers that this differentiation

²⁰ *Social Justice Report 2007*, 249.

²¹ *Social Justice Report 2007*, 249-250; Similar arguments apply in relation to the purported concern to remedy a breakdown of law and order.

²² *Social Justice Report 2007*, 278.

²³ *Social Justice Report 2007*, 285-289.

amounts to unlawful discrimination contrary to Article 26 of the ICCPR and contrary to the CERD.

5.3 Right to non-discrimination - Special measures

41. The NTER legislation specifies that the provisions of the NTER legislation, and any acts done under or for the purposes of the legislation, are, for the purposes of the RDA, “special measures”.²⁴
42. Four elements must be satisfied to establish a special measure. Those elements are that the measure:²⁵
 - (a) provides a benefit to some or all members of a group based on race;
 - (b) has the sole purpose of securing the advancement of the group so the group can enjoy human rights and fundamental freedoms equally with others;
 - (c) is necessary for the group to achieve that purpose; and
 - (d) stops once the purpose has been achieved and does not set up separate rights permanently for different racial groups.
43. The HRLRC is concerned that these elements have not been adequately satisfied. Critically, the HRLRC considers many aspects of the NTER to be regressive and detrimental to Indigenous people, rather than providing a benefit. Specifically, the NTER infringes the rights of Indigenous people in relation to non-discrimination,²⁶ self-determination,²⁷ protection of families and children,²⁸ an effective remedy,²⁹ social security,³⁰ privacy³¹ and freedom of movement.³² These wide-spread and serious limitations on human rights are not consistent with the purpose of special measures, which

²⁴ *Northern Territory National Emergency Response Act 2007*, section 132(1); *Families, Community Services and Indigenous Affairs and other Legislation Amendment Northern Territory National Emergency Response and other Measures) Act 2007*, section 4(1); and *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007*, section 4(2).

²⁵ *Gerhardy v Brown* (1985) 159 CLR 70 per Brennan J, 133.

²⁶ See section 4 below.

²⁷ See section 6 below.

²⁸ See sections 8 and 11 below.

²⁹ See section 9 below.

³⁰ See section 10 below.

³¹ See section 11 below.

³² See section 12 below.

is to accelerate the equal enjoyment of human rights by a minority group with the aim of achieving substantive equality.

44. Further, the HRLRC considers that the measures enacted in the NTER legislation are not “necessary”, but rather are ineffective and flawed methods in respect of the purported aims of the legislation. As the NTER does not satisfy the requirements of a special measure, and the government has not advanced evidence to demonstrate that the measures are necessary and effective, the human rights limitations imposed by the NTER are unjustified. This issue is discussed further in section 8 of this submission on the rights of the child.

5.4 Exemption of the NTER from domestic anti-discrimination legislation

45. The former Australian Government’s apparent concern that measures enacted by the NTER legislation are discriminatory is made evident by the blanket exemption of the legislation from the ambit of the RDA, as well as from otherwise applicable Northern Territory and Queensland anti-discrimination laws.³³
46. The exemptions are exceptionally broad. They attach not just to the provisions of the legislation governing the NTER, but also to any acts done under or for the purposes of those provisions. The practical effect of these sweeping exemptions is that if the NTER measures are in fact racially discriminatory, then the usual protections that the RDA affords to individuals will not apply.
47. In situations where international law permits differential treatment, the State bears the onus to establish that the aim of such measures is legitimate and that the measures taken to achieve the aims are necessary and proportionate. A ‘demonstrable justification’ requires a ‘very high degree of probability’ and evidence.³⁴ The examples provided above indicate that aspects of the NTER do not satisfy this requirement.

5.5 The practical implications of the NTER and the right to non-discrimination

48. The *CAALAS / NAAJA Joint Submission* made the following point about the suspension of the RDA:

³³ See example, *Northern Territory National Emergency Response Act 2007* (Cth), sections 132 and 133; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), sections 4 and 5.

³⁴ See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6.

The suspension of the Racial Discrimination Act sent a message to mainstream Australia that it was acceptable and appropriate to discriminate against Aboriginal people from the Northern Territory. In Alice Springs, Aboriginal people experienced previously subtle racism becoming overt because the intervention conveyed implicit Government sanction of discrimination against Aboriginal people.

49. The *CAALAS / NAAJA Joint Submission* sets out numerous concerns about the practical implications of the NTER that engage the right to non-discrimination. For example, policing, incarceration rates, income management practices and access to social security all have discriminatory underpinnings. These issues are all considered throughout this submission in relation to the extent to which they constitute breaches of other human rights. However, the simultaneous discriminatory effects should also be born in mind.

5.6 Recommendations

Recommendation 3:

The HRLRC recommends the immediate reinstatement of the application of the *Racial Discrimination Act 1975* (Cth) and the Northern Territory and Queensland anti-discrimination laws to the NTER.

6. The Right of Self-Determination

50. The HRLRC is concerned that the manner of implementation of the NTER legislation and many of the measures enacted by the legislation fail to respect the right of self-determination.

6.1 The right of self-determination

(a) ICCPR and ICESCR

51. The importance of the right of self-determination is evidenced by its prominence as Article 1 of both the ICCPR and the ICESCR, in which both covenants provide that:

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

52. In the context of the NTER, the right of self-determination relied upon is the right of all peoples to pursue freely their economic, social and cultural development without outside interference. This is often referred to as the “internal aspect” of the right.

(b) CERD

53. Article 2 of CERD provides that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.

54. Article 5(c) of CERD provides that:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law ... in the enjoyment of ... political rights, in particular the

right to participate in elections to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

55. The content of these commitments was expanded upon by the Committee on the Elimination of Racial Discrimination which stated in its General Comment 21:³⁵

The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin...

In accordance with Article 2 of the ICERD and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups ... to play their part in the Government of the country of which they are citizens. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

(c) *Declaration on the Rights of Indigenous Peoples*

56. The right of Indigenous people to self-determination is further enshrined in the Declaration on the Rights of Indigenous Peoples.³⁶

6.2 The Australian Government's approach to self-determination

57. In 2001, when the former Australian Government was in its second term, HREOC made Submissions to the United Nations Committee on Economic, Social and Cultural Rights (**Submissions**).³⁷ The Submissions noted that the Government had explicitly abandoned self-determination as a policy guiding Indigenous affairs both in 1996, when the Minister for Aboriginal and Torres Strait Islander Affairs announced that the government's Indigenous

³⁵ Committee on the Elimination of Racial Discrimination, *General Comment 21 on the Right to Self-Determination*, (23 August 1996) [4-5].

³⁶ See Articles 3, 4, 5, 8(2)(b), 18, 19, 26, 27 and 28 of the *UN Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

³⁷ Human Rights and Equal Opportunity Commission, *Submission to the Committee on Economic, Social and Cultural Rights* (2001), available at http://www.hreoc.gov.au/pdf/social_justice/submissions_econ_social_cultural/self_determination.pdf.

affairs policy would no longer be based on the principle of self-determination and, again on 17 March 2000, when the Government rejected certain wording in the Draft Declaration of Reconciliation.

58. In contrast to this, the current government, in the *ALP National Platform and Constitution (2007)*, states at Chapter 13, paragraph 44, that:³⁸

Labor respects the right of Indigenous Australians to meaningful self determination arising from their First Nations status.

59. Consistent with this divergence in official policy, the HRLRC considers that the current Government should ensure that a consultation process with affected Indigenous peoples is implemented and some meaningful changes to the NTER enacted in response.

6.3 The practical implications of the NTER and the right to self-determination

60. The authors of *The Little Children are Sacred Report* concluded that the cause of many of the problems in Indigenous communities was the breakdown of culture and the disempowerment of Aboriginal communities. However, in spite of this, the NTER appears to further destroy the control that communities have over their own lives.

61. The circumstances of and the measures adopted in the NTER that impact on the right to self-determination are as follows:

- (a) implementation of the legislation without consultation;
- (b) disallowance of consideration of customary law;³⁹
- (c) increase in policing;⁴⁰
- (d) abolition of Community Development Employment Programme;⁴¹
- (e) income management;⁴² and
- (f) land reforms.⁴³

³⁸ Australian Labor Party, *ALP National Platform and Constitution (2007)*, available at http://www.alp.org.au/platform/chapter_13.php.

³⁹ *Northern Territory National Emergency Response Act 2007 (Cth)*, Part VI.

⁴⁰ *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*, Schedule II.

⁴¹ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*, Schedule III.

⁴² *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*, Schedule I.

62. Each of these measures is discussed further below.
- (a) *Implementation of the legislation without consultation*
63. The NTER legislation failed to implement the first recommendation of *The Little Children Are Sacred Report*, which was that both the Australian and Northern Territory Governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.
64. The NTER legislation was passed without consultation with Indigenous representatives and affected communities. The legislative process took only 10 days, despite the fact that it introduced 480 pages of new legislation.
65. In failing to engage in meaningful discussions with Indigenous peoples about legislation which would affect them, the former Government contravened its obligations under:
- (a) the ICCPR and ICESCR — to promote the realisation of the right to self-determination; and
- (b) under the CERD — 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.
66. The *CAALAS / NAAJA Joint Submission* reported that:⁴⁴
- the Northern Territory and Federal Governments' failure both to consult with Aboriginal people about legislative changes, and to properly communicate and engage with them about the changes that have been made, contributes to Aboriginal people feeling disempowered by the mainstream legal system.
67. At all times, it is imperative that any review of, and amendments to, the NTER legislation only be made after consultation with, and input from, affected Indigenous communities. Continuing to fail to meaningfully engage Indigenous communities in this process will be a further breach of Australia's obligations to "promote the realisation of the right of self-determination".⁴⁵

⁴³ *Northern Territory National Emergency Response Act 2007* (Cth), Part IV; and *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Schedule IV.

⁴³ *CAALAS/NAAJA Joint Submission*, p. 6.

⁴⁵ ICCPR, article 1(3).

(b) *Disallowance of consideration of customary law*

68. Part VI of the *Northern Territory National Emergency Response Act 2007* (Cth) provides that a court or bail authority must not consider any customary law or cultural practice as a mitigating factor in determining either sentencing or bail applications.
69. Since the introduction of this measure, sentences have increased.⁴⁶ This is not surprising given that Aboriginal offenders can no longer have the full context of their offending behaviour considered.
70. The HRLRC recognises that rights need to be balanced against one another and against competing public interests. However, the blanket exclusion of customary law and consideration of cultural practices takes away a major mechanism by which Aboriginal practices and traditions were merged with the general legal system. This aspect of NTER deprives Indigenous people of a right to determine their own social and political development. It also fetters the important capacity and responsibility of the judiciary to consider all relevant factors, including as to moral culpability, in sentencing.

(c) *Increase in Policing*

71. Schedule II of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) extends the mandate of the Australian Crime Commission to allow it to deal with child sexual abuse and Indigenous violence. Schedule II also deploys Australian Federal Police as “special constables” to the Northern Territory Police Force.
72. The *CAALAS / NAAJA Joint Submission* reported that since the introduction of this legislation, there has been an increase in the level of policing in Aboriginal communities.
73. In addition, the *CAALAS / NAAJA Joint Submission* reports that many Aboriginal people have complained about the behaviour of young police and police from interstate who have very little knowledge or understanding of Aboriginal people in the Northern Territory.⁴⁷
74. It must be borne in mind that, likewise, many Aboriginal people find the general legal system meaningless or very difficult to understand. As such, the police, as enforcers of the law, must respond in a culturally sensitive and appropriate way.

⁴⁶ *CAALAS/NAAJA Joint Submission*.

⁴⁶ *CAALAS/NAAJA Joint Submission*, p. 7.

(d) *Abolition of CDEP*

75. Schedule III of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) removed all funding for the Community Development Employment Program (**CDEP**) in the Northern Territory, moving all CDEP workers into the mainstream employment (or unemployment) market. Provision was made for a one-year transition payment to individuals transferring from CDEP to unemployment benefits in order to make up the shortfall in the amount received.
76. Jon Altman, the Director of the Centre for Aboriginal Economic Policy Research, Australian National University, has stated that:⁴⁸

The abolition of CDEP will place many community enterprises—including community stores and currently viable businesses—in immediate financial jeopardy. It will see the collapse of outstation resource agencies and the possible influx of up to 10,000 residents of 560 outstations into already overcrowded townships. CDEP abolition will see enhanced passivity that many argue is at the heart of dysfunction. This measure must be urgently reconsidered.

77. The abolition of CDEP replaced a system that empowered Aboriginal people with one which was foreign to their culture and practices.
78. The current Australian Government is to be commended for recognising the problems caused by the abolition of CDEP, and has reinstated CDEP in those communities where it had been abolished.

(e) *Income management*

79. Schedule I of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) establishes an income management regime (**Income Management Regime**) that suspends between 50% and 100% of welfare payments that would otherwise be paid to:
- (a) individuals responsible for the care and protection of children;
 - (b) individuals subject to the jurisdiction of the “Queensland Commission in Cape York”; and

⁴⁸ Jon Altman, Opening comments to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Provisions of the Northern Territory Emergency Response Bill 2007 and Associated Bills (10 August 2007), available at http://www.anu.edu/caepr/Publications/topical/Altman_Senate.pdf.

(c) individuals in “prescribed areas” (as identified by the *Northern Territory National Emergency Response Act 2007* (Cth)).

7. The suspended payments are quarantined and may only be spent on food and other essential items.
80. Janet Hunt, board member of Australians for Native Title and Reconciliation, has commented that there have been differing assessments about the effects of this measure:⁴⁹ some say that income management has made communities quieter and safer and that women are happier because they have more control over their money, however others resent the blanket imposition of income quarantining.
81. Since the re-instatement of CDEP, it is now largely women whose money is quarantined, as many male former-CDEP workers are now back in the program receiving wages and as such are not similarly regulated. This has the effect of rendering the Income Management Regime sexually discriminatory as well as racially discriminatory.
82. Since the introduction of the Income Management Regime, the Aboriginal and Torres Strait Islander Legal Service (**ATSILS**) has reported Aboriginal people feeling that their self worth has deteriorated. The practical implications are explained in the *CAALAS / NAAJA Joint Submission* as follows:⁵⁰
- ATSILS have experienced Aboriginal people feeling that their self worth has deteriorated. Some Aboriginal people feel they have returned to a previous welfare system. Indeed, the Government has implicitly sanctioned the view that all Aboriginal people are irresponsible with their money, and unable to properly care for their family. ATSILS staff have witnessed shop assistants verbalising this assumption, after serving Aboriginal people subject to income management. This has led to many Aboriginal people finding income management to be an insulting and degrading experience ...
83. The income management model rolled out thus far in the Northern Territory is a “one size fits all” model which lacks cultural awareness and sensitivity. ATSILS has suggested that it would be more culturally appropriate to offer income management interviews as a family group because this respects the way in which Aboriginal people use money.

⁴⁹ Janet Hunt, *NT Intervention one year on* (transcript) (21 June 2008), available at: <http://www.antar.org.au/content/view/718/>.

⁵⁰ *CAALAS / NAAJA Joint Submission*, 17–18.

84. In the HRLRC's view, the application of such a rigid, inflexible and unconsultative income management regime is inconsistent with the right of self-determination and equality before the law.

(f) *Land reforms*

85. The NTER provides for the compulsory acquisition of Aboriginal land by the Commonwealth and the abolition of the permit system, meaning that non-Aboriginal people now have the right to enter onto and remain on certain parts of previously restricted Aboriginal land.

86. The HRLRC submits that the land reforms implemented by the NTER legislation are inconsistent with the right of self-determination as they fail to protect the right of Indigenous peoples:

(a) to freely pursue their economic, social and cultural development without outside interference;⁵¹ and

(b) to freely dispose of their natural wealth and resources.⁵²

(i) *The right to freely pursue economic, social and cultural development without outside interference*

87. Indigenous peoples' connection with Aboriginal land is central to their economy, society and culture. To deny Indigenous peoples control over their land, is to deny them the right to freely pursue economic, social and cultural development without outside interference. As such, the land reforms fail to give full effect to the right of self-determination, as they fail to protect, promote and fulfil the right of Indigenous peoples to freely pursue their economic, social and cultural development.

(ii) *The right to freely dispose of their natural wealth and resources*

88. The appropriation of control over Aboriginal land by the Commonwealth government denies Indigenous peoples the right to freely dispose of their natural wealth and resources and is also inconsistent with the right of Indigenous peoples to self-determination.

⁵¹ ICCPR article 1.1; ICESCR article 1.1.

⁵² ICCPR article 1.2; ICESCR article 1.2.

Recommendation 4:

Measures that relate to Indigenous communities must be culturally sensitive and conscious of the meaningful connection that Indigenous peoples have to the land. This requires the recognition of the right of self-determination of Indigenous peoples and the need for a high level of consultation with and participation of Indigenous people about matters which directly affect them.

Recommendation 5:

It is recommended that Part IV of the *Northern Territory National Emergency Response Act 2007* (Cth) be amended so as to require a court or bail authority to consider any customary law or cultural practice as a mitigating factor in determining either sentencing or bail applications.

Recommendation 6:

Systems and training should be implemented to ensure that policing occurs in a manner that is human rights compatible, culturally sensitive and appropriate.

Recommendation 7:

The land reforms implemented by the NTER legislation should be repealed.

Recommendation 8:

It is recommended that a process of consultation with Indigenous peoples in relation to the Income Management Regime be entered into and changes to the regime made in response to the concerns raised.

Recommendation 9:

The revised Income Management Regime should be culturally appropriate and non-discriminatory.

8. The Rights of the Child

89. The HRLRC is concerned that the structure, content and manner of implementation of the NTER legislation and many of the measures enacted by the legislation do not meet or implement Australia's obligations in respect of the rights of the child. This failure is of particular concern given the Australian Government's strong rhetoric concerning child protection as being the chief motivation behind the enactment of the NTER legislation.

8.1 Stated rationale for the NTER legislation

90. The Australian Government purportedly introduced the NTER legislation as emergency measures intended to protect the rights of Indigenous children and implement Australia's obligations under the international human rights treaties to which Australia is party. The relevant Explanatory Memorandum reinforces the Australian Government's position that the NTER measures are consistent with Australia's human rights obligations.⁵³

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

91. This justification was reiterated repeatedly by the Minister for Families, Community Services and Indigenous Affairs, Mal Brough, in many public statements, including in media releases⁵⁴ and the second reading speech for the related appropriation bills.⁵⁵

92. The *Little Children are Sacred Report* identifies the CRC as the key 'frame of reference' in developing strategies to ensure the promotion of child rights and protection of children from abuse, including in particular Recommendation 9 that a position of Commissioner for Children and Young People be established.⁵⁶

93. Despite the Australian Government's stated intentions, neither the NTER legislation itself, nor any of the accompanying policy statements or explanatory materials detail how the

⁵³ Northern Territory Emergency National Response Bill 2007, Explanatory Memorandum, 76, available at www.austlii.edu.au/au/legis/cth/bill_em/ntnerb2007541/memo_0.html.

⁵⁴ See, eg, Minister for Families, Community Services and Indigenous Affairs, Commonwealth of Australia, *NT response - Underwhelming and poses more questions than it answers*, Press Release (20 August 2007).

⁵⁵ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).

⁵⁶ *Little Children are Sacred* report, 22 (and see further 89–90).

Australian Government considers that the NTER legislation specifically achieves those objectives, or which rights under international instruments are intended to be promoted or protected. The child rights framework set out in the CRC has not been used as a basis for implementing the purported purpose of the legislation, being the protection of the rights of Indigenous children. In particular there is no requirement in the legislation that the “*best interests of the child*” be considered as the paramount concern in relation to all provisions which may have an impact on a child’s welfare or rights.

8.2 Children’s Rights

94. The Aboriginal & Torres Strait Islander Social Justice Commissioner identified the following provisions of the CRC as being potentially relevant, directly or indirectly, to issues involving family violence and child abuse.⁵⁷

- (a) Governments shall respect and ensure the rights set out in the Convention are provided to each child within their jurisdiction without discrimination of any kind, including discrimination on the basis of race.⁵⁸
- (b) In all actions concerning children, the best interests of the child is a primary consideration, and the government has a duty of care to ensure that necessary protection is provided taking into account the rights of parents.⁵⁹
- (c) The family unit is recognised as fundamental for the growth and well-being of the child, and the government shall provide assistance to parents in meeting their child-rearing responsibilities and in the provision of services for the care of children.⁶⁰
- (d) Children have a right to protection from all forms of violence, and governments must take protective measures to prevent, identify, and address violations. These measures include social programmes which provide necessary support for a child and his or her parents.⁶¹
- (e) Children have a right to be protected from all forms of sexual abuse.⁶²

⁵⁷ *Social Justice Report 2007*, p 235.

⁵⁸ CRC, article 2.

⁵⁹ CRC, article 3.

⁶⁰ CRC, articles 5 and 18.

⁶¹ CRC, article 19.

⁶² CRC, article 34.

- (f) Governments must take measures to promote recovery and rehabilitation of children who are victims of neglect and abuse. This should be done in an environment that fosters the health, self-respect and dignity of the child.⁶³
- (g) Children have the right to the highest attainable standard of health and equal access to health care services. The government has a responsibility to diminish infant mortality, ensure the provision of necessary health care and combat disease and nutrition.⁶⁴
- (h) Indigenous children have the right to enjoy and practice their culture, in community with other members of their group.⁶⁵
- (i) Children must not be subjected to arbitrary interference with their privacy.⁶⁶

95. While the CRC does provide that children have a right to be protected from all forms of sexual abuse under article 34, that right needs to be considered in the context of both the other provisions of the CRC and also in the context of the human rights set out in other relevant human rights conventions to which Australia is party (as discussed in other sections of this submission), in particular the CERD.

96. The HRLRC submits that the NTER fails to address sexual abuse in a manner that adequately considers other relevant rights. Specifically, the HRLRC questions the need for the NTER to be discriminatory, culturally insensitive and breach other human rights in order to protect children from sexual abuse. Human rights infringements resulting from the NTER have a detrimental impact on Indigenous children as well as their families and communities. The HRLRC queries the necessity of such broad limitations on the human rights of Indigenous Australians and the impact on Indigenous children.

8.3 Developing a children's rights framework

97. The NTER legislation should not, in attempting to protect children, undermine the promotion and protection of children's rights as required by the CRC. The right to survival and development outlined in Article 6 of the CRC must be interpreted in the "broadest sense as an holistic concept, embracing the child's physical, mental, spiritual, moral,

⁶³ CRC, article 39.

⁶⁴ CRC, article 24.

⁶⁵ CRC, article 30.

⁶⁶ CRC, article 16.

psychological and social development”.⁶⁷ This holistic approach includes respect and support for the important role that the family and community play in a child’s life.⁶⁸ This approach requires that full consideration of the impact of legislation be considered, not just on the child, but also on their family and their entire community.

98. A child rights approach also requires that sufficient consideration be given to the views of the child, with regard to the child’s age and maturity. This right, not only to participate in decision-making, but also to be entitled to have an impact on the outcome of any such decision-making, is clearly required by article 12 of the CRC. Given that the provisions of the NTER are likely to have such a substantive impact on the lives of many children, compliance with the CRC demands that the NTER be formulated through a meaningful consultation process in the context of an integrated human rights, and specifically child rights, framework.
99. The touchstone for any comprehensive child rights framework consistent with the CRC is that, in all actions concerning children, the “best interests” of the child are of primary importance and must be determinative in directing relevant decision-making and implementation. A best interests analysis insists that any actions taken which may have an impact on a child must be:
- (a) based on evidence; and
 - (b) able to be objectively demonstrated to be in the best interests of the child.
100. This assessment cannot rely on speculation, assumption or conjecture; it must be assessed using objective criteria and, where possible, by considering the views of children.

8.4 Protection of children from other children

101. The *CAALAS / NAAJA Joint Submission* emphasises the extreme importance of ensuring that, where the perpetrators of child abuse are themselves children or young people, a conventional law enforcement approach is not appropriate to either the protection of the victims or the punishment or rehabilitation of the perpetrators.
102. This is an issue which is not adequately addressed by the NTER legislation and related measures.⁶⁹ In the absence of a child rights framework, it is difficult to see how clear and

⁶⁷ Committee on the Rights of the Child, *General Comment No.5 (2003) General Measures of Implementation for the Committee on the Rights of the Child*, CRC/GC/2003/5, [12].

⁶⁸ CRC article 5.

⁶⁹ *CAALAS / NAAJA Joint Submission*, 12–13.

constructive policies can sensibly be developed to deal with key factors which lead to abuse, including:

- (a) the removal of access to materials which are understood to lead to abusive, specifically sexually abusive, behaviour;
- (b) the perpetuation of abuse among peer groups and between age groups;
- (c) the empowerment and engagement of the local community in the development and implementation of abuse prevention strategies, particularly in relation to living arrangements, education and health; and
- (d) the manner in which child perpetrators of abuse are dealt with in criminal and other law enforcement processes, particularly in relation to the rehabilitation of child perpetrators.

Recommendation 10:

The CRC and the notion of children as “rights bearers” should be used as a determinative framework for the NTER. A child rights framework should be used to set benchmarks against which to develop, implement and monitor laws and policies aimed at protecting children in Indigenous communities from sexual abuse, and for promoting and protecting the rights of Indigenous children generally.

⁶⁹ Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

9. The Right to an Effective Remedy

103. The HRLRC is concerned that the NTER legislation denies Indigenous peoples the right to an effective remedy when their human rights are violated.

9.1 Right to an effective remedy

104. It is a basic principle of international human rights law that the obligation to respect, protect and fulfil international human rights obligations includes a duty to provide effective remedies to victims.⁷⁰

(a) *ICCPR*

105. Under Article 2 of the ICCPR, each State party undertakes to:

(2) take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, *to adopt such laws or other measures as may be necessary to give effect to the rights* recognized in the present Covenant;

(3)(a) ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*;

(3)(b) ensure that any person claiming such a remedy shall have his right thereto determined by *competent judicial, administrative or legislative authorities*, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and

(3)(c) ensure that the competent authorities shall *enforce such remedies* when granted (emphasis added).

106. In General Comment 31, the UN Human Rights Committee addressed the implementation obligations that Article 2 of the ICCPR imposes on States parties. The Committee stated at paragraph 15 that:⁷¹

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person ... The Committee attaches importance to States Parties' establishing appropriate judicial and administrative

⁷¹ Human Rights Committee, *General Comment 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

mechanisms for addressing claims of rights violations under domestic law ... Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.

(b) *ICESCR*

107. Article 2(1) provides that States parties undertake to:

take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by *all appropriate means*, including particularly the adoption of legislative measures (emphasis added).

108. The HRLRC submits that this obligation on States parties to achieve the full realisation of rights extends to providing an effective remedy where ICESCR rights are breached.

(c) *CERD*

109. CERD provides that States parties agree to condemn and eliminate racial discrimination and provide effective remedies against racial discrimination, as indicated by the articles outlined below.

2(1) condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races;

...

5(a) [undertake to] prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... [t]he right to equal treatment before the tribunals and all other organs administering justice;

...

6 assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination (emphasis added).

9.2 Practical implications of the NTER and the right to an effective remedy

110. There are two principal areas of concern in relation to the right to an effective remedy arising from the NTER. They include:

- (a) the exclusion of the operation of Part II of the *Racial Discrimination Act 1975* (Cth); and
- (b) the lack of merits review (and potentially judicial review) for a number of executive actions under the *Northern Territory Emergency Response Act 2007* (Cth) and related legislation.

111. The declaration of the existence of an “emergency” in Indigenous communities in the Northern Territory has been used by the Government as the basis for denying safeguards, including the right to an effective remedy, which we have come to expect in Australia.

9.3 Exclusion from RDA

112. The RDA is the means by which Australia gives effect to some of its key obligations under the ICCPR, ICESCR and CERD. The exclusion of the RDA effectively places all executive action done pursuant to the NTER legislation beyond the scope of the domestic law by which Australia fulfils its obligations to:

- (a) protect persons against racial discrimination; and
- (b) provide a remedy where such discrimination occurs.

9.4 Exclusion of external merits review

113. The legislation excludes, or does not provide for, merits review in a number of circumstances. The *Social Justice Report 2007* sets out some of these provisions.⁷² They include:

- (a) sections 34(9), 35(11), 37(5), 47(7), 48(5) and 49(4) of the *Northern Territory National Emergency Response Act 2007* (Cth), which provide that various determinations about Indigenous land made by the Minister for Indigenous Affairs are not to be considered legislative instruments and thus, should not be subject to parliamentary scrutiny; and
- (b) section 144(ka) of the *Social Security (Administration) Act 1999* (Cth) enacted by the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth)), which denies persons in a relevant Northern Territory area the right to seek administrative review by the Social Security Review Tribunal of decisions that relate to income management.

114. The implications of these provisions are that:

⁷² *Social Justice Report 2007*, 251-255.

- (a) where provisions are declared by the legislation not to be “legislative instruments” — the provisions cannot be reviewed by the judiciary;⁷³
 - (b) where external merits review is denied in relation to administrative decisions — the decisions cannot be reviewed by the executive; and
 - (c) given the highly political nature of the provisions — the provisions are unlikely to be susceptible to review by the judiciary.
115. As indicated below, this result is inconsistent with Australia’s international human rights obligation.
- (a) *ICCPR*
116. To the extent that it impinges on the usual system of ensuring that the government respects ICCPR rights and/or that there is an effective remedy available where it does not, the removal of merits review amounts to a breach of Australia’s undertakings to:
- (a) take necessary steps to adopt such laws or other measures as may be necessary to give effect to the ICCPR rights;⁷⁴
 - (b) ensure that any person whose ICCPR rights are violated shall have an effective remedy;⁷⁵ and
 - (c) ensure that any person claiming such a remedy shall have the claim determined by competent judicial, administrative or legislative authorities.⁷⁶
- (b) *ICESCR*
117. The removal of an ability to seek merits review also runs counter to Australia’s undertakings under the ICESCR to take steps to achieve progressively the full realisation of the ICESCR rights by “all appropriate means”, including particularly the adoption of legislative measures.⁷⁷

⁷³ *Legislature Instruments Act 2003* (Cth).

⁷⁴ ICCPR article 2(2).

⁷⁵ ICCPR article 2(3)(a).

⁷⁶ ICCPR article 2(3)(b).

⁷⁷ ICESCR article 2(1).

(c) *CERD*

118. These provisions also amount to a breach of the obligation under Article 5(a) of the CERD to guarantee the right to everyone to equality before the law in the enjoyment of the right to equal treatment before tribunals and all other organs administering justice.
119. Further, contrary to Article 6, the provisions remove a fundamental measure for ensuring protection of rights and the availability of an effective remedy.

9.5 Recommendations

120. The HRLRC recommends that the Australian government immediately repeals all provisions which deny external merits review and replaces them with provisions that make explicit that merit review processes do apply.
121. The HRLRC also refers to and reiterates Recommendation 3, being that the application of anti-discrimination legislation to NTER be immediately reinstated.

Recommendation 11:

Affected individuals must have available to them effective remedies to be able to review decisions under the NTER that impact on the human rights of Indigenous peoples. All provisions under the NTER which deny individuals the right to have decisions reviewed should be repealed and replaced with provisions that explicitly enable access to external merits review processes.

10. The Right to Social Security

122. The HRLRC is concerned that the measures provided for in the NTER legislation, particularly the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), pose a threat to the right to social security.

10.1 The right to social security

122.1 The right to social security is contained in Article 9 of the ICESCR, which provides that:

[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

123. The right to social security has been strongly affirmed in international law, being recognised in the Declaration of Philadelphia (1944), the Universal Declaration of Human Rights (1948) and incorporated into a range of international and regional human rights treaties, including CERD, CEDAW and CRC.⁷⁸ Furthermore, in 2001, the International Labour Conference affirmed that social security “*is a basic human right and a fundamental means for creating social cohesion.*”⁷⁹

124. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination, in order to secure protection from, among other things:

- (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age or death of a family member;
- (b) unaffordable access to health care; and
- (c) insufficient family support, particularly for children and adult dependents.⁸⁰

125. The International Labor Organization has well-developed standards in relation to social security, their principal instrument being the *Social Security (Minimum Standards) Convention of 1953* (No 102). This Convention delineates nine specific branches of social security:

- (a) medical care;

⁷⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security*, (27 November 2007) E/C.12/GC/19, [6].

⁷⁹ *Ibid.*

⁸⁰ *Ibid* [2].

- (b) sickness benefit;
- (c) unemployment;
- (d) old-age benefit;
- (e) employment injury benefit;
- (f) family benefit;
- (g) maternity benefit;
- (h) invalidity benefit; and
- (i) survivors' benefit.

126. This right is of central importance in guaranteeing human dignity and, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.⁸¹

127. Significantly, the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.⁸²

10.2 Practical implications of the NTER and the right to social security

128. There are two principal concerns relating to the NTER and the right to social security. These include:

- (a) the introduction of the Income Management Regime; and
- (b) the abolition of CDEP (since reinstated).

129. Further, the introduction of the Income Management Regime and the abolition of the CDEP (since reinstated) has many adverse consequences on human rights, other than the right to social security.

10.3 The Income Management Regime

130. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) establishes the Income Management Regime, which suspends between 50% to 100% of welfare payments that would otherwise be paid to those in "prescribed areas". This quarantining and control of welfare income continues for a period of 12 months, with a

⁸¹ Ibid [1] and [3].

⁸² Ibid [9].

possible extension of up to five years, and applies to almost every form of welfare payment.

131. The practical implications of the implementation of the Income Management Regime are explained in the *CAALAS / NAAJA Joint Submission* as follows:⁸³

Senior leaders in one community reported to us that before income management people had enough food to eat and that following income management people are going hungry and are “criss-crossing” family groups in the community, looking for food. The community reported children were crying for food, and at times being fed gruel made from powdered milk. In our experience, some people have experienced having less money because they have been unknowingly accumulating surpluses in their income managed accounts. For other people, it is because they are now forced to travel long distances, incurring additional costs, to be able to shop with income managed funds....

We note with concern the comments by the Central Land Council that:

“... Anecdotally, store prices have universally increased since the advent of income management in a community. There may be some increased costs associated with administration of this system, but it appears the guarantee of quarantined money is fuelling high inflation at community stores. The CLC would support higher benchmarks for stocking nutritional food, stricter controls on pricing, and, as stated in our previous submission, a requirement that stores have the capacity to train and employ local community members.”

10.4 Impact of the Income Management Regime on the right to social security

132. The HRLRC is concerned that the practical implications of the Income Management Regime breach the right to social security by failing to:

- (a) take steps to ensure the right to social security within available resources;
- (b) implement the right to social security reasonably and proportionately;
- (c) prohibit retrogressive steps in the fulfilment of the right to social security;
- (d) provide effective remedies; and
- (e) consult with Indigenous peoples.

(a) *Take steps to ensure the right to social security within available resources*

133. States parties are obliged to take the necessary steps towards the realisation of the right to social security within their maximum available resources. The Income Management

⁸³ *CAALAS / NAAJA Joint Submission*, 17–18.

Regime, however, renders the delivery of welfare provisions extremely costly, with a significant increase in administrative involvement and costs. The HRLRC considers that these funds would be better spent by the government on taking steps to ensure that there is appropriate education and public awareness concerning access to social security schemes. This is an essential component of the obligation to fulfil the right.⁸⁴

(b) Implement the right to social security reasonably and proportionately

134. According to General Comment 19, in assessing whether States parties are respecting and promoting the right to social security, the Committee on Economic, Social and Cultural Rights will look at, among other things, whether implementation of a social security regime is reasonable and proportionate with respect to the attainment of the relevant rights.⁸⁵

Reasonableness

135. The Income Management Regime has a blanket application in prescribed Northern Territory communities. This means that measures are applied to persons including those who are not responsible for the care of children, who do not gamble and who do not abuse alcohol or other substances. The criteria for being subject to the regime is therefore based upon race, as opposed to need. This is at odds with the requirement that the implementation of a social security regime should be reasonable.
136. As such, there is a tenuous connection between the scheme and its object of addressing family violence and abuse. The HRLRC considers that only if the measures were targeted specifically to parents or families in need of assistance to prevent neglect or abuse of children (as they are in section 123UC of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*), could some form of income management be viewed as an appropriate exercise of the government's "margin of discretion" to ensure that families benefit from welfare and receive the necessities for survival.
137. The scheme renders it difficult for individuals to be exempted from the income management provisions. Exemption depends on the exercise by the Minister of his or her discretion, in circumstances the Minister sees fit. The HRLRC considers that it would be more appropriate for the applicability of the scheme to be reversed, so that a positive decision is required before the scheme applies to a particular individual. Failure to do so

⁸⁴ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security*, above n 60, [49].

⁸⁵ *Ibid* [63].

may have the effect of subjecting individuals to arbitrary and unreasonable restrictions on their existing social security coverage, which, is in breach of the right to social security.

Proportionality

138. The HRLRC is concerned that the quarantining of 100% of welfare entitlements is a disproportionate response. The HRLRC submits that controlling how a person spends money is a drastic interference with the way that a person manages his or her life and family and a disproportionate response to the issues faced in Aboriginal communities. As a matter of human rights law, the government is obliged to consider voluntary schemes or schemes that are less intrusive as a first response before moving to options as draconian as compulsory income management.⁸⁶

(c) Prohibit retrogressive steps in the fulfilment of the right to social security

139. By increasing the restrictions on access to social security, the Income Management Regime is as a retrogressive measure. This raises concerns about compliance with the ICESCR, as there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the ICESCR. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the ICESCR, in the context of the full use of the maximum available resources of the State party.⁸⁷
140. To this end, the Committee on Economic, Social and Cultural Rights would look carefully at whether:⁸⁸
- (a) there was reasonable justification for the action;
 - (b) alternatives were comprehensively examined;
 - (c) there was genuine participation of affected groups in examining the proposed measures and alternatives;
 - (d) the measures were directly or indirectly discriminatory;
 - (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an

⁸⁶ *Social Justice Report 2007*, 278.

⁸⁷ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security*, above n 60, [42].

⁸⁸ *Ibid.*

individual or group is deprived of access to the minimum essential level of social security; and

(f) whether there was an independent review of the measures at the national level.

141. The HRLRC submits that these requirements have not been met and could not be proved to have been met in light of the fact that 480 pages of legislation was produced in a legislative process that took 10 days.

(d) *Provide effective remedies*

142. The Income Management Regime heavily limits the scope for reviewing decisions made in relation to the regime, by denying certain external merits review processes. This calls into question whether there is an adequate monitoring and accountability framework. The HRLRC is concerned that this amounts to a denial of justice and does not meet the requirement to provide effective judicial or other appropriate remedies, which are integral to the right to social security.⁸⁹

(e) *Consult with Indigenous peoples*

143. General Comment 19 provides that an integral part of any policy, programme or strategy concerning social security includes the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security.⁹⁰ The lack of participation and consultation with Indigenous peoples in the formulation of the new social security regime is therefore concerning.

144. The HRLRC considers that there should have been significant consultation with Indigenous peoples to determine the best means of regulating their social security benefits and recommends that the current Government commence a programme of consultation with affected Indigenous peoples and where necessary, make changes to the Income Management Regime, in response to the concerns raised.

10.5 Abolition of the CDEP scheme⁹¹

145. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) abolished the Federal government's CDEP in the Northern Territory. We commend the current Government for reinstating the program.

⁸⁹ Ibid [77].

⁹⁰ Ibid [69].

⁹¹ For a detailed discussion of human rights concerns relating to the abolition of the CDEP scheme, see *Social Justice Report 2007*, 280-285.

146. Upon the abolition of the CDEP, former-CDEP participants became unemployed and therefore subject to the Income Management Regime. The resultant increase in persons becoming subject to the Income Management Regime, has adverse implications for the fulfilment of the right to social security. It meant that former-CDEP participants became required to fulfil certain participation requirements, such as looking for work and training or participating in work for the dole programs. If these requirements were breached, former-CDEP participants could have their social security payments frozen.

10.6 Interference with other human rights

147. The introduction of the Income Management Regime and the abolition of the CDEP, raises human rights concerns in relation to, among others, the following rights:

- (a) the right to an effective remedy;
- (b) the right to non-discrimination;
- (c) the right to self-determination; and
- (d) the right to an adequate standard of living.

148. The formulation and implementation of national social security strategies and plans of action should respect, among other things, the principle of non-discrimination.⁹² The criteria for being subject to the income management provisions is based upon the race of the welfare recipient, raising serious issues in the context of the right to non-discrimination.⁹³ As the Committee on Economic, Social and Cultural Rights states,

[s]tates parties should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination.⁹⁴

149. General Comment 19 provides that social security strategies and plans should also respect the right of affected persons to participate in the creation of policies that affect them. Implementation of the Income Management Regime, which divests Aboriginal people of

⁹² HRC, *General Comment No 19: The right to social security*, above n 60, [69].

⁹³ For a discussion of racial discrimination in the income management regime, see the Joint Submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities, June 2008, Chapter 3.

⁹⁴ HRC, *General Comment No 19: The right to social security*, above n 60, [35].

any power to make choices to govern their own financial affairs is severely out of step with the right of self-determination.⁹⁵

150. The abolition of CDEP also raises concerns in relation to the right of Indigenous peoples to an adequate standard of living under article 11 of the ICESCR, which is tied to the achievement of an acceptable level of income as well as the provision of employment opportunities.

10.7 Recommendations

151. The HRLRC refers to and reiterates Recommendations 8 and 9, being that the Income Management Regime should be reviewed and revised following a consultation process and that any changes should be culturally appropriate and non-discriminatory.

⁹⁵ *Social Justice Report 2007*, 278.

11. The Right to Privacy, Family and Home

152. The HRLRC is concerned that the practical implications of the NTER pose a threat to the right to privacy, family and home.

11.1 The right to privacy, family and home

153. The right to privacy, family and home is set out at article 17 of the ICCPR. It provides that:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

154. General Comment 16 does not clarify the meaning of privacy, but does focus on the meaning of “unlawful” and “arbitrary”.

155. The term “unlawful” means that “no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant”.⁹⁶ The law must be precise and circumscribed, so as not to give decision-makers too much discretion in authorising interferences with privacy.⁹⁷ The Committee went on to say that “relevant legislation must specify in detail the precise circumstances in which such interference may be permitted. A decision to make use of such authorised interference must be made only by the authority under the law, and on a case-by-case basis”.⁹⁸

156. In the Committee’s view the term “arbitrary” is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances.⁹⁹ The Committee further gave an indication of how the reasonableness of interferences with privacy might be assessed:¹⁰⁰

⁹⁶ Human Rights Committee, *General Comment No 16: The right to privacy, family and home* (1988), U.N. Doc. HRI/GEN/1/Rev.1, [3].

⁹⁷ Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2006), 352.

⁹⁸ Human Rights Committee, *General Comment No 16: The right to privacy, family and home*, above n 79, [8].

⁹⁹ *Ibid* [4].

¹⁰⁰ *Ibid* [7].

[T]he competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.

11.2 Practical implications of the NTER legislation on the right to privacy, family and home

157. The HRLRC is concerned that the practical implications of certain measures enacted by the NTER may violate the right to privacy, family and home. The relevant measures include:

- (a) the deployment of Australian Federal Police as "special constables" to the Northern Territory Police Force;¹⁰¹
- (b) the prohibition on the sale, consumption and purchase of alcohol in prescribed areas and the compulsory collection of information on large alcohol purchases;¹⁰²
- (c) the ban on the possession, control or supply of pornographic material;¹⁰³
- (d) the requirement that records must be kept of each person that uses, and the purpose of that person's use, of a computer in a prescribed area that receives government funding;¹⁰⁴
- (e) the compulsory acquisition of leases¹⁰⁵ and the abolition of the permit system¹⁰⁶ (now reinstated); and
- (f) the licensing of stores operating in prescribed areas whose main purpose is the provision of food or groceries requiring them to participate in the Income Management Regime.¹⁰⁷

¹⁰¹ *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Schedule II.

¹⁰² *Northern Territory National Emergency Response Act 2007* (Cth), Part II.

¹⁰³ *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Schedule I.

¹⁰⁴ *Northern Territory National Emergency Response Act 2007* (Cth) Part III.

¹⁰⁵ *Ibid*, Part IV.

¹⁰⁶ *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Part IV.

¹⁰⁷ *Ibid*, Part VII.

(a) *Deployment of police and alcohol and pornography bans*

158. The *CAALAS / NAAJA Joint Submission* reports that “[l]egal services have received anecdotal reports from Aboriginal people that they have experienced an increase in discriminatory treatment from the Northern Territory Police Service”,¹⁰⁸ such as the entering into of all the houses in a community where people are seen drinking. Other such invasive practices have been reported since the introduction of the NTER legislation. These practices raise serious concerns in relation to the right to privacy, family and home.
159. The HRLRC submits that this is a disproportionate invasion into the right of Indigenous peoples to privacy.

(b) *Records of computer use and large alcohol purchases*

160. The NTER legislation mandates that records be kept of each person that uses, and the purpose for which that person uses, any computer in a prescribed area that receives government funding. These records are required to be kept for three years. The HRLRC is concerned that this constitutes a breach of the right to privacy.
161. The NTER provides that people selling take-away alcohol in the Northern Territory must require the purchaser of larger quantities of alcohol to produce proof of identity and then must record the person’s name, address and the place where the purchaser proposes to consume the alcohol.

(c) *Land reforms*

162. The HRLRC is concerned that the land reforms enacted by the NTER legislation constitute an arbitrary interference with the privacy, family, home and honour of Aboriginal peoples. By compulsorily acquiring Aboriginal land and removing the permit system, the Commonwealth has dismantled the exclusive sanctity of the peoples’ land-based community units. It is contended that this interference is arbitrary because it is not based on objective facts, reasons or principles.
163. This contention is confirmed by the case of *Hopu and Bessert v France*.¹⁰⁹ In that case, the Human Rights Committee held that France breached the right to privacy by allowing a hotel to be developed on sacred burial grounds of ancestors, because this geographic area played an important part in the peoples’ identity.

¹⁰⁸ *CAALAS / NAAJA Joint Submission*, 4.

¹⁰⁹ Communication No 549/1993 (29 July 1997) CCPR/C/60/D/549/1993/Rev.1.

(d) ***Income Management Regime***

164. As part of the NTER, section 123 of the *Social Security Act 1991* (Cth) requires that a significant amount of personal information be collected, used and disclosed across Australia between schools, state and territory education authorities, child welfare agencies and businesses in order to determine which individuals will be subject to income management. This collection of information will act as a 'trigger' for income management in various circumstances.¹¹⁰ The way in which personal information will be shared between government agencies such as State Child Protection Authorities, Centrelink, State Education Authorities, the Department of Families, Housing, Community Services and Indigenous Affairs and private sector agents has not been made explicit in the legislation. The HRLRC is concerned that this poses a threat to the right to privacy.

Recommendation 12:

It is recommended that the NTER legislation be amended to ensure that adequate protections are provided to protect the privacy of persons in relation to their family, home and personal information.

¹¹⁰ *Social Justice Report 2007*, 278.

12. The Right to Freedom of Movement

165. The HRLRC is concerned that the implications of some of the measures enacted by the NTER legislation fails to protect the right to freedom of movement.

12.1 Right to freedom of movement

166. The right to freedom of movement is enshrined in Article 12 of the ICCPR. Article 12 relevantly provides that:

- (1) Everyone lawfully within the territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence.
- (3) The abovementioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

12.2 The practical implications of the NTER and the right to freedom of movement

167. The HRLRC is concerned that the practical implications of the following key measures adopted in the NTER legislation adversely affect the fulfilment of the right to freedom of movement:

- (a) alcohol bans;¹¹¹ and
- (b) the compulsory acquisition of land.¹¹²

12.3 Alcohol bans

168. Notwithstanding that lawful incarceration is an exception to the right to freedom of movement, the exceptionally high incarceration rates of Aboriginal people in the Northern Territory is cause for concern. A recent report of the NT Department of Justice states that 82% of the prison population in the Northern Territory is Aboriginal,¹¹³ although only 32% of the general population in the Northern Territory is Aboriginal.¹¹⁴ The NTER has created a

¹¹¹ *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Schedule II.

¹¹² *Northern Territory National Emergency Response Act 2007* (Cth) Part IV.

¹¹³ NT Department of Justice, *Correctional Services Annual Statistics 2006-2007*, 3.

¹¹⁴ Australian Bureau of Statistics, *4705.0 - Population Distribution, Aboriginal and Torres Strait Islander Australians*, 30 June 2006, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features>

raft of new offences, most relevantly alcohol bans, breaches of which have the potential to increase the percentage of Aboriginal people in prison. The *CAALAS / NAAJA Joint Submission* reports that the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency are also “concerned about additional rises in the incarceration rate of Aboriginal people.”¹¹⁵

169. The penalties imposed for possessing alcohol when passing through certain restricted communities, otherwise known as “grog running”, are extreme, including that police can confiscate the car that the offending person was driving for up to 18 months. This is becoming a significant issue, as it restricts movement for many people and family members, not just the offenders. In remote communities such as Elliot, court hearings are held as little as every 2 to 3 months, meaning that there is no opportunity to appeal such decisions until this time. In the meantime, families are struggling to function without their cars.

12.4 Land reforms

170. The HRLRC submits that the right to liberty of movement has been breached as a result of the land reforms enacted as part of the NTER. By force of the NTER legislation, the Commonwealth acquired from Aboriginal peoples the right to exclusive possession of specified areas of Aboriginal land, being land that was chosen by Aboriginal peoples as their place of residence. By taking away Aboriginal entitlement to this land, the right of freedom to choose his or her residence has been breached. The Human Rights Committee in General Comment 27 confirms that the right to reside in a place of one’s choice includes “protection against all forms of forced internal displacement”.¹¹⁶

Recommendation 13:

It is recommended that, where necessary and appropriate, programmes be implemented to assist affected Indigenous people to recover from alcohol and drug dependency issues.

12006?OpenDocument, accessed on 14 August 2008.

¹¹⁵ *CAALAS / NAAJA Joint Submission*, 9.

¹¹⁶ Human Rights Committee, *General Comment 27, Freedom of movement* (1999) UN Doc CCPR/C/21/Rev.1/Add.9, [7].

Recommendation 14:

The provision for alcohol bans and the compulsory acquisition of land under NTER should be reviewed and revised to ensure that these provisions do not directly or indirectly infringe the right to freedom of movement, the right to freedom from discrimination and other relevant human rights.