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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
INCLUDING THE RIGHT TO DEVELOPMENT**

**Report by the Special Rapporteur on the situation of human rights and
fundamental freedoms of indigenous people, James Anaya**

**OBSERVATIONS ON THE
NORTHERN TERRITORY EMERGENCY RESPONSE IN AUSTRALIA**

ADVANCED UNEDITED VERSION

*This document will be published as an appendix to the Special Rapporteur's
forthcoming report on the situation of indigenous peoples in Australia*

I. INTRODUCTION

1. This report presents the observations of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, on the Northern Territory Emergency Response (“NTER”) program in Australia, in advance of reforms to the NTER that are anticipated in 2010. These observations follow an exchange of information and communications with the Government of Australia, indigenous peoples, and other stakeholders, including during the visit of the Special Rapporteur to Australia between 17 and 28 August 2009, during which he visited, with the cooperation of the Government, numerous Aboriginal communities in the Northern Territory, including Alice Springs (as well as the Alice Springs town camps), the Bagot community in Darwin, Yuendumu, Yirrkala, Angurugu, Gamgam, and Raymangirr. The observations included in parts I–V of the report were submitted initially to the Government by a note of 2 December 2009. These parts of the report appear here with only minor changes that do not alter substantively the observations previously submitted to the Government. Part VI of the report includes a summary of the Government’s comments on the observations previously submitted, comments the Special Rapporteur received on 16 February 2010; and part VII provides final observations by the Special Rapporteur.

2. The NTER is a suite of legislation and related government initiatives implemented in 2007, which are aimed at addressing conditions faced by indigenous peoples in the Northern Territory, but that contain several problematic aspects from an indigenous human rights standpoint. Although many of the concerns related to the NTER are being addressed in the Special Rapporteur’s main report on the situation of Aboriginal and Torres Strait Islander peoples in Australia—including with respect to self-determination, self-governance, participation in the design, delivery, and oversight of programs, and cultural match—the Special Rapporteur would like to devote special attention to the matter of the NTER, given its extraordinary nature and its deep

implications for a range of fundamental human rights, especially the right to non-discrimination, and for what it may represent for the direction of indigenous-State relations in Australia.

3. The Government of Australia is correct to endeavour to ensure the security of Aboriginal women and children as a matter of urgency and priority, and to improve the wellbeing of Aboriginal people in the Northern Territory. Affirmative measures by the Government to address the extreme disadvantage faced by indigenous peoples and issues of safety for children and women are not only justified, but they are in fact required under Australia's international human rights obligations, including under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. The NTER program, however, in several key aspects limits the capacity of indigenous individuals and communities to control or participate in decisions affecting their own lives, property and cultural development, and it does so in a way that in effect discriminates on the basis of race, thereby raising serious human rights concerns.

4. It is the opinion of the Special Rapporteur that, as currently configured and carried out, provisions of the NTER are incompatible with Australia's human rights obligations. The present document sets forth the reasoning behind this assessment. In this regard, the Special Rapporteur also takes note of the analysis contained in the 2007 Social Justice Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Special Rapporteur understands that the NTER is currently undergoing a process of reform, and he hopes that the following observations are helpful in revising NTER measures to diminish or remove their discriminatory aspects and adequately take into account the rights of indigenous peoples to self-determination and cultural integrity, in order to bring this Government initiative in line with Australia's international obligations.

II. BACKGROUND

5. In 2006 the Northern Territory government established the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, following a number of media reports on the subject. The work of the board resulted in the report, *Ampe Akelyernemane Meke Mekarle – “Little Children are Sacred”*, which drew national attention to the problems of child abuse in the Northern Territory and made numerous specific recommendations for addressing these issues, in relation to government leadership; family and children’s services; health crisis intervention; police; prosecutions and victim support; bail; offender rehabilitation; prevention services; health care as prevention of abuse; family support services; education; alcohol and substance abuse; community justice; employment; housing; pornography; gambling, and cross cultural practices.

6. Six days after the report was issued, on 21 June 2007, the Commonwealth Government announced that there would be a “national emergency intervention” into Aboriginal communities in the Northern Territory. On 17 August 2007 the Senate approved a package of legislation, which was composed of the Northern Territory National Emergency Response Act 2007 (“NTER Act”); the Social Security and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007; and the Families, Community Services and Indigenous Affairs and Other Legislation Amendment Act 2007. Reportedly, the proposed legislation was introduced by the Government in the House of Representatives on 6 August 2007, 47 days after the announcement of the Government’s emergency plan and less than 24 hours after drafts of the proposed legislation were shared with opposition parties and relevant stakeholders. No consultations with indigenous peoples in the Northern Territory were carried out prior to the adoption of the NTER.

7. While specifically oriented towards the eradication of child sexual abuse in a number of indigenous communities and town camps within the Northern Territory, the

NTER in fact addresses a diverse cross section of economic and social issues that confront the Northern Territory, including: law and order; family support; welfare reform and employment; child and family health; education; housing and land reform; and coordination for service delivery. The Northern Territory Emergency Response Taskforce was instrumental in the design of the NTER, and the Department of Families, Housing, Community Services and Indigenous Affairs has been the primary government agency responsible for its implementation.

8. Since its adoption, the NTER measures have sparked widespread criticism both domestically and internationally. Concerns were brought to the attention of the Government of Australia by the previous Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor Rodolfo Stavenhagen. On 10 October 2007, Professor Stavenhagen sent a communication to the Government, together with the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. In the letter, the special rapporteurs commended the Australian Government on the national emergency response to the “critical situation” and its expressed commitment to tackle the issue of sexual abuse of indigenous children in the Northern Territory as a matter of urgency and priority.

9. At the same time, however, the special rapporteurs expressed concern about the numerous reports received alleging potential or actual contradiction between the new legislation and international human rights standards that are binding upon Australia. In particular, they expressed concern that the NTER measures “include restrictions on the exercise of individual rights of the members of Aboriginal communities, including for alcohol consumption or use of pornographic materials, as well as a number of limitations to vested communal rights. It was alleged that these measures would arbitrarily limit the exercise of their individual rights on an equal basis with other

sectors of the national population, thus amounting to discrimination prohibited under international and domestic law/legislation.”¹

10. In a letter of 22 November 2007 responding to the special rapporteurs, the Australian Government stated that it considered that the measures of the NTER are necessary to ensure that indigenous people in the Northern Territory, and in particular indigenous women and children in relevant communities, are able to enjoy their social and political rights on equal footing with other Australians. The Government added that the NTER includes both exceptional and necessary measures to enable all, particularly women and children, to live their lives free of violence and to enjoy the same rights to development, education, health, property, social security and culture that are enjoyed by other Australians. In this regard, the Government noted that many of the provisions are time limited and designed to stabilize communities so that longer-term action can be taken.

11. United Nations treaty monitoring bodies have also expressed concern over the NTER. The Human Rights Committee and the Committee on Economic, Social, and Cultural Rights have expressed concern that NTER measures are inconsistent with Australia’s obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, respectively, in particular with respect to the right to non-discrimination.² Specifically, the Human Rights Committee recommended that Australia “redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the 1995 Racial Discrimination Act and the [International Covenant on Civil and Political Rights].”³ Further, the NTER is currently being examined under the

¹ A full summary of the communication sent and response received is available in the 2008 Communications Report of the Special Rapporteur (A/HRC/9/9/Add.1) (15 August 2008).

² CCPR/C/AUS/CO/5, para. 14 (2009) and E/C.12/AUS/CO/4, para. 15 (2009).

³ CCPR/C/AUS/CO/5, para. 14 (2009).

urgent action and early warning procedure of the Committee on the Elimination of Racial Discrimination.

12. During his visit to Australia in August 2009, the Special Rapporteur heard complaints about the NTER through multiple oral statements by numerous indigenous individuals and leaders, not just in the Northern Territory but in all the places he visited in Australia. He also received written petitions against the NTER signed by hundreds of indigenous individuals. Several other indigenous individuals with whom the Special Rapporteur met did speak in favour of the NTER in general and the need for government action to address the problems it targets.

III. INCOMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

A. Racially discriminatory treatment of indigenous individuals and communities

13. No doubt the NTER represents a substantial commitment of human and financial resources on the part of the Government to overcome immediate problems and improve the conditions of indigenous peoples, with particular attention to the needs of indigenous women and children. The NTER, however, has an overtly interventionist architecture, with measures that undermine indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy. These measures include the following:

- Under Section 31 of the NTER Act, the Government compulsorily acquired five-year leases to the lands of over 64 communities, in order to provide access to the Government over these areas to improve housing. The leases give the Commonwealth exclusive possession and quiet enjoyment of the land while the

lease is in force.⁴ Such five-year leases came into effect at the entry of force of the NTER, without consultation or consent by the relevant Aboriginal associations. Further, these leases were acquired without any compensation to the indigenous owners.

- Under Section 47, the NTER Act allows the Government to take control of Aboriginal town camps, which are held under leases in perpetuity by Aboriginal associations under the Special Purposes Act and the Crown Lands Act of the Northern Territory. The Commonwealth has the option of vesting in itself all rights, titles and interests in town camps merely by giving notice, with a similar consequence as the compulsory five-year leases.
- Section 51 suspends the “future act” provisions of the Native Title Act over areas held under leases granted under sections 31 and 47, and in some other circumstances. The future acts provisions allow indigenous communities to negotiate arrangements with third parties, including natural resource extraction companies, while native title claims are pending.
- Part 5 of the NTER Act vests broad powers in the Minister for Families, Housing, Community Services and Indigenous Affairs to intervene in the operation of representative Aboriginal community councils and associations, including with respect to service delivery and management of funds. Section 67 grants the Minister broad discretion to decide when to intervene in service delivery, including if “a service is not being provided in the area to the satisfaction of the Minister.” Further, the Minister can unilaterally determine how Commonwealth funding is to be used, managed or secured, within declared “business management areas;” and any area within the Northern Territory may be declared a business management area by the Minister, through a legislative instrument. The Government placed in many

⁴ Section 35(1).

indigenous communities in the Northern Territory its own “Government Business Managers” to oversee and coordinate the delivery of services.

- The NTER introduces a regime of compulsory income management that involves severe limitations on the use of social security benefits received by indigenous individuals. Fifty percent of individuals’ income support and 100% of advances and lump sum payments made to them are diverted to an “income management account.” The quarantined funds can only be spent in specially licensed stores on “priority needs,” such as food, clothing, and household items, using a bright green “Basics Card” that clearly identifies its holder as someone subject to income management. This regime applies to all those living in prescribed areas inhabited by indigenous peoples, regardless of whether or not they have responsibilities over children or have been shown to have problems managing income in the past. By contrast, outside of the prescribed areas, income quarantining applies only on a case by case basis in demonstrated situations of neglect, abuse, or inadequate school attendance. Further, the NTER terminated the Community Development Employment Project (“CDEP”), under which the Commonwealth provided funding to employers to hire Aboriginal peoples who otherwise would have received unemployment support. Since termination of the CDEP, payments are now classified as unemployment payments, and are therefore subject to compulsory income management.⁵
- The NTER imposes bans on alcohol consumption and pornographic materials within Aboriginal communities in prescribed areas (with limited exceptions to the alcohol ban), and in connection with the pornography ban requires policing of the use of publically funded computers. Mandatory signs are prominently placed at the

⁵ The Special Rapporteur heard reports that the termination of the CDEP has had both negative effects on Aboriginal employees, who are left to seek work into the formal labour market, without adequate alternative employment options or training, and on employers, who have lost funds with which to hire Aboriginal employees, thereby abruptly reducing their potential workforce.

entrances to the communities, announcing the alcohol and pornography bans (“it is an offence to bring, possess, consume, supply, sell or control liquor in a prescribed area without a liquor permit or license” and “it is an offence to bring, possess, supply, sell and transport certain prohibited material in a prescribed area”) and outlining serious fines, up to AUS \$74,800 and/or 18 months in jail, for failure to abide by the restrictions.⁶

- Part 6 of the NTER Act limits the consideration of indigenous customary law or the cultural practice of an offender in criminal proceedings for all alleged offenses (not just those involving domestic or sexual violence), in bail applications and sentencing.
- The Australian Crime Commission is accorded special powers, approved for use by the National Indigenous Violence and Child Abuse Intelligence Taskforce, to enhance its ability to collect information on alleged crime affecting indigenous communities. These include secrecy and witness confidentiality provisions, and special access to individuals’ records.

14. The Special Rapporteur cannot avoid observing that, on their face, these measures involve racial discrimination. Under the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention to Eliminate Discrimination”), to which Australia is a party, “the term ‘racial discrimination’ shall mean 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

⁶ These maximum fines are, with respect to alcohol restrictions: AUS \$1,100 for the first offence, \$2,200 for the second or subsequent offences, and \$74,800 and/or 18 months in jail for supplying/intending to supply over 1350 ml quantity of pure alcohol in liquor to a third person; and with respect to the prohibited materials restrictions, \$5,500 for “level 1 material and” \$11,000 for “level 2 material.”

fundamental freedoms in the political, economic, social, cultural or any other field of public life” (art. 1.1).

15. First, the above measures of the NTER, like the NTER overall, distinguish on the basis of race, because they are intended to and in fact do apply specifically to indigenous individuals and communities in the Northern Territory and not to others. The NTER measures specifically target indigenous people or apply to people and land within “prescribed areas” which, pursuant to section 4(2) of the NTER Act, are specified “Aboriginal land” and other designated areas that are populated almost entirely by indigenous people. These areas cover some 600,000 square kilometres and encompass more than 500 Aboriginal communities and over 70% of Aboriginal people within the Northern Territory (approximately 45,500 Aboriginal men, women, and children).⁷

16. Second, the differential treatment of indigenous peoples in the Northern Territory involves impairment of the enjoyment of various human rights, including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity. These rights are recognized, inter alia, in the International Covenant on Civil and Political Rights (ICCPR) (especially arts. 1, 14, 17, 27) and in the United Declaration on the Rights of Indigenous Peoples (especially arts. 3, 5, 7, 8, 11, 15, 18, 19, 20, 23, 26, 32). The Declaration places special emphasis on the right of indigenous peoples to self-determination and self-government (arts. 3, 4), to be actively involved in the design and implementation of development initiatives in their communities (art. 23), to control the disposition of their lands and territories (arts. 26, 32), and to be consulted for “legislative or administrative decisions that may affect them” (art. 19). Significantly, by all accounts, the NTER was initiated without any consultation with the affected indigenous communities. Additionally, especially in its income management regime, the

⁷ *Northern Territory Emergency Response – Report of the NTER Review Board* (October 2008), p. 9 (“*Report of the NTER Review Board*”).

NTER imposes discriminatory treatment of indigenous peoples in relation to their right to social security, which is protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) (art. 9).

17. As a party to both the ICCPR and the ICESCR, Australia must respect the human rights protected by these treaties, in addition to being bound to the provisions of the Convention to Eliminate Discrimination; and, having declared its support for the Declaration on the Rights of Indigenous Peoples, it should also adhere to the principles of that instrument.

18. Under the Convention to Eliminate Discrimination (art. 2.1), and various other human rights instruments, including the ICCPR (art. 2.1) and the ICESCR (art. 3), States are obligated to avoid and prevent discriminatory treatment on the basis of race that impairs the enjoyment of human rights. The proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis. Under article 4(1) of the ICCPR, “[i]n time of public emergency which threatens the life of the nation” a State party may derogate certain rights of the Covenant “to the extent strictly required by the exigencies of the situation” and only “provided that such measures ... *do not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin.”⁸ Similarly, the Declaration states in article 46 that “[a]ny such limitations [on the rights contained therein] shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

⁸ Emphasis added.

B. Special measures

19. Provisions of the NTER legislation identify the operative parts of the NTER program as “special measures” for the purposes of the Commonwealth Racial Discrimination Act of 1975. With this “special measures” designation, related provisions of the NTER legislation suspend the prohibition of discrimination of the Racial Discrimination Act and of the racial discrimination laws of the Northern Territory.

20. Notwithstanding the effect of this legislative arrangement on the domestic norms dealing with discrimination, the NTER measures must be evaluated autonomously in regard to Australia’s international obligations, particularly under the Convention to Eliminate Discrimination. In the opinion of the Special Rapporteur, the discriminatory aspects of the NTER discussed above have not been shown to qualify as “special measures” that may be deemed not to constitute racial discrimination for the purposes of the Convention. Article 1(4) of the Convention to Eliminate Discrimination provides, “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection ... shall not be deemed racial discrimination.”⁹

21. As already stressed, special measures in some form are indeed required to address the disadvantages faced by indigenous peoples in Australia and to address the challenges that are particular to indigenous women and children. But it would be quite extraordinary to find, consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged

⁹ Further, article 2(2) requires States “when the circumstances so warrant” to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing” the full enjoyment of their human rights.

groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.

22. The Committee on the Elimination of Racial Discrimination has advised that, “Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary....States should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.”¹⁰

23. Being racially discriminatory on their face, the rights-impairing aspects of the NTER measures should be presumed to be illegitimate. That presumption might possibly be overcome only if there is a strong showing that the measures are proportional and necessary in regard to a valid objective, and that adequate consultations have been undertaken. As pointed out above, no such consultations preceded enactment of the NTER program; and, apart from that, the discriminatory measures cannot be viewed, in the considered opinion of the Special Rapporteur, as proportional or necessary to the stated objectives of the NTER, valid as those objectives are.

24. Indigenous people with whom the Special Rapporteur met in various communities in the Northern Territory, including numerous women, expressed anguish over not just the immediate impacts of various aspects of the NTER, but also about a deepening sense of indignity and stigmatization that is brought about by the entire scheme. In addition, according to the information received by the Special Rapporteur, the NTER measures have had the effect of generating or heightening racist attitudes among the public and the media against Aboriginal people. Concern has been expressed especially about the stigmatizing effects of the large signs at the entrance to prescribed

¹⁰ Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), paras. 16, 18.

areas announcing the alcohol and pornography bans, and of the special government-issued Basics Card that is mandatory for purchasing essential household items.

25. The Special Rapporteur finds credible assertions that, in general, the design of the NTER provisions animates perceptions of indigenous peoples as being somehow responsible for their present disadvantaged state. The special government-appointed independent board established to evaluate the NTER, the NTER Review Board, noted that “there is a strong sense of injustice that Aboriginal people and their culture have been seen as exclusively responsible for problems within their communities that have arisen from decades of cumulative neglect by governments in failing to provide the most basic standards of health, housing, education and ancillary services enjoyed by the wider Australian community.”¹¹

26. After considered evaluation of the totality of circumstances, and with the objectives of the relevant international human rights instruments in mind, the Special Rapporteur is not convinced that the particular aspects of the NTER that limit or impair rights are justified by and proportional to the legitimate aims of the NTER. When government measures not only apply differential treatment to indigenous peoples, but also limit or condition their enjoyment of human rights and cast a stigmatizing shadow upon them, the most exacting inquiry must apply. To find the rights-limiting, discriminatory measures of the NTER to be justified would require a careful assessment that they are strictly necessary to the achievement of the legitimate NTER objectives, that those objectives somehow override the rights and freedoms being limited, and that there is an absence of suitable alternatives.

27. At this stage, after more than two years of the NTER being operative, such an assessment would have to be based, at a minimum, on clear evidence that the NTER is in fact yielding results in terms of its stated objects and that the rights-limiting aspects of the program are in fact necessary contributing factors to those results. To date, the

¹¹ *Report of the NTER Review Board*, p. 9.

evidence in this respect is at best ambiguous.¹² The Government has reported certain improvements in access to food and in safety for indigenous women and children, on the basis of consultations with indigenous individuals subsequent to the adoption of the NTER measures.¹³ However, even assuming such improvements, there is no evidence that the rights-impairing discriminatory aspects of the NTER have been necessary.

28. The Special Rapporteur is of the view that there must be better alternatives to the current NTER scheme that could incorporate a holistic approach to advancing the security and wellbeing of indigenous women and children along with the wellbeing and rights of all indigenous individuals and of the communities that they constitute. Several indigenous women with whom the Special Rapporteur met pleaded for such a holistic approach while explaining that their rights as indigenous women are inextricably bound to their capacity to make choices for themselves and to the self-determination and cultural integrity of their communities. In this regard, the NTER Review Board aptly observed:

Not surprisingly, there was a convergence among official commentaries and submissions to the Board around the fundamental principle of international human rights law that different classes of rights cannot be traded off against each other....

It is important to note that criticisms over the exclusion of the [Racial Discrimination Act] do not simply reflect an ‘academic’ debate. Throughout the Board’s community visits and consultations with various organizations and representatives, it was made abundantly clear that people in Aboriginal communities felt humiliated and shamed by

¹² For example, in its report monitoring NTER activities for the period January 2009 to June 2009, the Government identified data showing significant increases during that period in reported incidents of alcohol-related and domestic violence, and of child abuse, although it could be that these increases are at least in part due to an increase in reporting to the police of such incidences. FaHCSIA, *Closing the Gap in the Northern Territory: January 2009 to June 2009, Whole of the Government Monitoring Report – Part One, Overview of Measures*, pp. 31-33.

¹³ See Australian Government, *Report of the Northern Territory Emergency Response Redesign Consultations* (2009).

the imposition of measures that marked them out as less worthy of legislative protections afforded other Australians ...

The fact that different sets of human rights are not to be traded off against one another is particularly critical in the context of addressing specific concerns in Aboriginal communities. The indivisibility and interdependence of human rights in this context means that addressing issues of violence and abuse ... cannot be done by enacting racially discriminatory measures. Indeed, the critical point to be made here is that addressing the safety and wellbeing of children, women and families requires the strengthening of human rights frameworks. Such strengthening cannot occur in the context where different categories of rights are considered to be inherently inconsistent—which is not the case.¹⁴

29. While overall the NTER is surrounded by controversy, many of the program's components are undoubtedly legitimate and important efforts to address indigenous disadvantage. Most notably, the NTER has brought an influx of funds and new initiatives to improve the conditions of indigenous peoples, including women and children, in key areas such as housing, health, education, employment and police protection. However, the Special Rapporteur is of the conviction that these efforts can move forward without the racially discriminatory aspects of the NTER, and that, indeed, they can best succeed without them and by ensuring, as the NTER Review Board has counselled, that the broader human rights framework is strengthened for Aboriginal peoples in the Northern Territory.

IV. ANTICIPATED REFORM

30. Amidst a number of criticisms of the NTER, the Government committed to a process of review of the program after a year of its operation. The NTER Review Board issued its report to the Government on 12 October 2008, making a number of

¹⁴ *Report of the NTER Review Board*, p. 46.

recommendations in each of the program areas of the NTER, as well as three overarching recommendations: (1) that “[t]he Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory; (2) that “[i]n addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership”; and (3) that “Government actions affecting the Aboriginal communities respect Australia’s human rights obligations and conform with the Racial Discrimination Act 1975.”¹⁵

31. In its response to the report of the NTER Review Board, the Government accepted each of these recommendations, as well as a number of the Review Board’s recommendations that are specific to the various program areas,¹⁶ and outlined its vision for the NTER in its May 2009 *Future Directions for the Northern Territory Emergency Response Discussion Paper* (“*Discussion Paper*”). In its *Discussion Paper* the Government committed to introducing into Parliament in 2009 the necessary legislation for the reinstatement of the Racial Discrimination Act. It also reported its intention to redesign some of the NTER measures through appropriate legislative and administrative reforms, following a consultation process that would be independently monitored and facilitated by interpreters. The Government recognized that many of NTER’s efforts have fallen short of expectations because of a lack of community involvement and participation in the design and implementation of the NTER, and it expressed its intention to remedy this issue by working more closely with and listening to community members and leaders.

¹⁵ Ibid., p. 12.

¹⁶ *Australian Government and Northern Territory Government Response to the Report of the NTER Review Board* (May 2009).

32. From June through August 2009 the Government proceeded with a wide-ranging process of consultation with indigenous communities and individuals in the Northern Territory with a view to enacting reforms to the NTER, and later that year it issued the results of these consultations.¹⁷ The Special Rapporteur received reports alleging that the consultations did not adequately accommodate to indigenous peoples own leadership structures or decision-making procedures, that there often was an absence of interpreters or adequate explanation of NTER measures, and that the consultations were at times geared to specific predetermined outcomes.¹⁸ In this regard, the Special Rapporteur stresses that consultations with indigenous peoples should be carried out in accordance with their own representative institutions and mechanisms of decision-making.

33. On the other hand, the Special Rapporteur is cognisant of the difficulties inherent in a consultation process of this magnitude. He also is aware of the assessment of some government officials and observers that indigenous peoples' own leadership and decision-making structures are in some ways dysfunctional, because of the very disadvantage they face, and that those structures do not allow for the voices of the most disadvantaged, in particular women, children and the elderly, to be heard. Such an assessment, however, should be closely scrutinized. In this regard, the Special Rapporteur notes that indigenous women played prominent and often leading roles in all of the multiple meetings he had at indigenous communities in various locations in the Northern Territory.

34. In any case, the Special Rapporteur acknowledges that the extensive consultations engaged in by the Government represent a significant effort to understand

¹⁷ See Australian Government, *Report of the Northern Territory Emergency Response Redesign Consultations* (2009) ("Government Report on Consultations").

¹⁸ Although generally favourable toward the consultative process, the report of the independent institution commissioned by the Government to monitor the process includes some such criticisms. See Cultural & Indigenous Research Centre Australia (CIRC), *Report of the NTER Redesign Engagement Strategy and Implementation* (2009) ("CIRCA report").

and address the concerns of the indigenous communities that the NTER measures are intended to benefit. At the same time, it is apparent from the Government's own report of the results of these consultations that there is an absence of evidence of broad or even substantial acceptance by indigenous communities of the rights-impairing aspects of the NTER measures. While indicating that many indigenous individuals who were consulted on an individual basis or in open community meetings support the NTER measures, the Government's report reveals a general pattern of criticism, emanating from workshops with indigenous leaders and representative organizations, of the NTER measures in their current form in regard to income management, leasing, and alcohol restrictions.¹⁹

35. In November 2009, the Government introduced into Parliament draft legislation to reinstate application of the Racial Discrimination Act and the anti-discrimination laws of the Northern Territory, and to reform essential aspects of the NTER. In doing so the Government indicated its openness to constructive feedback from all stakeholders on the specifics of the proposed reforms. The Special Rapporteur welcomes this development and encourages the ultimate adoption of reforms to the NTER that fully comport with Australia's international human rights obligations.

V. CONCLUSIONS AND RECOMMENDATIONS

36. The Government should continue its commitment to address problems faced by Aboriginal people in the Northern Territory, in particular concerning the wellbeing of Aboriginal women and children. However, any measures should involve a holistic approach, which recognizes the interdependent character of human rights, and must be

¹⁹ It is noteworthy that the Government report on the consultations states that the information contained therein "should be read as a summary of the information recorded during the consultations. It should not be considered to be representative of all the opinions of those affected by the NTER measures." *Government Report on Consultations*, p. 19.

devised and carried out with due regard of the rights of indigenous peoples to self-determination and to be free from racial discrimination and indignity.

37. Aspects of the NTER as currently configured are racially discriminatory and incompatible with Australia's international human rights obligations. These include aspects related to compulsory income management, compulsory acquisition of Aboriginal land, the assertion of extensive powers by the Commonwealth Government over Aboriginal communities, and alcohol and pornography restrictions in prescribed areas, as well as the other provisions of the NTER listed in paragraph 13, supra.

38. The Government and Parliament should reinstate the Racial Discrimination Act, as the Government has committed to do, and should enact appropriate reforms to the NTER in light of all of Australia's international human rights obligations. Further, such reforms should be developed on the basis of full and adequate consultations with the affected indigenous peoples.

39. Any discriminatory measures or limitations to the human rights and fundamental freedoms of indigenous peoples that remain part of the NTER program must be narrowly tailored, proportional, and strictly necessary to achieve the legitimate objectives being pursued.

40. Additionally, such limitations on rights should exist only on the basis of the free, prior and informed consent of the indigenous peoples concerned. Where this is not possible because of exigent circumstances, due regard should be given to the full range of applicable human rights norms. In any case, any measure that accords differential treatment to indigenous peoples or that limits their human rights and fundamental freedoms should fulfil the requirements of "special measures" under applicable human rights standards, including the Convention to Eliminate Discrimination.

41. Efforts should be made to reach agreements in accordance with the organisational patterns and leadership structures of the diverse indigenous communities of the Northern Territory regarding the terms of the NTER and any similar programs

affecting these communities. This could lead to arrangements that, pursuant to such agreements, vary from one community to another for measures such as income management, alcohol regulation, and delivery of services.

VI. COMMENTS OF THE GOVERNMENT ON THE SPECIAL RAPPORTEUR'S OBSERVATIONS

42. The Special Rapporteur submitted the foregoing observations to the Government by a note of 2 December, 2009, and on 16 February 2010, the Special Rapporteur received from the Government its comments on the observations. These comments are summarized here.

43. In its comments, the Government explains that the NTER should be considered within its larger policy on indigenous affairs, which includes a package of initiatives to “close the gap” between indigenous and non-indigenous living standards in Australia. The Government acknowledges that “the suspension of the [Racial Discrimination Act], combined with a lack of consultation at the outset of the NTER, left Aboriginal people feeling hurt, betrayed and less worthy than other Australians”. The Government states that its actions were not intended to promote a perception that Aboriginal people are to be blamed for the circumstances which they currently face, and that it recognises the need for indigenous and non-indigenous Australians to work together in trust and good faith to advance human rights and close the gap in “real life outcomes”. The Government further affirms that in order for NTER measures to be effective it is essential that they be implemented in consultation with indigenous persons.

44. In this regard, the Government refers to its consultations with indigenous people about the future direction of the NTER, and it provides the Special Rapporteur with a summary of the consultation process and its proposed reforms of the NTER which it describes as resulting from the consultations. Overall, according to the Government, it has accepted and acted on the overarching recommendations of the independent NTER Review Board (see para. 30, *supra*), including introducing legislation to reinstate the

Racial Discrimination Act in relation to the NTER and to make necessary changes to the NTER measures.

The Consultation Process

45. The Government reports that the consultations between June and August 2009 involved all 73 communities in which the NTER is in place, as well as several other Northern Territory indigenous communities and town camps. The consultations are described as having been designed and delivered so as not only to engage with indigenous people through their own community and regional leadership structures, but also to access other groups that the Government considered more likely to provide feedback through smaller and more informal settings. The Government especially notes the role of interpreters in the consultations in order to reach indigenous individuals for whom English is not their first language, and also notes the efforts it made to reach as many people as possible and adapt the consultations to the particular conditions of the communities, including remote communities. The Government describes the four-tiered approach it developed and employed, which involved consultations with individuals and families (tier 1); whole-of-community meetings (tier 2); workshops in NTER communities (tier 3); and workshops with major stakeholder organizations (tier 4).

46. The Government's *Discussion Paper* (referenced in para. 31, supra), it says, was a starting point for consultations, but other views, ideas and proposals were put forward and considered during the engagement process, which the Government states is reflected by the fact that some of the measures subsequently introduced to reform the NTER depart from the proposals contained in the *Discussion Paper*, based on the views expressed during the consultations.

47. The Government refers to the monitoring of the consultations by the independent Cultural and Indigenous Research Centre Australia, which reported on the

openness and integrity of the process while outlining a number of criticisms.²⁰ In response to the criticisms, the Government points out the magnitude and complexity of the exercise, and affirms that it made every effort to give as many people as possible affected by the NTER the opportunity to be heard.

Proposed revisions to the NTER following on the consultation process

48. According to the Government, the views expressed through the consultations were a significant factor in developing the reforms to the NTER that are contained in the legislation it introduced into the Australian Parliament on 25 November 2009. Moreover, the Government indicates that it has complied with the requirement of “free, prior and informed consent” of article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which it interprets in light of article 46 of the Declaration, by consulting extensively and in good faith with indigenous persons in order to develop the proposed NTER reforms.

49. The Government provided the Special Rapporteur with information on the reform legislation, which proposes a number of changes to the NTER.²¹ The Government summarizes the proposed changes as follows:

- All new and redesigned NTER measures to be implemented from July 2010 are designed to conform with the RDA [Racial Discrimination Act]. The legislation provides for the current suspension of the RDA in relation to the NTER to be lifted from 31 December 2010, allowing time for the passage of legislation through both Houses of the Australian Parliament, and the

²⁰ See *CIRCA Report*, supra.

²¹ In particular, the Government provided the Special Rapporteur with its *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, which sets out in some detail the content of the reforms.

necessary time for the redesigned measures to be put in place and for an effective transition from existing to new arrangements;

- Between 1 July 2010 and 31 December 2010, a new, targeted scheme of income management will be rolled out across the Northern Territory – in urban, regional and remote areas – as a first step in a future national roll out of income management to disadvantaged regions. The targeted categories are not based on race. The scheme will be targeted at:
 - disengaged youth who are not working or studying
 - long-term recipients of unemployment benefits and parenting payments
 - people assessed by Centrelink as requiring income management for reasons including vulnerability to financial crisis, domestic violence or economic abuse, and
 - people referred for income management by child protection authorities.
 - : The categories provide an objective basis for targeting the benefits of income management that is independent of race, and as a result, is intended to be non-discriminatory. The RDA will apply in relation to the new scheme of income management from the commencement of implementation in July 2010.
 - : Following collection and evaluation of evidence from the [Northern Territory] in 2011, the scheme will be extended to other disadvantaged regions of Australia beyond the [Northern Territory]. This new scheme is part of the Government's significant welfare reform agenda;

- Alcohol restrictions will be continued, but the restrictions will be varied to meet the individual needs of specific communities based on careful analysis of evidence about each community's circumstances, and implemented in consultation with the community. Existing alcohol restrictions will remain in place in a particular area until an assessment of alcohol-related harm and other matters and appropriate consultations have taken place. The Government will also work with the Northern Territory Government and

Indigenous communities to look at ways to make the alcohol and prohibited materials road signs more acceptable to local people. The provisions giving [Northern Territory] police the power to enter a private residence in a prescribed area as if it were a public place will be repealed and will only be available in a particular area through a Ministerial declaration in response to a request from a community resident and after community consultation;

- In light of the strength of community views expressed during the consultations against the availability of sexually explicit and very violent material, the current pornography restrictions will remain in place. However, communities could ask to have the restrictions lifted in their community. Decisions on these requests would consider evidence about the prevalence of sexually explicit and very violent material in the community, the wellbeing of people in the community and the views of those in the community. The advice of the relevant law enforcement authority will also be sought. The Government will work with the Northern Territory Government and individual communities to look at ways to make the road signs more acceptable to local people;
- The purpose and operation of the five-year leases will be clarified by:
 - making it clearer that the objectives of the five-year leases are to enable special measures to be taken to improve the delivery of services in Indigenous communities in the [Northern Territory] and promote economic and social development in those communities;
 - defining the permitted use of leases as being directly related to achieving those objectives;
 - clarifying that exploration and mining are not permitted uses of the five-year leases;
 - requiring the five-year leases to be administered with regard for Aboriginal culture;

- facilitating the Government's commitment to move to voluntary leases by requiring the Government to negotiate the terms and conditions of voluntary leases in good faith where requested; and
 - developing clear guidelines to better explain the land use approval process to ensure the transparent allocation of lots.
- Separately, the Government is compensating land owners for the acquisition of these leases; and
- The Australian Crime Commission's (ACC) special law enforcement powers will be amended to make it clear that these powers are in relation to serious violence or child abuse committed *against* an Indigenous person, which is a change from the existing provision which applies to serious violence or child abuse by or against, or involving, an Indigenous person.

50. In addition to providing the foregoing summary of the proposed reforms, the Government addressed the Special Rapporteur's concerns about current provisions of the NTER that limit consideration of customary law and cultural practices in criminal proceedings (see para. 13, *supra*). The Government stated that, while the NTER limits the contexts in which customary law and cultural practice may be considered by the legal system, it is not intended to exclude them entirely as factors that may be taken into account in bail and sentencing decisions. According to the Government, legislative amendments prevent customary law and cultural practice being taken into account only as a reason for mitigating or aggravating the seriousness of criminal behaviour.

Evidence of results of the NTER, with specific reference to income management

51. The Government argues that the NTER has in fact yielded intended results, asserting generally that results can be discerned from the feedback provided during consultations and in other research and evidence. Beyond this general assertion, the Government provides a summary of information taken from Government and other sources to show the practical benefits of the income management regime of the NTER.

52. As told by the Government, these sources reveal data showing that people subject to income management are buying more and healthier food, resulting in greater nutritional wellbeing, especially for children. Additionally, surveys referenced by the Government indicate that initial mistrust and confusion about income management has abated over time, and that women and caregivers in particular were found to speak most positively about aspects of income management.

Reference to international instruments

53. In regard to rights identified by the Special Rapporteur in relation to several international instruments (at para. 16, supra), the Government states that it does not accept that the NTER infringed all of the rights mentioned. In particular, the Government rejects that the NTER constituted arbitrary interference with the family under article 17 of the International Covenant on Civil and Political Rights; that it denied the right of indigenous people under article 27 of the Covenant to enjoy their own culture, profess and practice their own religion, or use their own language; or that the NTER infringed the right to equality before the courts under article 14 of the Covenant.

54. Furthermore, the Government affirms that, since declaring its support for the Declaration on the Rights of Indigenous Peoples, it has acted consistently with the Declaration by consulting extensively with indigenous peoples on the future direction of the NTER. Also in regard to the Declaration, the Government states that it is unclear about how many of the articles cited by the Special Rapporteur can be construed to be violated by the NTER, mentioning in particular article 7 of the Declaration which is aimed at protecting the life and security of indigenous people.

55. The Government refers to the Special Rapporteur's recommendation in paragraph 40 about special measures in connection with the Convention to Eliminate Discrimination and states, "differential treatment of particular groups can be undertaken consistent with the principle of 'legitimate differential treatment' under international law and, if so, is not discriminatory under international law". According to the

Government, “Such treatment need not conform to the requirements of a ‘special measure’ in order to be legitimate”.

56. Finally, the Government affirms that it is doing a great deal to address the disadvantages faced by indigenous Australians, through the NTER as well as through its broader policy agenda on indigenous affairs.

VII. FINAL OBSERVATIONS

57. The Special Rapporteur welcomes the comments of the Government on his observations, and is grateful for the spirit of constructive dialogue in which they are offered. The Special Rapporteur considers it useful to make some final observations in light of these comments.

58. As an initial matter, the Special Rapporteur observes that in its response the Government does not specifically express disagreement with the conclusion that the NTER as currently configured is racially discriminatory and incompatible with Australia’s international human rights obligations under the Convention to Eliminate Discrimination and other international instruments. The Government’s recognition of the flawed character of the NTER and the need to bring it in line with Australia’s human rights obligations is an important predicate to its initiatives to reform the NTER.

59. The Government rejects, however, that there has been denial of *all* of the rights identified by the Special Rapporteur and found in the several international human rights instruments he mentions. It is noteworthy that the Government avoids asserting that none of the rights identified has been infringed and only specifically raises questions as to a few of those rights.

60. Without directly engaging the Government in its focus on particular rights and provisions of international instruments mentioned, and on whether or not each and every one has been violated, the Special Rapporteur stresses that the Government’s position does not undermine his overarching conclusion that the NTER is in several

aspects racially discriminatory and hence incompatible with Australia's human rights obligations. The Government's focus on particular rights appears to depend on an assessment that erroneously separates the question of impairment of rights from the racial discrimination involved. It is well established that not every Government measure that impairs or limits a human right referenced in an international instrument is a violation of that instrument incurring for the State international responsibility, if the measure is justifiable and non-discriminatory. However, measures that impair or limit rights and do so in a racially differentiated manner *prima facie* violate the standard of non-discrimination that is implicit in all human rights norms and that is explicit, *inter alia*, in the Convention to Eliminate Discrimination.

61. It is not difficult to see how the full enjoyment of the various human rights mentioned in paragraph 16, *supra*, is undermined by the NTER measures; and, as shown by the Special Rapporteur, *supra*, paragraph 15, such impairment rests on a distinction based on race. This is so even if in a strict sense each of the cited provisions of the other international instruments, standing alone, is not violated. To hold that the non-discrimination norm is only infringed when other human rights norms are violated would be to render the non-discrimination norm a redundancy.

62. It is not surprising, thus, that in the end the Government in its response to the Special Rapporteur does not explicitly contest that aspects of the NTER discriminate on the basis of race. Nor does it specifically refute the Special Rapporteur's conclusion that these aspects fail to qualify as permissible "special measures" under the Convention to Eliminate Discrimination. The Government does argue that "legitimate differential treatment" for particular groups may be permissible under international law in accordance with standards different from those to justify "special measures". It is remarkable, however, that this argument is offered only summarily, without any explanation of what the different standards are or how they might apply to justify the NTER. In any case, the Special Rapporteur is of the considered view that the NTER's racially discriminatory aspects could no more qualify as "legitimate differential treatment" than they could as "special measures".

63. The Special Rapporteur stresses that any government measures that discriminate on the basis of race must, in order to comply with Australia's human rights obligations, survive the highest scrutiny and be found to be proportional and necessary to advance valid objectives. As noted above, after having been in place for well more than two years, the discriminatory measures of the NTER cannot be found necessary to the legitimate objectives they are intended to serve, if the discriminatory treatment is not shown to actually be achieving the intended results.

64. In response to the Special Rapporteur's assertion that the evidence of such success is ambiguous at best, the Government only provides specific information to show some success in the income management regime. No evidence of success by the other NTER measures is offered. Of course the Special Rapporteur welcomes any improvement in the living conditions of indigenous peoples, especially the most vulnerable among them, although he is aware that the Government's interpretation of the data in this regard is disputed. Yet, even accepting the Government's account of such improvements as a result of income management, one can only speculate how the compulsory aspects of the income management regime that discriminate on the basis of race have been necessary elements leading to the improvement. The question is not simply whether the NTER measures are yielding results; but whether the discriminatory, rights-impairing aspects of the measures are themselves proportional and necessary to the results. The Special Rapporteur reaffirms his assessment that the evidence in this regard is ambiguous at best.

65. In any event, the Special Rapporteur commends the Government for taking the initiative to engage in wide-ranging consultation with affected indigenous people and to reform the NTER. Without specifically opining on the content of the reforms the Government has proposed, the Special Rapporteur notes that he is aware that the reforms are being vigorously debated by stakeholders and challenged by some as insufficient. The Special Rapporteur is also aware, as noted in paragraph 32, *supra*, of significant criticisms against the very consultative process that the Government contends meets the standard of free, prior and informed consent. Thus, open to question

is the extent to which the Government's proposed NTER reforms can indeed be said to count on broad support among the affected indigenous people.

66. In conclusion, the Special Rapporteur reaffirms the recommendations provided in paragraphs 36-41, while reiterating the need to fully purge the NTER of its racially discriminatory character and conform it to relevant international standards, through a process genuinely driven by the voices of the affected indigenous people.