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增进和保护所有人权——公民权利、政治权利、  
经济、社会和文化权利，包括发展权

## 土著人民人权和基本自由情况特别报告员 詹姆斯·安纳亚的报告

增编

### 澳大利亚土著人民的情况\*

\* 报告的提要以所有正式语文分发。报告本身载于提要后的附录，仅以原文分发。因文件过长，附录未经编辑。

## 内容提要

本报告是土著人民人权和基本自由情况特别报告员詹姆斯·安纳亚发表的对澳大利亚土著人和托雷斯海峡岛民境况的看法。在撰写报告之前，他与政府、土著人民和其他有关当事方交换了意见，还于 2009 年 8 月 17 日至 28 日访问了澳大利亚。

土著人和托雷斯海峡岛民有着遭受压迫和种族歧视包括种族灭绝的历史，比如强迫土著儿童离开家庭，以及剥夺土著人民土地等，今天与非土著人相比仍处于十分不利的地位。

澳大利亚政府近年为保护土著人和托雷斯海峡岛民的人权采取了一系列行动和方案，值得赞赏。特别报告员尤其注意到政府屡次作出承诺，表示与土著人民和解，包括 2008 年发表了“国家道歉”，还支持《联合国土著人民权利宣言》。他还高兴地注意到政府订立了重要的目标，决心消除土著人和托雷斯海峡岛民在幼儿、教育、卫生、经济参与、卫生之家、安全社区和治理以及领导权等关键领域存在的巨大社会经济差距，并承诺为此拨付资源。

然而，特别报告员还在报告中指出，总体而言政府需要在方案中考虑采取更加综合性的方法，解决全国土著人面临的不利境况，不仅要促进土著人民的社会和经济福祉，而且要推进他们的自治和增强他们的文化联系。政府应寻求将推进土著人自治的目标列入其政策，特别是鼓励土著人民地方自治，确保土著人参与有关方案的设计、实施和监督，促进在文化上适合并纳入或强化土著人自主行动的方案。此外，还要进一步确保土著人对土地、资源和遗产地的权利，使生活在偏僻地区的土著人能够享受与澳大利亚其他人口阶层同样的社会和经济权利，而又不牺牲他们的重要文化和生活方式。

尤其令人关切的是附录 B 所述的《北方领土紧急反应措施》，《措施》在某些方面限制了土著个人和社区控制或参与对其有影响的决定的能力，从而构成了基于种族的歧视，引起了严重的人权关切。

特别报告员提出了一些建议，希望这些建议能够有助于指导澳大利亚政府、土著人和托雷斯海峡岛民以及其他有关当事方制定和实施符合国际土著人民人权标准的法律、政策和方案。

## ANNEX

**Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the situation of indigenous peoples in Australia**

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## I. INTRODUCTION

1. In this report, the Special Rapporteur examines the human rights situation of indigenous peoples in Australia, on the basis of research and information gathered, including during a visit to Australia from 17 to 28 August 2009 carried out with the cooperation of the Government and indigenous peoples of the country. During his visit to Australia, the Special Rapporteur met with a wide range of Government officials at the federal and state levels and with numerous indigenous communities, organizations and their leaders in several locations across Australia. The complete details of the visit are included in appendix A. The Special Rapporteur would like to express his appreciation for the support of the Government and to the indigenous individuals and organizations that provided indispensable assistance in the planning and coordination of the visit.

2. By a note of 18 December 2009, the Special Rapporteur submitted to the Government a preliminary version of the present report and, on 16 February 2010, received comments from the Government. The Special Rapporteur is grateful to the Government for its detailed comments, which have been taken into account in the preparation of the final version of this report.

## II. BACKGROUND AND CONTEXT

### A. The indigenous peoples of Australia

3. The peoples indigenous to Australia, the Aboriginal and Torres Strait Islander peoples, have inhabited the territory of Australia for over 50,000 years. Their population is estimated to have been 750,000 at the start of British colonization in 1788, with about 250 distinct languages and over 600 dialects spoken. The Torres Strait Islander peoples, traditionally occupying the many islands between the Australian continent and what is now Papua New Guinea, have culture, languages and social patterns distinct from the Aboriginal peoples of the continent.

4. Since British occupation, indigenous peoples have suffered oppressive treatment, including acts of genocide, dispossession of lands and social and cultural disintegration, and a history animated by racism that is well-documented in numerous sources. Today, the indigenous population is around 520,350 or 2.5 per cent of the total Australian population.<sup>1</sup> A majority of the indigenous population self-identifies as belonging to a specific clan, tribal or language group and many continue to reside within their traditional homelands.<sup>2</sup>

5. Having suffered a history of oppression and racial discrimination, Aboriginal and Torres Strait Islander peoples now endure severe disadvantage compared with non-indigenous Australians. There is a significant gap between indigenous and non-indigenous peoples across a range of indicators, all of which are well-documented by the Australian Bureau of Statistics, the Productivity Commission's report, *Overcoming Indigenous Disadvantage*, and the social justice reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights Commission (Social Justice Commissioner), and discussed further in part V. Despite this, during his time in Australia, the Special Rapporteur was impressed with demonstrations of strong and vibrant

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<sup>1</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey, 2008*.

<sup>2</sup> Ibid.

indigenous cultures and inspired by the strength, resilience and vision of indigenous communities determined to move towards a better future.

## **B. The legal and policy framework**

6. The British Crown claimed possession of the east coast of Australia in 1770 and established a colony at Sydney Cove in 1788. Eventually, the entire continent came under British control through six independent colonies. The British did not conclude any treaties with the indigenous peoples of Australia and the indigenous peoples were not acknowledged to have any inherent rights or equal rights with British citizens.

7. The Commonwealth of Australia was founded on 1 January 1901 as a constitutional monarchy, imbued with a parliamentary system of government and a federal structure under which powers are distributed between a national Government (the Commonwealth) and the six states (the former colonies). Three territories, including the Northern Territory, have self-government arrangements subject to Commonwealth authority.

8. In the new Australia, the indigenous inhabitants of the country were denied any form of constitutional recognition or protection at the federal level and, indeed, were excluded from national census data by a provision of the Constitution of 1901. Specific laws and policies, not necessarily consistent across state boundaries, were introduced by the state parliaments to manage the indigenous people. These laws segregated indigenous people into “reserve” areas, prohibited cultural practices, regulated marriages and social contact, managed labour and controlled movement away from the reserves.

9. In 1967, a national referendum amended the Constitution to remove text that discriminated against Aboriginal and Torres Strait Islanders. Thus, indigenous people were included in the national census and the Commonwealth Government gained the authority to legislate on matters related to indigenous people. In 1975, the Government enacted the Commonwealth Racial Discrimination Act to make discrimination on the basis of race, colour, descent or national or ethnic origin illegal. This national law supplanted discriminatory laws and policies at the state level.

10. Until relatively recently, the Australian legal framework did not recognize rights of Aboriginal and Torres Strait Islander peoples to land on the basis of traditional occupancy alone. Beginning in 1976, state and national land rights laws were passed but, while significantly benefiting some indigenous populations, these had limited application. In 1992, the High Court of Australia, in the landmark case of *Mabo v Queensland (No. 2)* (“*Mabo*”),<sup>3</sup> determined that Australian common law could recognize indigenous peoples’ customary title to land, thereby causing a re-examination of Australian laws and policies in this regard. The issue of indigenous rights to land and resources is discussed further in part IV.

11. An important recent milestone in the evolution of Australia’s policies towards Aboriginal and Torres Strait Islander peoples was the motion of apology to Australia’s indigenous peoples (the National Apology), introduced by Prime Minister Kevin Rudd and unanimously passed by the House of Representatives on 13 February 2008, in which the Australian Federal Parliament apologised for “the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss” on Aboriginal and Torres Strait Islanders. The Parliament noted that “the time has now come

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<sup>3</sup> Judgement of the High Court of Australia, *Mabo v. Queensland (No. 2)*, 1992, 175 CLR 1.

for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future".

12. Also recently, the Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007. Reversing the earlier position of Australia on the Declaration, on 3 April 2009, the Minister responsible for indigenous affairs issued a public statement pledging Government support for the Declaration and expressing the commitment of the Government to redefining and improving Australia's relationship with indigenous peoples. The Government's support for the Declaration supplements the commitment of Australia to human rights in relation to various international instruments, including most of the core United Nations human rights treaties, which have been ratified by Australia.

13. The Government's abolition of the Aboriginal and Torres Strait Islander Commission in 2005 has been the subject of repeated concern expressed to the Special Rapporteur. Recently, the Government has taken important steps to support a new national representative body, the National Congress of Australia's First Peoples, which is expected to be established and fully operational by January 2011.

14. Indigenous peoples have called for reforms to deliver constitutional recognition of Aboriginal and Torres Strait Islander peoples, provide guarantees of non-discrimination and protect their rights in a charter of rights to be included in the Constitution or other legislation. The Government has, in principle, recognized the need for such reforms, although it has stressed the complexity of enacting them. Hence, advances in this regard have been slow or non-existent. However, the Government has reported that the National Congress of Australia's First Peoples will play a key role in advancing constitutional recognition of Aboriginal and Torres Strait Islander peoples.

15. The Government has in place a number of programmes and policy statements aimed at benefiting indigenous peoples, which it describes as being in accordance with its intention to "reset" the relationship with them. The Government's major programmatic initiative toward indigenous peoples is in its "Closing the Gap" campaign, which is aimed at reducing the significant disadvantages faced by indigenous peoples in socio-economic spheres. It is not possible to detail each of the Government programmes in this report, however, components of the Closing the Gap campaign and other programmes are discussed in parts V and VI.

16. Notwithstanding important advances, there are a number of problematic aspects of Australia's legal and policy regime concerning indigenous peoples, which are discussed below. Especially troublesome is the suite of legislation and programmes known as the Northern Territory Emergency Response, to which the Special Rapporteur devotes special attention in appendix B of this report.

### **III. THE STOLEN GENERATIONS**

17. One of the notorious aspects of the history of discriminatory treatment of Aboriginal and Torres Strait Islander peoples was the forcible removal of the children of these peoples from their families and communities by Government agencies and churches. The 1997 report on the situation, *Bringing Them Home*, by the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children From their Families, found that at least 100,000 indigenous children (between 10 and 30 per cent of the Aboriginal and Torres Strait Islander populations) were removed between 1910 and 1970, and concluded that the forcible removal of children was an act of genocide. The detrimental intergenerational effects of the removal policies have been documented by various sources. For example, one study found that Aboriginal children whose primary caregivers had been forcibly separated

from their natural families are over twice as likely to be at high risk of clinically significant emotional or behavioural difficulties, conduct problems and hyperactivity and were approximately twice as likely to abuse alcohol and drugs as other children.<sup>4</sup>

18. By 2003, the Commonwealth Government had committed AUS \$117 million to initiatives in response to the *Bringing Them Home* report. In recent years, the Government has taken renewed steps to provide redress for the victims of removal, who have become known as the Stolen Generations, beginning with the National Apology. In 2007–2009, the Government committed AUS \$29.5 million to initiatives for Stolen Generations survivors. It has also announced that it will establish a healing foundation and invest an additional AUS \$26.6 million over the next four years, to address trauma and aid healing in Aboriginal and Torres Strait Islander communities, with a strong focus on the needs of the Stolen Generations survivors.

19. The Commonwealth Government has said, however, that it will not provide monetary compensation for the victims where claims could be directed at state governments. Also, significant steps are still needed to implement the 54 recommendations of the *Bringing them Home Report* and to move towards genuine healing and reparation.<sup>5</sup> The Government reports that it continues to work with Stolen Generations representatives in this regard. The Special Rapporteur concurs with the recommendation of the United Nations Human Rights Committee that Australia “should adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies”.<sup>6</sup>

#### IV. LANDS AND NATURAL RESOURCES

20. Another crippling aspect of the history of racial discrimination suffered by indigenous peoples in Australia is their progressive loss of control over and access to traditional lands and natural resources. As stated in the preamble to the 1993 Native Title Act, indigenous peoples “have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands. As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.”

21. Similar to indigenous peoples across the world, Aboriginal and Torres Strait Islander peoples maintain a profound connection to their land that forms an essential part of their cultural and spiritual life and material wellbeing. As noted in the *Overcoming Indigenous Disadvantage* report, “land ownership may lead to greater autonomy and economic independence, increased commercial leverage and political influence. It can also deliver commercial benefits like increased income, employment and profits”.<sup>7</sup> Further, as noted by the Social Justice Commissioner, securing indigenous land rights “is important for the

<sup>4</sup> Western Australian Aboriginal Child Health Survey, *Forced Separation from Natural Family and Social and Emotional Wellbeing of Aboriginal Children and Young People*, vol. 2 (Perth, Centre for Developmental Health, 2005), p. 52.

<sup>5</sup> See Australian Human Rights Commission, *Social Justice Report 2008*, chap. 4.

<sup>6</sup> CCPR/C/AUS/CO/5, para. 15.

<sup>7</sup> Productivity Commission, *Report on Overcoming Indigenous Advantage: Key Indicators 2009*, p. 511.

advancement of reconciliation between Australia's past and present, and between Indigenous and non-Indigenous Australians".<sup>8</sup>

22. Beginning in the 1970s, the Commonwealth and state governments began to legislate to return lands to indigenous communities and allow claims to other lands, to varying degrees. In 1976 the federal Parliament passed the Aboriginal Land Rights Act, under which Aboriginal peoples in the Northern Territory could own land based on traditional connection. Under the law, more than 50 per cent of Northern Territory lands have been returned to the traditional owners. However, during his visit, the Special Rapporteur heard numerous concerns that amendments to the law, enacted in 2006, increased individualization of communally held indigenous lands and impaired traditional decision making over indigenous lands, in addition to several other concerns.

23. Notable land rights legislation was also enacted at the state level, in New South Wales and South Australia. But an effort by the Commonwealth Government to establish national land rights legislation was withdrawn in 1985. As a result, the return of lands through legislative enactments has not been achieved throughout the country.

24. In 1992, the High Court handed down the landmark *Mabo* decision, which rejected the discriminatory doctrine of *terra nullius* (vacant land) and held that the common law of Australia recognizes continuing title held by indigenous peoples to their traditional lands in accordance with their traditional laws and customs. Although the High Court's rejection of the doctrine of *terra nullius* was exemplary, the court also found that, by virtue of the sovereignty of the Crown, native title rights are extinguished by otherwise valid Government acts that are inconsistent with the continued existence of native title rights, such as the grant of freehold or some leasehold estates.

25. The *Mabo* decision prompted Parliament to pass the Native Title Act of 1993, which sets out the processes for determining native title rights and dealings on native title lands. Despite these significant developments, laws and policies of subsequent Governments, as well as court decisions, have appeared to roll back the advancements associated with the *Mabo* decision, especially the controversial Native Title Amendments Act of 1998, which was the subject of criticism by the Committee on the Elimination of Racial Discrimination.<sup>9</sup>

26. The Special Rapporteur received information during his visit that the current Native Title Act framework has serious limitations that impair its ability to protect the native title rights of Aboriginal and Torres Strait Islanders. According to the Government's own evaluation, the native title process is complex and slow and in need of reform. Among the principal concerns is the onerous requirement that indigenous claimants show proof of continuous connection to the lands claimed, in accordance with their traditional laws and customs, since the time of British acquisition of sovereignty. This is viewed as an unjust requirement, particularly considering the history of policies of Governments that undermined indigenous peoples' connections to their lands. In addition, the native title process, including the mechanism for facilitating indigenous representation in the process, is under-supported according to informed observers.

27. With respect to mining and other natural resource exploitation on lands subject to native title claims, in several cases indigenous representative bodies or land councils have negotiated agreements that have provided benefits for indigenous traditional owners. Still, the Special Rapporteur heard concerns that indigenous rights are often inadvertently undermined because the terms of such agreements are kept secret, the traditional owners

<sup>8</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, report No. 2/2008 (Sydney, Australian Human Rights and Equal Opportunities Commission, 2007), p. 3.

<sup>9</sup> See CERD/C/AUS/CO/14.

have limited time to negotiate, legal representation is often inadequate and Government involvement does not always align with indigenous interests. Also, concerns have been raised that agreements have not been developed in ways that maximize benefits for the future generations of the indigenous peoples.

28. The Special Rapporteur acknowledges Government efforts to streamline the existing native title procedure and pursue related reforms, such as minimizing the adversarial approach of the native title system to allow for native title negotiations to be carried out in a more flexible manner, and stresses that continued efforts in this regard should be made. The Special Rapporteur wishes to highlight the recommendation of the Committee on the Elimination of Racial Discrimination that Australia pursue “discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.”<sup>10</sup> The Special Rapporteur also notes the comprehensive recommendations for reform in the annual Native Title reports of the Australian Human Rights Commission, published since 1994.

29. The strengthening of legislative and administrative protections for indigenous peoples’ rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples. Of note is that the Declaration effectively rejects a strict requirement of continuous occupation or cultural connection from the time of European contact in order for indigenous peoples to maintain interests in lands, affirming simply that rights exist by virtue of “traditional ownership or other traditional occupation or use” (art. 26). Also incompatible with the Declaration, as well as with other international instruments, is the extinguishment of indigenous rights in land by unilateral uncompensated acts. Contrary to the doctrine of extinguishment, the Declaration (art. 28) affirms that “indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”.<sup>11</sup> In this regard, the Special Rapporteur notes with concern reports received that compensation to indigenous peoples whose rights have been extinguished is extremely difficult to obtain under the current statutory scheme.<sup>12</sup>

30. On top of ensuring adequate recognition of indigenous peoples’ proprietary or other interests in lands and natural resources, care must be taken to ensure that those interests are not unduly affected by Government regulation. For example, the Special Rapporteur heard concerns that the Wild Rivers Act of 2005 of the state of Queensland limits indigenous communities’ use of and decision-making control over their lands, especially with respect to economic development activities. Likewise, concern was expressed that the New South Wales National Parks and Wildlife Act of 1974 does not recognize the right of Aboriginal people to be consulted on decisions concerning heritage sites. Similarly, the Special Rapporteur received reports that the Western Australia Aboriginal Heritage Act of 1972 grants a State entity the ultimate authority to make decisions concerning Aboriginal heritage sites.

<sup>10</sup> Ibid., para. 16.

<sup>11</sup> See Sawhoyamaya, Inter-American Court of Human Right (Ser. C) No. 146 (2006), at para. 128 (applying these principles within the framework of the Inter-American Convention on Human Rights).

<sup>12</sup> *Native Title Report 2007*, p. 7.

31. Subsequent parts of this report address a number of other concerns related to indigenous peoples' ability to effectively enjoy rights over traditional or acquired lands. These include the issue of access to public services by indigenous peoples in remote areas of traditional lands, discussed in paragraphs 66–70, and the arrangements in place or being developed for the Government to lease indigenous lands to build housing and for other purposes, discussed in paragraphs 41–44.

## V. INDIGENOUS DISADVANTAGE AND GOVERNMENT RESPONSE

### A. The Closing the Gap campaign

32. As noted, secure rights to lands and resources are crucial to the cultural survival of indigenous peoples of Australia and their ability to develop economically and reduce the disadvantages they face as result of a history of racial discrimination against them. Apart from addressing claims over lands and resources, the Government has taken significant steps aimed at addressing these disadvantages and improving the socio-economic conditions of indigenous peoples, through its “Closing the Gap” campaign. Created in 2008 through an agreement of the Council of Australian Governments (COAG), the Closing the Gap campaign provides a broad policy framework based on inter-government collaboration as well as identified targeted outcomes for reducing indigenous disadvantage across seven identified “platforms”: early childhood, schooling, health, economic participation, healthy home, safe communities, and governance and leadership.<sup>13</sup>

### B. Health

33. In its National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes of 2008, COAG affirmed that “indigenous Australians experience the worst health of any one identifiable cultural group in Australia” (p. 4) and identified an alarming 17-year gap in indigenous life expectancy in comparison to non-indigenous sectors of Australian society. The Closing the Gap campaign aims to eliminate the disparity in life expectancy between indigenous and non-indigenous persons within a generation and halve the gap in mortality rates for indigenous children under five within a decade. The Special Rapporteur welcomes the commitment by the Government to establishing clear goals to overcome long-term and extreme indigenous disadvantage in health.

34. However, a lack of adequate cultural adaptation in the delivery of health services continues to represent a barrier to the effective enjoyment of the right to health for indigenous peoples. There is a reported dearth of indigenous physicians, nurses and other health-care workers such as drug and alcohol rehabilitation workers, sex offender counsellors and psychologists, as well as a continuing need to strengthen indigenous control over the design and delivery of health services. While there are several successful health-care programmes by and for Aboriginal and Torres Strait Islanders, in particular those provided by the National Aboriginal Community Controlled Health Organisation (“NACCHO”), further efforts are needed to provide culturally appropriate health services (see paras. 62–65). Increasing support for such successful existing Aboriginal and Torres

<sup>13</sup> Australia, *Closing the Gap on Indigenous Disadvantage: The challenge for Australia* (Minister of Families, Housing, Community Services, and Indigenous Affairs, 2009).

Strait Islander-controlled programmes, and ensuring that new programmes do not duplicate or undermine these existing ones, are important steps towards this end.

### C. Education

35. As part of its commitment to closing the gap on indigenous disadvantage, COAG has established the following benchmarks in the area of education: within five years, provide all indigenous four-year-olds in remote indigenous communities with access to a good-quality early-childhood education; within a decade, halve the gap in reading, writing, and numeracy achievements among indigenous children; and by 2020 at least halve the gap for indigenous retention through grade 12.

36. In addition, the Special Rapporteur recognizes Government efforts to include a cross-cultural perspective in the national curriculum. Nevertheless, sources consulted by the Special Rapporteur identified problems with the curriculum currently used and the day-to-day operations of schools across Australia that are attended by indigenous children, as well as a lack of adequately trained teachers for bilingual and culturally appropriate education and a lack of resources to sustain such programmes. There are very few examples of Aboriginal children being taught in their own languages. Of particular concern is the information the Special Rapporteur received from numerous sources that, as of January 2009, the Northern Territory government requires that school activities be conducted in English for the first four hours of each school day. The Special Rapporteur is aware of the value of and need to improve literacy in the national language, but emphasizes that the Northern Territory government must make greater effort to respect cultural diversity and find a better approach to addressing the challenges of bilingual education.

37. The remote character of many indigenous communities is another major challenge for the provision of education, which is well-documented and analysed in the 2008 Social Justice Report.<sup>14</sup> Providing schooling to children in remote areas by placing them in boarding schools away from their communities raises further complex considerations. The inadequacy of current educational opportunities has resulted in indigenous children in remote areas exhibiting low rates of attendance, achievement, and retention.<sup>15</sup> Recognizing the complexities in delivering services, including education services, to remote areas, the Special Rapporteur urges the Government to give adequate focus and priority to this issue, as discussed in more detail in part VI (B).

### D. Employment and income

38. COAG has identified the target of halving the gap in employment outcomes between indigenous and non-indigenous Australians within a decade. In furtherance of this goal, the National Partnership on Indigenous Economic Participation seeks to improve opportunities for indigenous people to engage in private and public sector jobs through a number of programmes.

39. The Special Rapporteur commends this initiative. However, he is concerned that recent welfare reform efforts have had the effect of abruptly cutting off income and jobs upon which indigenous individuals have relied, leaving them with no adequate alternatives for income generation. For example, as a result of welfare reform initiatives, the Yarrabah

<sup>14</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner (Sydney, Human Rights and Equal Opportunity Commission, 2009), report No. 1/2009, chap. 3.

<sup>15</sup> *Overcoming Indigenous Disadvantage*, chap. 6.

community in Queensland reported losing AUS \$7 million in assistance previously received under the Community Development Employment Projects programme, although according to the Government, this funding merely shifted to other employment service and job assistance programmes, such as Job Services Australia and the Indigenous Employment Programme, and has not been eliminated altogether.

40. The Special Rapporteur would also like to emphasize that increasing indigenous peoples' control over their lands and resources, self-determination and self-government is an essential component of advancing economic development and employment opportunities.

## **E. Housing**

41. In 2006, the former Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context visited Australia and noted that indigenous peoples face a "severe housing crisis, evidenced by the lack of affordable and culturally appropriate housing, the lack of appropriate support services, the significant levels of poverty and the underlying discrimination".<sup>16</sup> Such problems persist and contribute to overcrowded living conditions and homelessness in indigenous communities at rates exceeding those of the mainstream population.

42. Primarily through its National Partnership on Remote Indigenous Housing, the Closing the Gap campaign promises to address the key issues of overcrowding, homelessness, poor housing conditions and severe housing shortages. However, the new policy envisages the indigenous communities handing over control of their community lands to the Government for housing to be provided and managed. Long-term leases, arranged with indigenous landowners or traditional owners, are becoming a precondition for delivering housing and upgrade services. These leases grant the Government access to and control over the indigenous land for a term of at least 40 years. Tenancy management is to be undertaken by state and territory housing authorities, thus removing tenancy management from indigenous control. The Government argues that this leasing arrangement ensures clear ownership of fixed assets and therefore responsibility to maintain those assets for the benefit of residents. It further asserts that lease agreements are voluntary, although it will not provide housing without an agreement.

43. Almost everywhere, the Special Rapporteur heard concerns about the Government's approach. Numerous indigenous people, especially community leaders, expressed that they felt pressured or even "bribed" into handing over ownership and control of their lands to the Government in exchange for much-needed housing services. The Special Rapporteur heard these concerns even in communities that have negotiated leases with the Government, such as in the Groote Eylandt communities of Angurugu, Umbakumba and Milyakburra. In addition, the Special Rapporteur heard concerns that housing construction and upgrade services have, by and large, been delivered in a manner that bypasses locally run Aboriginal construction companies, missing the opportunity to provide jobs and training to indigenous peoples for the delivery of these services, although it is worth noting that under the National Partnership Agreement on Remote Indigenous Housing, 20 per cent of "local employment" is required for all new housing construction.

44. The Special Rapporteur is concerned that this leasing scheme, in conjunction with other initiatives such as the 2006 amendments to the Aboriginal Land Rights Act (Northern Territory) 1976 (referenced in para. 22), promotes individual land tenure to the detriment of traditional indigenous communal land tenure and diminishes indigenous control over lands

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<sup>16</sup> A/HRC/4/18/Add.2, para 80.

that traditionally have been held collectively. In this regard, the individualization of lands could implicate threats to indigenous peoples' cultural integrity and way of life, in addition to affronting their property rights.

## F. Women, children and families

45. Aboriginal and Torres Strait Islander women and children continue to suffer distressingly high rates of violence and poor living conditions. The Australian Bureau of Statistics found that 18.3 per cent of indigenous women experienced physical or threatened abuse in a 12-month period, compared with 7 per cent of non-indigenous women. Further, according to the *Overcoming Indigenous Disadvantage* report, 41 out of every 1,000 indigenous children were under care and protection orders, compared to 5.3 per 1,000 non-indigenous children.<sup>17</sup> Concern was expressed that some children under these care and protection orders are placed in environments outside of their communities and cultures.

46. Additionally, the findings of the 2007 report *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*, issued by the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse and commissioned by the government of the Northern Territory, and other studies, such as the National Aboriginal and Torres Strait Islander Social Survey, indicate high incidence of child sexual abuse in Aboriginal communities. These reports provide the backdrop for many of the policy initiatives of the Government of Australia related to indigenous peoples, most notably the aggressive measures under the Northern Territory National Emergency Response (NTER) programme.

47. While specifically oriented towards the eradication of child sexual abuse in the Northern Territory, the NTER in fact addresses a range of economic and social issues that confront the Northern Territory. The Special Rapporteur acknowledges the importance of many parts of the NTER programme; however, he also notes with concern that many of its aspects are characterized by extreme measures that single out indigenous peoples and communities for separate treatment, a strategy that involved the Government's decision in 2007 to suspend the protections of the Racial Discrimination Act in relation to NTER provisions. The NTER measures that are of particular concern to the Special Rapporteur are addressed further in appendix B to this report.

48. A number of mainstream programmes are in place to address the key issues of protection and safety both in the Northern Territory and elsewhere. Notably, the Family Violence Prevention Legal Services programme provides community-controlled justice, advisory and referral centres for victims of family violence. In addition, the National Council to Reduce Violence Against Women and their Children, established in 2008, operates at a national level to design and implement the National Plan to Reduce Violence Against Women and their Children. The Commonwealth Government also administers the Indigenous Parenting Support Service programme and the Indigenous Women's programme.

49. The Special Rapporteur commends the Government for attaching urgency and priority to the issue of protecting vulnerable groups and abating violence against women and children. However, despite the NTER initiative and other government responses, violence and other problems persist. In this connection, the Special Rapporteur heard reports of a lack of access by Aboriginal and Torres Strait Islander women, especially women in remote communities, to legal assistance. In addition, the Special Rapporteur heard expressions of concern that government authorities fail to engage in a real dialogue

<sup>17</sup> *Overcoming Indigenous Disadvantage*, p. 260.

with Aboriginal and Torres Strait Islander women to formulate practical and culturally appropriate strategies to protect women and children at risk. The Special Rapporteur also received information alleging that mainstream domestic violence and child protection models are inconsistent with Aboriginal and Torres Strait Islander cultures.

## **G. Administration of justice**

50. There are alarmingly high levels of incarceration of Aboriginal and Torres Strait Islander persons, including women and minors. According to figures reported by the Government, indigenous prisoners represent 24 per cent of the total prisoner population and the average rate of indigenous imprisonment is 13 times higher than the non-indigenous rate.<sup>18</sup> Disturbingly, indigenous youth comprise 54 per cent of persons in juvenile detention and are 21 times more likely than non-indigenous juveniles to be detained.<sup>19</sup> Other major concerns that were brought to the Special Rapporteur's attention are limited access to justice in remote areas and inadequate provision of culturally appropriate justice services, including translation services for criminal defendants.

51. A high rate of deaths in custody was another concern expressed to the Special Rapporteur, an issue that is explored in the report of the Royal Commission into Aboriginal Deaths in Custody, completed in 1991, and exemplified by the disturbing case in Western Australia of the death of Ian Ward while being transported in police custody. The Government affirms that it has taken steps to address the concerns raised in that report, although the Special Rapporteur notes information that many of the recommendations of the Royal Commission have still not been fully and adequately addressed.

52. Though criminal justice matters are primarily the responsibility of Australia's state and territory governments, there have been some noteworthy efforts funded by the Commonwealth to provide legal services to indigenous peoples, including the Aboriginal and Torres Strait Islander Legal Services and the delivery of indigenous-specific legal services in 116 permanent locations. Further, the Government is developing some new initiatives within the framework of the Closing the Gap campaign to reduce the overrepresentation of Aboriginals and Torres Strait Islanders in the criminal justice system. Clearly, though, given the extremity of this situation, much work remains to be done.

## **VI. CROSS-CUTTING CONCERNS REGARDING GOVERNMENT PROGRAMMES**

### **A. Self-determination**

53. The Special Rapporteur acknowledges the significant commitment of the Government to advancing the rights of Aboriginal and Torres Strait Islander peoples and to shrink the comparative disadvantage that indigenous people suffer vis-à-vis non-indigenous people across the range of socio-economic indicators. However, there is a need to incorporate into government programmes a more integrated approach to addressing indigenous disadvantage across the country, one that secures for indigenous peoples not just social and economic well-being, but in doing so also advances their self-determination

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<sup>18</sup> CCPR/C/AUS/Q/5/Add.1, para. 27.

<sup>19</sup> Ibid.

and their rights to maintain their distinct cultural identities, languages and connections with their traditional lands.

54. The right to self-determination, which is affirmed for indigenous peoples in article 3 of the Declaration on the Rights of Indigenous Peoples, is a foundational right, without which indigenous peoples' other human rights, both collective and individual, cannot be fully enjoyed. Enhancing indigenous self-determination is also conducive to successful practical outcomes. As noted in the *Overcoming Indigenous Disadvantage Report*, "when [indigenous people] make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-indigenous] decision-makers".<sup>20</sup>

55. Although the Government recognizes the importance of collaboration with indigenous peoples, there is a continuing need to empower indigenous peoples to take control of their own affairs in all aspects of their lives. The Government should seek to decidedly include in its initiatives the goal of advancing indigenous self-determination, in particular by encouraging indigenous self-governance at the local level, ensuring indigenous participation in the design, delivery and monitoring of programmes, and developing culturally-appropriate programmes that incorporate and build on indigenous peoples' own initiatives.

## 1. Local self-governance

56. Of concern to the Special Rapporteur is the apparent increased centralization of governance institutions in several states and the Northern Territory, at the expense of local, indigenous-run governance institutions. Most notably, starting in July 2008, the Northern Territory government consolidated 73 community-based governance councils into 9 larger shire governments. Given that the transition to the shire system in the Northern Territory is fairly recent, its impacts are not yet completely known. However, the Special Rapporteur received information related to several concerns, including: a potential loss of representation and control at the local level; the employment of shire staff without knowledge of local issues; the channelling of formerly community-based programmes and services through shires; the location of shire offices in urban centres; and the implementation of an electoral system that may result in communities with low populations being either under- or unrepresented in the shire political structures.

57. The Special Rapporteur was particularly disturbed by situations in which the Government has revoked self-governance powers of Aboriginal people when communities have displayed shortcomings in managing their own affairs. The clearest example of this practice is the NTER, discussed in appendix B to this report. In addition, the Special Rapporteur visited the Swan Valley Nyungah community in Perth, Western Australia, where, because of supposed rampant alcoholism and abusive behaviour, including among the community's principal leadership, the state of Western Australia legislatively revoked the management authority of the community, and placed it with the Aboriginal Affairs Planning Authority, a state entity, and evicted the community from its location.<sup>21</sup> According to reports received by the Special Rapporteur, some of the community's women and children, astoundingly, are now homeless and living on the streets while their community remains under lock and key, although the Government insists that all women and children were moved into state government housing. While emphasizing the need to take measures to address the extreme social problems faced by the Swan Valley community, the Special Rapporteur considers that the expulsion of all community members from their

<sup>20</sup> *Overcoming Indigenous Disadvantage*, p. 653, citing Harvard Project on American Indian Economic Development 2003-04 (referring to the case of indigenous peoples in the United States of America).

<sup>21</sup> See Reserves (Reserve 43131) Act 2003.

homes and community and revoking the community's decision making authority, is a troubling and ineffective approach to resolving the concerns, and is at odds with international standards.

58. Another example of this trend of undermining indigenous decision-making and governance structures is found in the Government leasing scheme, as well as the 2006 amendments to the Aboriginal Land Rights Act, discussed in paragraphs 22 and 44, which also remove management and oversight authority from indigenous leadership structures. The Government has stated that, in the past, traditional owners of indigenous land were rarely consulted in investment and administrative decisions, and that the Government leasing system is intended to address this failure by defining responsibilities and standards for housing maintenance, in consultation with traditional land owners and others. The Special Rapporteur acknowledges that this is a worthy objective, but believes that this objective is achievable without restricting the rights of the indigenous communities to decision making about land tenure through a scheme by which they are pressed to lease their land to the Government for a minimum 40-year period.

59. The Special Rapporteur notes that replacing or undermining indigenous decision-making structures feeds into a mistaken conception of indigenous peoples as responsible for their present disadvantaged state and unable to change. At the same time, the Special Rapporteur echoes the statements he heard from indigenous leaders about the need for indigenous peoples themselves to continue to strengthen their own organizational and local governance capacity, in order to meet the challenges faced by their communities and, in this connection, notes the importance of restoring or building strong and healthy relationships within families and communities.

## **2. Participation in the design, delivery and oversight of programmes**

60. Also required is that Aboriginal and Torres Strait Islander peoples participate effectively in the design, delivery, and oversight of development programmes, on an ongoing basis. As affirmed by the Declaration, "indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions" (art. 23).

61. Clearly, an important overarching aspect of the Closing the Gap campaign is the Government's expressed commitment to redefine its relationship with indigenous peoples through close collaboration and partnership within a context of mutual respect and understanding. However, despite this, it is hard to ignore the fact that indigenous peoples have not been included as a party to any of the national inter-governmental partnership agreements developed under the Closing the Gap initiative and no national consultations took place in relation to the development of these agreements. However, the Government notes that certain partnership provisions, specifically under the Remote Service Delivery National Partnership Agreement, discussed in paragraph 67, are designed to boost indigenous engagement and participation in programme activities.

## **3. The need to support and build on indigenous-controlled initiatives**

62. Developing programmes that are effective and culturally-appropriate requires innovation and flexibility, and is not free from challenges of all kinds. As a preliminary matter, it requires consultation with the affected indigenous groups about community needs and programme design, as well as openness to varied models. In particular, it is essential to provide continued support to programmes, especially those designed by indigenous people themselves, that have already demonstrated achievements. The Special Rapporteur observed numerous successful indigenous-controlled programmes already in place to

address issues of alcoholism, domestic violence, health, education and other areas of concern, in ways that are culturally appropriate and adapted to local needs.

63. For example, in the health sector, the National Aboriginal Community Controlled Health Organization (NACCHO) represents over 140 Aboriginal health services across the country. A central objective of the organization is to deliver holistic and culturally appropriate health and health-related services to the Aboriginal community. NACCHO and its partners have achieved many noteworthy successes. The vast majority of NACCHO funding is through the Commonwealth Department of Health and Ageing, although its operations require supplemental funds which come from non-governmental sources.

64. In another example, the Mount Theo programme was created in 1993 to address chronic petroleum-sniffing in Yuendumu, Northern Territory. It is comprised of culturally based youth programmes, including its core programme where at-risk youth are sent to the Mt. Theo Outstation, located 160 km from Yuendumu, where they are cared for by community elders and provided cultural healing and empowerment, for at least one month. The programme has achieved significant success, and Yuendumu is now, according to community leaders, a community that is free of petroleum-sniffing. The *Little Children are Sacred* report (p. 146) commended the Mt. Theo programme and identified it as a potential model to address other problems facing indigenous communities, including the problem of child sexual abuse.

65. The *Overcoming Indigenous Disadvantage* report, the annual Social Justice reports and other sources document numerous other examples of indigenous good practices in a variety of areas. Supporting and promoting precisely these types of programmes furthers the rights of indigenous peoples with regards to self-determination, consultation and participation, and cultural integrity, while at the same time serving as a practical strategy for addressing indigenous disadvantage. The Special Rapporteur encourages the Government to pursue such an approach across its various programme areas.

## B. Remote service delivery and homelands

66. Twenty-four percent of indigenous Australians live in remote and very remote Australia compared to two percent of non-indigenous Australians.<sup>22</sup> While there are complexities involved in delivering services such as health, schooling, employment, and housing to remote areas, special efforts are required to ensure that indigenous peoples living in these areas, including homelands (also called outstations), can enjoy the same social and economic rights as other segments of the Australian population, without having to sacrifice important aspects of their cultures and ways of life.

67. COAG has entered into the Remote Service Delivery National Partnership Agreement to ensure that indigenous people living in selected remote communities receive services. The national partnership has identified 26 priority locations in remote areas with concentrated indigenous populations across several states, to be expanded to additional locations in the future, which were identified according to a set of “practical criteria” including significant concentration of population; anticipated demographic trends and pressures; and the potential for economic development and employment. In addition, the Northern Territory’s *A Working Future – A New Deal for the Remote Territory*, released on 20 May 2009, outlines its proposal to develop twenty “Territory Growth Towns” as services centres for surrounding homelands.

<sup>22</sup> *National Aboriginal and Torres Strait Islander Survey, 2008*; Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*.

68. This “hub approach” to service delivery has caused concern among many indigenous people, who fear that communities that do not fall within one of these key priority or growth areas, in particular sparsely-populated homeland communities, will be forced to move to larger communities to receive basic services. In fact, the Northern Territory government states that it “will not financially support the establishment of new outstations and homelands” and that “government services to outstations/homelands will in most cases involve a form of remote delivery, based from the closest or most accessible hub town”.<sup>23</sup> This policy further provides that residents of homelands are expected to contribute financially to the installation of basic services, such as water, electricity and sanitation.

69. For its part, the Commonwealth Government has communicated to the Special Rapporteur that it does not intend to abandon homelands or to relocate residents, that it is committed to maintaining current levels of funding for the maintenance of occupied outstations and for key government services and that it has committed AUS \$60 million over three years to fund essential services to homelands. Nevertheless, members of homeland communities visited by the Special Rapporteur and other sources indicated weakening support from the Commonwealth Government for the homelands in practice.

70. The Special Rapporteur observed the profound connection that many Aboriginal people in Australia have to their homelands, many of which began to be re-populated in the 1970s when elders took their people back to ancestral lands from larger communities run by missions, and the importance of these lands to the lives and culture of Australia’s Aboriginal people. Further, homelands are widely understood to have lower levels of social problems, such as domestic violence and substance abuse, than more populated communities. According to reports, the health of indigenous people living on homelands is significantly better than of those living in larger communities, with the death rate among indigenous peoples living in homelands being 40 to 50 per cent lower than the Northern Territory average for indigenous adults.<sup>24</sup> Homelands are also used effectively as part of substance abuse and other programmes for at risk Aboriginal youth living in more populated or urban centres, such as the Mt. Theo Programme discussed above.

## VII. CONCLUSIONS AND RECOMMENDATIONS

### *Overarching conclusions*

**71. The Government of Australia is to be commended for the advancements made in addressing the human rights of Aboriginal and Torres Strait Islander peoples over recent years and for enacting reforms to redress historical negative policies and actions. The Special Rapporteur particularly notes the many instances of commitment made by the Government to reconcile with indigenous peoples, including the National Apology of 2008, and its support for the Declaration on the Rights of Indigenous Peoples. He is also pleased to note the important goal set to eliminate significant social and economic disadvantages faced by the Aboriginal and Torres Strait Islander peoples by the year 2020 and the resources committed thereto by the Government. The Special Rapporteur welcomes the numerous policies, programmes and studies in**

<sup>23</sup> Northern Territory Government, *Headline Policy on Homelands/Outstations* (May 2009).

<sup>24</sup> K.G. Rowley et al., “Lower than expected morbidity and mortality for an Australian Aboriginal population: 10 year follow up in a decentralized community”, *Medical Journal of Australia*, vol. 188, No. 5 (2008), pp. 283–287.

place to address indigenous issues, many of which he was unable to detail in the present report, as well as the significant funding the Government has dedicated for the purpose.

72. Despite the Government's attention to indigenous issues, there is a continued need to develop new initiatives and reform existing ones, in consultation and in real partnership with indigenous peoples, to conform to international standards requiring genuine respect for cultural integrity and self-determination. Ownership and control of their lands and territories continues to be denied to many indigenous communities in Australia. Indigenous institutions and community governance structures also are subject to high levels of control by the State, and are often devoid of genuine opportunity to generate social, cultural, and economic development. Accusations of past shortcomings of indigenous self-governance unfairly assign blame to indigenous peoples and at the same time ignore government failures in this regard.

73. The Special Rapporteur is concerned about ongoing effects of historical patterns of racism within Australian society and that their negative consequences continue to severely undermine the dignity of Aboriginal and Torres Strait Islander peoples and individuals. Additional efforts, beyond the recent laudable efforts of the Government to advance reconciliation and reset the relationship with indigenous peoples, is needed to address negative perceptions within society and to generate greater confidence and self-respect amongst the indigenous population, to create a healthy environment conducive to the enjoyment of rights and freedoms.

### *Legal and policy framework*

74. The Commonwealth and state governments should review of all legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration on the Rights of Indigenous Peoples.

75. The Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner providing long-term security for these rights.

76. In consultation with the Aboriginal and Torres Strait Islander peoples, the Government should look to ratify International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).

77. The Commonwealth Government should ensure that state, territory and local governments are aware of their obligations to promote and protect the human rights of indigenous peoples. The Government should promote a consistent approach to these rights across all levels of government authority.

78. The Special Rapporteur considers the position of Aboriginal and Torres Strait Islander Social Justice Commissioner within the Australian Human Rights Commission to be an exceptional model for advancing the recognition and protection of rights of indigenous peoples. The Commissioner's reports should be given greater attention in government administration to promote a higher level of accountability and sensitivity to human rights commitments.

79. All efforts should be made to increase the number of indigenous peoples' representatives in legislative, executive, and judicial institutions at all levels. The Special Rapporteur welcomes the Government's support in establishing a national indigenous representative body and emphasizes the importance of indigenous participation in the ongoing design, development and functioning of this mechanism.

80. The Council of Australian Governments should look to integrate the proposed national representative indigenous body into its structure for decision-making and design of strategic initiatives, for the purpose of coordinating policies and strategies relating to Aboriginal and Torres Strait Islander peoples.

81. The Commonwealth and state governments should, in cooperation with the indigenous peoples concerned, enhance efforts to strengthen Aboriginal and Torres Strait Islander peoples' own governance structures, and increase the capacity of indigenous leadership at all levels.

82. Any government decision that has the effect of limiting or removing indigenous decision-making authority should be reconsidered and evaluated in light of Australia's human rights obligations.

83. The Government should collaborate with the Australian Human Rights Commission to ensure that adequate remedies, including compensation, are provided as a matter of urgency to the Stolen Generation victims.

### *Lands, territories and resources*

84. The Special Rapporteur recognizes the efforts of the Commonwealth and state governments in recent decades to advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources. Continued efforts should be made to uphold the rights of indigenous peoples over their lands and resources and guarantee for these peoples a sustainable basis for economic, social and cultural development.

85. The Commonwealth and state governments should ensure that all laws and administrative practices related to lands and natural resources align with international standards concerning indigenous rights to lands, territories and resources. To this end, the Government should establish a mechanism to undertake a comprehensive review at the national level of all such laws and related institutions and procedures, giving due attention to the relevant reports of the Australian Human Rights Commission and the Committee on the Elimination of All Forms of Racial Discrimination.

86. Legislative and administrative mechanisms that allow for the extraction of natural resources from indigenous territories should conform to relevant international standards, including those requiring adequate consultations with the affected indigenous communities, mitigation measures, compensation and benefit-sharing.

87. The Government should increase the availability and effectiveness of technical and financial resources to support indigenous representation and participation in the procedures to identify and protect indigenous peoples' native title.

88. The Commonwealth and state governments should revise existing legislation that vests ultimate decision-making authority over Aboriginal and Torres Strait Islander heritage sites or objects in government entities, to ensure indigenous participation in decision-making and full respect for indigenous rights in relation to cultural heritage. In this connection, the Special Rapporteur welcomes information from the Government that it has proposed national reforms to improve indigenous participation in decision-making over traditional sites and objects.

89. The Queensland state government should review and revise as necessary the Wild Rivers Act of 2005 to ensure its conformity with international standards

concerning the rights of the traditional owners to control and manage their lands, territories and resources. The review of the legislation should engage the traditional owners to achieve an agreed arrangement.

90. The Commonwealth Government and state governments should embrace a long-term vision for social and economic development of homeland communities, especially bearing in mind the practical social and cultural benefits that the homelands provide to Aboriginal and Torres Strait Islander peoples, as well as to the society at large.

### *Overcoming indigenous disadvantage*

91. The Government should be commended for efforts to address the socioeconomic disadvantage of Aboriginal and Torres Strait Islander peoples. As part of this process, the Government should seek to include in its initiatives the goal of advancing indigenous self-determination, in particular by encouraging indigenous self-governance at the local level, ensuring indigenous participation in the design, delivery and monitoring of programmes and developing culturally appropriate programmes that incorporate or build on indigenous peoples' own initiatives.

92. The Aboriginal and Torres Strait Islander peoples should be fully consulted about all initiatives being developed to overcome indigenous disadvantage, including the national partnership agreements, at the earliest stages of the design of those initiatives. In particular, adequate options and alternatives for socio-economic development and violence prevention programmes should be developed in partnership with affected indigenous communities.

93. Relevant government agencies should facilitate greater decision-making power by indigenous peoples over the design and delivery of government services in their communities. The Government should support, both logistically and financially, indigenous programmes already in place that have demonstrated success and should also support the development of new indigenous service-delivery programmes. In this regard, the Government should look to establish a national focal point for skills training for the purpose of increasing the capacity of indigenous individuals and communities to be self-sufficient and to manage their own affairs, including their social and economic development.

### *Health*

94. While the Government has taken important steps to improve indigenous health, it should strengthen efforts to ensure that indigenous Australians have equal access to primary health care and that the basic health needs of indigenous communities are met, especially in remote areas. Every effort should be made to enhance indigenous peoples' participation in the formation of health policy and delivery of services. The Government should ensure and strengthen support for health-care initiatives by indigenous communities and organizations as a matter of priority. All medical professionals should be provided with comprehensive, culturally appropriate medical training and health services in the language of the community should always be available.

### *Education*

95. The Special Rapporteur recognizes the efforts of the Government to close the gap of indigenous disadvantage in the area of education. However, indigenous systems of teaching, cross-cultural curricula and bilingual programming should be further incorporated into the education of indigenous children and youth. In addition, indigenous communities and their authorities should have greater participation in educational programming.

96. Equal educational opportunities should be provided in remote areas, including Aboriginal homelands, in accordance with the recommendations contained in the 2008 Social Justice Report.

97. The Northern Territory government should reform its policy that school activities be conducted in English only for the first four hours of each school day and provide bilingual and culturally appropriate education to Aboriginal children.

### *Employment and Income*

98. In recent years, the Government has taken noteworthy steps to promote economic development and employment opportunities for indigenous peoples. As part of this process, the Government should work with Aboriginal and Torres Strait Islanders and their organizations to determine goals and priorities for economic development and should build the capacity of indigenous peoples to take control over their own economic development.

99. The Government should ensure that adequate and, at a minimum, equivalent funding and employment opportunities are in place before reforming or abolishing existing welfare and social security programmes for Aboriginal and Torres Strait Islander communities. Any reforms to welfare and social security programmes should be carried out in consultation with indigenous peoples and their organizations.

### *Housing*

100. The Special Rapporteur welcomes the Government's long-term funding commitments on housing and essential infrastructure. However, Government initiatives to address the housing needs of indigenous peoples should avoid imposing or promoting housing arrangements that would undermine indigenous peoples' control over their lands. Housing programmes for the benefit of indigenous communities, especially within indigenous territories, should be administered by indigenous community-controlled institutions.

### *Women, children, and families*

101. The Special Rapporteur commends the Government for attaching urgency and priority to the issue of protecting vulnerable groups and abating violence against women and children. However, efforts should be made to intensify consultations with indigenous women at the community level to amplify and adapt services and solutions to violence and other problems in their own communities. Special emphasis should be placed on providing access to culturally appropriate, community-based legal and support services to victims of domestic violence in remote areas.

*Administration of justice*

102. The Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and women, in custody.

103. The Government should take further action, in addition to action already taken, to ensure the recommendations of the Royal Commission into Aboriginal Deaths in Custody are being fully implemented.

104. Additional funds should be immediately provided to community-controlled legal services to achieve, at a minimum, parity with mainstream legal aid services. In particular, culturally appropriate legal services should be available to all Aboriginal and Torres Strait Islander peoples, including those living in remote areas, and interpreters should be guaranteed in criminal proceedings and, where necessary for a fair hearing, in civil matters.

105. Greater effort should be made to reform the civil and criminal justice system to incorporate Aboriginal and Torres Strait Islander customary law and other juridical systems, including community dispute resolution mechanisms.

*Northern Territory Emergency Response*

106. The legislative and administrative measures that relate to the Northern Territory Emergency Response should be revised so that those measures are in conformity with Australia's international human rights obligations, and the Special Rapporteur acknowledges the initiatives of the Government in this regard. Specific observations and recommendations of the Special Rapporteur concerning the initiative are contained in appendix B to this report.

*To Aboriginal and Torres Strait Islander peoples and their organizations*

107. Indigenous peoples should endeavour to strengthen their capacities to control and manage their own affairs and to participate effectively in all decisions affecting them, in a spirit of cooperation and partnership with government authorities at all levels, and should make every effort to address any issues of social dysfunction within their communities, including with respect to women and children.

## Appendix A

### **DETAILS OF THE VISIT TO AUSTRALIA OF THE SPECIAL RAPPORTEUR FROM 17 TO 28 AUGUST 2009**

1. In Canberra, the Special Rapporteur held meetings with various members of the Government, including the Minister for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); the Attorney General; the Minister for Indigenous Health, Regional and Rural Health, and Regional Service Delivery; and representatives of the Department of Education, Employment and Workplace Relations, the Department of Health and Ageing, and the Department of Foreign Affairs and Trade. The Special Rapporteur also met with various members of Parliament from diverse political parties. Additionally, he met with the Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights Commission. In other parts of Australia, he met with representatives of state governments, including in Western Australia, New South Wales, and Queensland, and he also met with representatives of the Northern Territory government.
2. The Special Rapporteur held consultations with indigenous individuals and groups, including traditional owners, in Canberra, Adelaide, Perth, Alice Springs, Darwin, Cairns, and Brisbane. Indigenous communities visited included those at Swan Valley (Western Australia), La Perouse (New South Wales), Yarrabah (Queensland), Angurugu (Groote Eylandt, Northern Territory), and Bagot, Yuendumu, Yirrkala, Gamgam and Raymangirr (Northern Territory). The Special Rapporteur also consulted with representatives of the Goldfields Land and Sea Council, Central Land Council, Anindiyakwa Land Council, Northern Land Council, North Queensland Land Council, New South Wales Aboriginal Land Council, and Cape York Land Council, as well as with the Torres Strait Regional Authority, Yarrabah Shire Council, and Tangentyere Council.
3. The Special Rapporteur met with representatives of various indigenous peoples' organisations and non-governmental organisations, including the Foundation for Aboriginal and Islander Research Action (FAIRA), National Aboriginal Community Controlled Health Organizations (NACCHO), Aboriginal Legal Rights Movement, National Native Title Council, Aboriginal Legal Service of Western Australia, Coalition of Aboriginal Peak Organizations (Sydney), Aboriginal Health and Medical Research Council, Ngaaytjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council, and several other community organizations, church groups and indigenous support agencies at various locations during the Special Rapporteur's visit. In Perth, Western Australia, the Special Rapporteur met with representatives of extractive industries and the Chamber of Minerals and Energy.
4. During the visit, Professor Anaya also participated in an academic symposium at the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra, and in a conference of the United Nations Association, on the United Nations Declaration on the Rights of Indigenous Peoples, in Brisbane.
5. The Special Rapporteur expresses his appreciation to members of the indigenous peoples' organisations of Australia for their indispensable support in organising and carrying out the visit, and to the Government of Australia, especially FaHCSIA, for the support provided before, during, and after the visit. The Special Rapporteur would also like to thank the United Nations Information Centre, for their support in the preparation and execution of the visit, and the Support Project for the Special Rapporteur, at the University of Arizona Indigenous Peoples Law and Policy Program, for its help in all aspects of preparation of the visit and this report.

## Appendix B

### **OBSERVATIONS ON THE NORTHERN TERRITORY EMERGENCY RESPONSE 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.”<sup>1</sup>

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.<sup>2</sup> 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].”<sup>3</sup> Further, the NTER is currently being examined under the 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.

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<sup>1</sup> 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).

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

<sup>3</sup> CCPR/C/AUS/CO/5, para. 14 (2009).

### 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.<sup>4</sup> 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 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.”

<sup>4</sup> Section 35(1).

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 “BasicsCard” 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.<sup>5</sup>

- 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 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.<sup>6</sup>
- 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 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

<sup>5</sup> 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.

<sup>6</sup> 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.”

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).<sup>7</sup>

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 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.”<sup>8</sup> 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.”

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

<sup>8</sup> 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.”<sup>9</sup>

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 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.”<sup>10</sup>

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,

<sup>9</sup> 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.

<sup>10</sup> 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.

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 areas announcing the alcohol and pornography bans, and of the special government-issued BasicsCard 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.”<sup>11</sup>

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 evidence in this respect is at best ambiguous.<sup>12</sup> 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.<sup>13</sup> 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

<sup>11</sup> *Report of the NTER Review Board*, p. 9.

<sup>12</sup> 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.

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

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 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.<sup>14</sup>

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 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

<sup>14</sup> *Report of the NTER Review Board*, p. 46.

respect Australia's human rights obligations and conform with the Racial Discrimination Act 1975."<sup>15</sup>

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,<sup>16</sup> 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.

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.<sup>17</sup> 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.<sup>18</sup> 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 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

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<sup>15</sup> Ibid., p. 12.

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

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

<sup>18</sup> 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").

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.<sup>19</sup>

35. In November 2009, the Government introduced into Parliament draft legislation to reinstate application of the Racial Discrimination Act and the anti-discriminations 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 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.

<sup>19</sup> 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.

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.<sup>20</sup> 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.<sup>21</sup> 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 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

<sup>20</sup> See *CIRCA Report*, *supra*.

<sup>21</sup> 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.

- 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.