



**Australian
Human Rights
Commission**

The Suspension and

Reinstatement of the RDA and

Special Measures in the NTER

AUSTRALIAN HUMAN RIGHTS COMMISSION

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Summary

The suite of changes brought about initially by the NTER legislation and later by the 2010 Welfare Reform Act were numerous and complex. However, this note is limited to consideration of the impact of these pieces of legislation on the suspension and reinstatement of the RDA and on the characterisation of the intervention Acts as special measures.

In brief, the Commission has persistently raised concerns about the operation of the NTER legislation, both pre and post the 2010 amendments, in its Social Justice Reports, in Parliamentary submissions, in submissions to the CERD Committee and in external consultations. Although the Commission welcomed several of the amendments in the 2010 Welfare Reform Act, it has remained concerned about the extent and practical effectiveness of the 'reinstatement' of the RDA and regarding the characterisation of measures as special measures, particularly in the absence of effective and meaningful consultation and monitoring and evaluation.

Key ongoing concerns regarding the reinstatement of the RDA

Although, since the coming into force of the 2010 Welfare Reform Act, the RDA now applies to decisions and actions done under or for the purposes of the NTER legislation, the amending legislation:

1. Did not bring an immediate end to all intervention measures that were racially targeted;
2. Excludes from the scope of the RDA, discriminatory actions already taken under the intervention and
3. Fails to implement the Principles of the Declaration on the Rights of Indigenous Peoples, in particular through its failure to facilitate the exercise of the right to free, prior and informed consent.

However, the key impediment to the unequivocal and effective reinstatement of the RDA arises from the failure of the amendments to expressly state that the RDA will prevail, notwithstanding anything to the contrary in the NTER legislation; that is, a 'notwithstanding clause'. The consequences of not including a 'notwithstanding clause' are significant. Without such a clause, any provision of the amended emergency response legislation that is inconsistent with the RDA is likely to still override the RDA. The inclusion of such a clause is required to create certainty that all acts authorised under the NTER legislation must be undertaken consistently with the RDA.

Key ongoing concerns regarding 'Special Measures'

Although, since the 2010 Welfare Reform Act, the Government has repealed the sections under the NTER legislation that deemed the entire NTER legislation to be a 'special measure', the Commission continues to be concerned about the characterisation of the measures as a 'special measure' under the RDA for 5 key reasons.

1. The measures intentionally discriminate on the basis of race and were formulated without the appropriate participation and acceptance of Indigenous peoples.
2. They were developed without an appropriate evidence base to show that the measures were required and likely to be effective.
3. Simply stating that the measures are 'special measures' in an objects clause, rather than substantively redesigning the measures, does not satisfy the criteria necessary for a measure to be a 'special measure' - but may reduce the ability of the measures to be challenged under the RDA because courts are required to interpret legislation consistently with its stated purpose.
4. There are inadequate mechanisms for monitoring and evaluating the previous and redesigned measures to ensure that they are working effectively and to determine whether their objectives have been met.
5. The characterisation of five-year leases as a 'special measure' is inconsistent with the RDA (for the reasons outlined in section 3.1(4) of this note).

1 **Background: suspension of the *Racial Discrimination Act 1975 (Cth) (RDA)* under the NTER Legislation**

In June 2007, the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse provided its report, *Little Children are Sacred*, to the Chief Minister of the Northern Territory.

On 21 June 2007, in response to the Board of Inquiry's findings, the Howard Government announced the 'national emergency response to protect Aboriginal children in the Northern Territory' from sexual abuse and family violence. Also on 21 June 2007 the Government enacted the Northern Territory National Emergency Response (NTER) NTER legislation. The NTER legislation when originally enacted comprised a package of five Acts:

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

The NTER legislation applied to a wide range of 'prescribed areas' in which Aboriginal people are the sole or predominant inhabitants, including Aboriginal land, declared town camps and other declared areas. Some of the significant features of the NT intervention package included:

- bans on the sale and consumption of alcohol in prescribed areas;
- bans on the possession and supply of pornographic material in prescribed areas;
- compulsory acquisition by the Commonwealth of 5-year leases over declared Aboriginal land, Aboriginal 'community living areas' and town camps;
- denial of compensation equivalent to that to which another landholder in the NT would be entitled for compulsory acquisition;
- the exclusion of customary law and cultural practice as a factor relevant to sentencing and bail decisions;
- the application of income management to residents of prescribed (and other declared) areas;
- the denial of review by the Social Security Appeals Tribunal of income management decisions; and

- modifications to the permit system to allow greater access to Aboriginal land.

Relevantly, the NTER Act, the SSWP Act and the FCSIA Act provided that acts done under or for the purposes of those Acts were:

- (1) excluded from the operation of Part II of the RDA (prohibition on racial discrimination),¹ and
- (2) 'special measures' for the purposes of s 8 of the *Racial Discrimination Act 1975* (Cth).²

The practical effect of the legislation was to suspend the operation of the RDA in relation to the intervention measures and to deem acts done pursuant to the NTER, SSWP and FCSIA Acts to be 'special measures'.

Similarly, the operation of certain Northern Territory and Queensland legislation dealing with discrimination was excluded.

The terms of the particular sections as originally enacted are set out in **Annexure A** to this note.

1.1 Suspension of the NTER Act, the SSWP Act and the FCSIA Act from the operation of Part II of the RDA (prohibition on racial discrimination)

(a) Part II of the RDA

Part II of the RDA proscribes racial discrimination in subsections 9(1)³ and 9(1A)⁴ and provides for the right to equality before the law in s 10.⁵ Section 9 is relevant to an allegation that an act or conduct of a person⁶ is discriminatory.⁷ Section 10 is relevant to an allegation that a law is discriminatory in its terms or its practical effect.⁸ To make a successful claim under s 10 of the RDA, the complainant must be able to show that the discrimination complained of arises by reason of a statutory provision.⁹

The making of laws by the Commonwealth and State and Territory legislatures or delegated lawmakers cannot be challenged as an act under s 9.¹⁰ Instead, the resulting law or delegated legislation can only be challenged under s 10.

To make a successful claim under s 10 of the RDA, the complainant must be able to show that by reason of a law of the Commonwealth or of a State or Territory: (1) persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race; or (2) persons of a particular race, colour or national or ethnic origin enjoy a right to a more limited extent than persons of another race.¹¹

The provisions of the NTER legislation were targeted directly at Indigenous people. As a result, they were clearly open to challenge as being racially discriminatory. By suspending (excluding) the operation of Part II of the RDA, the members of the communities affected by the NTER legislation were effectively denied the protections afforded by the RDA to every other citizen to challenge legislation that they consider to be in breach of the RDA .

1.2 Deeming of acts done pursuant to the NTER Act, the SSWP Act and the FCSIA Act to 'special measures' for the purposes of s 8 of the Racial Discrimination Act 1975 (Cth).

(a) Meaning of 'special measures'

Section 8(1) RDA has the effect that 'special measures' are one of the few exceptions to the prohibition on discrimination in the RDA 1975 (Cth).¹² The concept of 'special measures' is generally understood to apply to positive measures taken to advance the human rights of certain racial or ethnic groups or individuals by redressing historical disadvantage and creating more favourable conditions or conferring benefits on a particular racial group. Measures characterised as 'special measures' are protected from challenge by those outside the racial or ethnic group who cannot access the measure or do not benefit from them.¹³

Accordingly, the expression 'special measures' has often been used interchangeably with expressions such as 'affirmative action' and the concept has been understood to protect positive Criteria for 'special measures'

(b) Criteria of a special measure

To meet the requirements of a 'special measure', a measure must comply with all of the following criteria:

- the measure must confer a benefit on some or all members of a class of people;
- membership of this class must be based on race, colour, descent, or national or ethnic origin
- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
- the measure must not have already achieved its objectives.¹⁴

(c) Characterisation of the NTER measures as 'special measures'

By deeming the NTER measures to be 'special measures', they were effectively deemed to be non-discriminatory and beyond the reach of the RDA. Characterising the measures as 'special measures' is contentious because rather than being an obviously positive measure taken to redress historical disadvantage and create more favourable conditions or confer benefits on a particular racial group (for example, like Abstudy) the NTER measures purport to have a protective purpose for some Indigenous people, or some members of Indigenous communities, but operate by restricting the rights of some or all of the members of those groups or communities.

2 Proposed change in the 2009 Welfare Reform Bill

In 2009, following the review of the NTER legislation which was reported to the government in October 2008 and consultations with the prescribed communities in the NT, the Government introduced a bill to reinstate the RDA and re-design some of the NTER measures.

The Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (**2009 Welfare Reform Bill**) amended several Acts relating to income management arrangements under the social security law and the NTER. The Bill also repealed sections of the NTER legislation that suspended the operation of the RDA.

Specifically, the *2009 Welfare Reform Bill* proposed the repeal of the provisions of the NTER Act, FCSIA Act, and SSWP Act which provided that the Acts and anything done under the Acts was excluded from the operation of Part 2 of the RDA.

The provisions relating to lifting the suspension on the RDA were proposed to commence on 31 December 2010 and were not retrospective.

2.1 Repeal of the ‘special measures’ deeming provisions and insertion of special measures objects clauses.

The *2009 Welfare Reform Bill* repealed the provisions of the NTER Act, FCSIA Act and SSWP Act which provided that the provisions of these Acts and anything done under, or for the purposes of these provisions are, for the purposes of the RDA, special measures. The *2009 Welfare Reform Bill* also proposed the insertion, in their place, of objects clauses in relation to four Parts of the NTER legislation.

Each clause stated that the object of the Part was “to enable special measures to be taken” for particular purposes. Those purposes were:

- alcohol restrictions;
- five-year leases;
- community store licensing; and
- prohibited material restrictions.

Similar object clauses were not proposed for:

- controls on use of publicly funded computers;
- law enforcement powers; and
- business management areas powers.

However, the Government indicated that it considered these additional three measures to be ‘special measures’ for the purposes of the RDA.¹⁵

3 The Senate Community Affairs Legislation Committee Inquiry into the 2009 Welfare Reform Bill

On 26 November 2009 the Senate, on the recommendation of the Selection of Bills Committee (Report No. 18 of 2009), referred the provisions of the 2009 Welfare Reform Bill¹⁶ to the Community Affairs Legislation Committee (the Committee) for inquiry and report by 9 March 2010.

3.1 Commissions submissions to the Senate Community Affairs Committee Inquiry into the 2009 Welfare Reform Bill

In its submission to the Committee the Commission, amongst other things,¹⁷ welcomed the lifting of the suspension of the RDA for the NTER legislation

However, the Commission noted that the proposed changes to the NTER legislation would not ensure full consistency with the RDA. Relevantly, the Commission expressed particular concern regarding the following:

- (1) Practical limitations on the reinstatement of the RDA that emerge due to the absence of a notwithstanding clause in the Bills.
- (2) Delays in the reinstatement of the RDA and state/ territory anti-discrimination legislation until 31 December 2010.
- (3) The failure to require consent for measures that are intended to be 'special measures' for the purposes of the RDA and Australia's human rights obligations.
- (4) The characterisation of five-year leases as a 'special measure' which appears to be inconsistent with the RDA. The RDA excludes from the 'special measures' exemption laws that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them. To be consistent with the RDA, measures relating to the management of land must be undertaken with the consent of the landowners.
- (5) The limited monitoring and evaluation measures in place to ensure that reliable evidence is available as to the effectiveness of existing and redesigned NTER measures.¹⁸

(a) The re-instatement of the RDA

The Commission submitted to the *Senate Community Affairs Committee Inquiry into the 2009 Welfare Reform Bill* that:

- a 'notwithstanding clause' ought to be inserted in order to specify that the provisions of the RDA are intended to prevail over the NTER legislation and that the NTER legislation does not authorise conduct that is inconsistent with the provisions of the RDA

- the Government should lift the suspension of the RDA for all NTER measures no later than 1 July 2010.¹⁹

(b) *Special measures provisions*

The Commission submitted to the *Senate Community Affairs Committee Inquiry into the 2009 Welfare Reform Bill* that the redesigned measures will not meet these requirements of a 'special measure' where:²⁰

- The government's redesign consultations do not meet the necessary standard of consultation and consent of the affected group.
- There is insufficient current and credible evidence which shows that the measure will be effective.
- There are alternative means of achieving the objective that are not as restrictive of affected persons' human rights.
- There are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.

The Commission considered in detail whether individual measures met the requirements of a 'special measure' under the RDA and submitted:

- The alcohol restrictions measure in the NTER have not been developed with adequate community consultation and do not meet the requirements of consent for a 'special measure'.²¹
- Five-year leases are not a 'special measure' because, to be consistent with the RDA, measures relating to the management of land must be taken with the consent of the landowners.²²
- The terms and conditions of the community stores licencing measure are reasonable, able to be complied with and do not have a negative impact upon the equal enjoyment of rights in public life by people of a particular race - and therefore are not racially discriminatory.²³
- The business management area powers are disproportionate and unnecessary.²⁴

Relevantly, Recommendation 6 in the Commission's submission to the Senate Inquiry was in the following form:

That the Parliament amend the [following] provisions of the NT intervention legislation²⁵ to clarify the status of the measures as 'special measures' under the RDA:

In particular, Parliament should:

- remove those provisions which deem the measures to constitute a special measure;
- replace these provisions with language which clarifies that the measures are intended to constitute special measures; and

- insert new provisions that require that in the performance of any actions undertaken to implement the measures contained in the legislation, the intended beneficial purpose of the legislation must be a primary consideration.²⁶

3.2 Recommendations of the Committee Inquiry

The Committee reported in March 2010 and recommended that the Bill be passed unamended.²⁷ In relation to special measures, the Committee concluded as follows:

The committee is of the opinion that the government's redesigned measures, other than income management, which is non-discriminatory, are special measures.²⁸

4 The 2010 Welfare Reform Act

The *2009 Welfare Reform Bill* was passed unamended as the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (**2010 Welfare Reform Act**).

Each of the sections identified in Annexure A to this note was repealed. Relevantly, the *2010 Welfare Reform Act* purportedly restored the application of the RDA to the Northern Territory Intervention measures²⁹ and in place of the previous provisions deeming certain measures to be 'special measures', objects clauses were inserted in the form set out in **Annexure B**. Each clause states that the object of the Part is "to enable special measures to be taken" for particular purposes being alcohol restrictions, five-year leases, community store licensing³⁰ and prohibited material restrictions.³¹

However, because the Bill was passed unamended, the concerns raised by the Commission in relation to the Bill remain in relation to the *2010 Welfare Reform Act*.

5 Conclusion: outstanding issues since the 2010 Act

The Commission's view is that the RDA has not been fully or unconditionally reinstated under the NTER legislation, and that issues remain with the characterisation of the intervention strategies as 'special measures' for the reasons outlined below.

5.1 Reinstatement of the RDA

Legislative amendments have formally lifted the suspension of the RDA in relation to the NTER legislation. This means that, theoretically, s 9 of the RDA will apply to decisions and actions done under or for the purposes of the NTER legislation and section 10 of the RDA will also apply in relation to the NTER legislation itself.

Notwithstanding that the operation of the RDA is no longer legislatively suspended the amending legislation:

- does not bring an immediate end to all intervention measures that were racially targeted;³²
- excludes discriminatory actions already taken under the intervention from the scope of the RDA (eg compulsory welfare quarantining based on race); and

- fails to implement the Principles of the Declaration on the Rights of Indigenous Peoples, in particular through its failure to facilitate the exercise of the right to free, prior and informed consent.³³

However, the key impediment to the unequivocal and effective reinstatement of the RDA arises from the failure of the amendments to expressly state that the RDA would prevail notwithstanding anything contrary in the NTER legislation. Accordingly, if there is a conflict between the (later) NTER legislation and the (earlier) RDA, and the provisions of the NTER legislation is unlikely to be read so as to be consistent with the RDA; the NTER legislation, being the later legislation, will prevail. A 'notwithstanding clause' is required to unequivocally reinstate the operation of the RDA.

(a) *Notwithstanding Clause*

An effective 'notwithstanding clause' would need to be in a form such as:

Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the NTER measures, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the NTER Act. The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*³⁴

The inclusion of such a clause would mean that all acts authorised under the NTER legislation must be undertaken consistently with the RDA.

5.2 'Special Measures'

Although the Government has repealed the sections under the NTER legislation that deemed the entire NTER legislation to be a 'special measure' under the RDA, simply altering the objects clause, rather than substantively redesigning the measures, does not satisfy the criteria necessary for the measure to be a 'special measure.'

The Commission maintains that it is preferable that measures that may limit the rights of people of a particular racial group are designed so as to be non-discriminatory under the RDA, rather than justified as special measures. The Commission has serious concerns about the inappropriate classification of State actions as 'special measures', particularly where they intentionally discriminate on the basis of race and are formulated without the participation and the acceptance of Indigenous peoples.³⁵

In particular, the redesigned 2010 measures will not meet the requirements of a 'special measure' in International law³⁶ for the reasons outlined below.

- (1) The consultations (in particular in relation to alcohol restrictions) have not been developed with adequate community consultation and do not meet the requirements of consent of the affected group to constitute a special measure; the failure to require consent for measures that are intended to be 'special measures' for the purposes of the RDA is inconsistent with Australia's human rights obligations.³⁷
- (2) There is insufficient current and credible evidence which shows that the measures are required and are effective.

- (3) There are inadequate mechanisms for monitoring and evaluating the previous and redesigned measures to ensure that they are working effectively and to if their objectives has been met.
- (4) The characterisation of five-year leases as a 'special measure' is inconsistent with the RDA (for the reasons outlined in section 4.1(4) of this note).
- (5) Although the amended measures can be challenged under the RDA,³⁸ Australian courts are required to interpret legislation consistently with its purpose. The 'special measures' objects clauses support an interpretation that the laws are 'special measures', and render a successful challenge difficult under the RDA.

6 Postscript

The Commission notes that many aspects of the NTER legislation are due to expire in 2012 and that the government aims to introduce new legislation. The continued relevance of the issues identified in this note will obviously depend on what new legislative measures are proposed.

Annexure A
Special measures and application of discrimination law to
NTER legislation

Northern Territory National Emergency Response Act 2007 (Cth)

132 Racial Discrimination Act

- (1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.
- (2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.
- (3) In this section, a reference to any acts done includes a reference to any failure to do an act.

133 Some Northern Territory laws excluded

- (1) The provisions of this Act are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as it would otherwise apply.
- (2) Any acts done under or for the purposes of the provisions of this Act have effect despite any law of the Northern Territory that deals with discrimination.
Northern Territory laws that are not excluded
- (3) However, subsections (1) and (2) do not apply to a law of the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsections (1) and (2) do not apply.
Reference to acts done includes failure to do an act
- (4) In this section, a reference to any acts done includes a reference to any failure to do an act.

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

4 Racial Discrimination Act

- (1) Subject to subsection (3), the provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.
- (2) Subject to subsection (3), the provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

- (3) Subsections (1) and (2) do not apply to amendments or repeals made by Division 2 or 3 of Part 1 of Schedule 2 (law enforcement) to this Act.
- (4) In this section, a reference to:
- (a) any acts done includes a reference to any failure to do an act; and
 - (b) provisions of this Act includes a reference to provisions of other Acts that are inserted, amended or repealed by the provisions of this Act.

5 Some Northern Territory laws excluded

- (1) Subject to subsections (3) and (4), the provisions of this Act are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as it would otherwise apply.
- (2) Subject to subsections (3) and (4), any acts done under or for the purposes of the provisions of this Act have effect despite any law of the Northern Territory that deals with discrimination.
Northern Territory laws that are not excluded
- (3) Subsections (1) and (2) do not apply to a law of the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsections (1) and (2) do not apply.
Provisions of this Act that are not excluded
- (4) Subsections (1) and (2) do not apply to amendments or repeals made by Division 2 or 3 of Part 1 of Schedule 2 (law enforcement) to this Act.
Interpretation
- (5) In this section, a reference to:
- (a) any acts done includes a reference to any failure to do an act; and
 - (b) provisions of this Act includes a reference to provisions of other Acts that are inserted, amended or repealed by the provisions of this Act.

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)

4 Racial Discrimination Act—Part 3B of the Social Security (Administration) Act

- (1) Subsections (2) and (3) apply to:
- (a) the provisions of Part 3B of the *Social Security (Administration) Act 1999*; and
 - (b) any acts done under or for the purposes of:
 - (i) those provisions; or
 - (ii) the income management regime;
- in relation to:

- (c) a person who is, or is potentially, subject to the income management regime under section 123UB of that Act (relevant Northern Territory area); or
 - (d) a person in the Northern Territory who is, or is potentially, subject to the income management regime under section 123UD or 123UE of that Act (school enrolment and attendance); or
 - (e) a person who is subject to the income management regime under section 123UF of that Act (Queensland Commission).
- (2) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a), and any acts referred to in paragraph (1)(b), are, for the purposes of the *Racial Discrimination Act 1975*, special measures.
- (3) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a), and any acts referred to in paragraph (1)(b), are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.
- (4) The following are, for the purposes of the *Racial Discrimination Act 1975*, special measures:
- (a) any acts done by the Queensland Commission in relation to the giving of:
 - (i) a notice referred to in paragraph 123UF(1)(b) or (2)(c) of the *Social Security (Administration) Act 1999*; or
 - (ii) a notice referred to in paragraph 123YM(2)(c) or 123YN(2)(c) of that Act; or
 - (iii) a direction referred to in section 123ZK of that Act;
 - (b) any provisions of any laws made by, or any acts done by, Queensland in relation to the establishment or operation of the Queensland Commission.
- (5) The following are excluded from the operation of Part II of the *Racial Discrimination Act 1975*:
- (a) any acts done by the Queensland Commission in relation to the giving of:
 - (i) a notice referred to in paragraph 123UF(1)(b) or (2)(c) of the *Social Security (Administration) Act 1999*; or
 - (ii) a notice referred to in paragraph 123YM(2)(c) or 123YN(2)(c) of that Act; or
 - (iii) a direction referred to in section 123ZK of that Act;

- (b) any provisions of any laws made by, or any acts done by, Queensland in relation to the establishment or operation of the Queensland Commission.

Definitions etc.

- (6) In this section:

Queensland Commission has the meaning given by section 123TC of the *Social Security (Administration) Act 1999*.

- (7) In this section, a reference to any acts done includes a reference to any failure to do an act.

5 **Some Queensland and Northern Territory laws excluded—Part 3B of the *Social Security (Administration) Act***

- (1) Subsections (2) and (3) apply to:

- (a) the provisions of Part 3B of the *Social Security (Administration) Act 1999*; and

- (b) any acts done under or for the purposes of:

- (i) those provisions; or

- (ii) the income management regime;

in relation to:

- (c) a person who is, or is potentially, subject to the income management regime under section 123UB of that Act (relevant Northern Territory area); or

- (d) a person in the Northern Territory who is, or is potentially, subject to the income management regime under section 123UD or 123UE of that Act (school enrolment and attendance); or

- (e) a person who is subject to the income management regime under section 123UF of that Act (Queensland Commission).

- (2) To the extent that this subsection applies, the provisions referred to in paragraph (1)(a) are intended to apply to the exclusion of a law of Queensland or the Northern Territory that deals with discrimination so far as it would otherwise apply.

- (3) To the extent that this subsection applies, any acts referred to in paragraph (1)(b) have effect despite any law of Queensland or the Northern Territory that deals with discrimination.

Queensland and Northern Territory laws that are not excluded

- (4) However, subsections (2) and (3) do not apply to a law of Queensland or the Northern Territory so far as the Minister determines, by legislative

instrument, that the law is a law to which subsections (2) and (3) do not apply.

Reference to acts done includes failure to do an act

(5) In this section, a reference to any acts done includes a reference to any failure to do an act.

6 Racial Discrimination Act—determining terms of relevant activity agreement for approved programs of work for income support

(1) Subsections (2) and (3) apply in relation to the implementation of guidelines, or the doing of any other acts, for the purpose of determining the terms of a relevant activity agreement in relation to an approved program of work for income support payment, if the implementation or acts are done in the period:

(a) beginning on 9 July 2007; and

(b) ending 5 years after the commencement of section 1 of the *Northern Territory National Emergency Response Act 2007*.

(2) Any such implementation, or other acts, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

(3) Any such implementation, or other acts, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

Definitions etc.

(4) In this section:

approved program of work for income support payment has the same meaning as in the Social Security Act 1991.

relevant activity agreement means:

(a) a Parenting Payment Activity Agreement (within the meaning of the *Social Security Act 1991*); or

(b) a Youth Allowance Activity Agreement (within the meaning of that Act); or

(c) a Newstart Activity Agreement (within the meaning of that Act); or

(d) a Special Benefit Activity Agreement (within the meaning of that Act);

that is in force between the Secretary and a person who is ordinarily resident in a relevant Northern Territory area within the meaning of Part 3B of the *Social Security (Administration) Act 1999*.

Reference to acts done includes failure to do an act

(5) In this section, a reference to any acts done includes a reference to any failure to do an act.

7 Some Northern Territory laws excluded—determining terms of relevant activity agreement for approved programs of work for income support

- (1) Subsection (2) applies in relation to the implementation of guidelines, or the doing of any other acts, for the purpose of determining the terms of a relevant activity agreement in relation to an approved program of work for income support payment, if the implementation or acts are done in the period:
- (a) beginning on 9 July 2007; and
 - (b) ending 5 years after the commencement of section 1 of the *Northern Territory National Emergency Response Act 2007*.
- (2) Any such implementation, or other acts, have effect despite any law of the Northern Territory that deals with discrimination.

Northern Territory laws that are not excluded

- (3) However, subsection (2) does not apply to a law of the Northern Territory so far as the Minister determines, by legislative instrument, that the law is a law to which subsection (2) does not apply.

Definitions

- (4) In this section:

approved program of work for income support payment has the same meaning as in the Social Security Act 1991.

relevant activity agreement means:

- (a) a Parenting Payment Activity Agreement (within the meaning of the *Social Security Act 1991*); or
- (b) a Youth Allowance Activity Agreement (within the meaning of that Act); or
- (c) a Newstart Activity Agreement (within the meaning of that Act); or
- (d) a Special Benefit Activity Agreement (within the meaning of that Act);

that is in force between the Secretary and a person who is ordinarily resident in a relevant Northern Territory area within the meaning of Part 3B of the *Social Security (Administration) Act 1999*.

Reference to acts done includes failure to do an act

- (5) In this section, a reference to any acts done includes a reference to any failure to do an act.

Annexure B

Objects clauses dealing with special measures

Northern Territory National Emergency Response Act 2007 (Cth)

6A Object of Part

The object of this Part is to enable special measures to be taken to reduce alcohol related harm in Indigenous communities in the Northern Territory.

30A Object of Part

The object of this Part is to enable special measures to be taken to:

- (a) improve the delivery of services in Indigenous communities in the Northern Territory; and
- (b) promote economic and social development in those communities.

91A Object of Part

- (1) The object of this Part is to enable special measures to be taken for the purpose of promoting food security for certain Indigenous communities in the Northern Territory.
- (2) In particular, this Part is intended to enhance the contribution made by community stores in the Northern Territory to achieving food security for certain Indigenous communities.

Classification (Publications, Films and Computer Games) Act 1995

98A Main object of Part

The main object of this Part is to enable special measures to be taken to protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material.

¹ s132(2) NTER Act, s4 (2) FCSIA, s4(3), 6(3) SSWP Act.

² NTER Act s 132(1), FCSIA Act s 4(1), SSWP Act ss 4(1), (2) and (4) and 6(2).

³ Section 9(1) prohibits what is generally known as 'direct' race discrimination:

- (1) It is unlawful for a person to do any act involving a 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 any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 9 makes unlawful a wide range of acts ('any act' involving a relevant distinction etc which has a relevant purpose or effect) in a wide range of situations ('the political, economic, social, cultural or any other field of public life').

⁴ Section 9(1A), prohibits 'indirect' race discrimination:

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

⁵ Section 10 of the RDA provides for a general right to equality before the law:⁵

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in article 5 of the Convention.

(3) Where a law contains a provision that:

- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

⁶ 'Person' includes 'a body politic or corporate as well as an individual': *Acts Interpretation Act 1901* (Cth) s 22(1)(a).

⁷ This includes action taken by a person to implement a Commonwealth, State or Territory law where that person has discretion about whether to implement the law in a discriminatory or non-discriminatory manner. However, s 10 would appear to apply to a discriminatory action taken by a person which is required by a Commonwealth, State or Territory law. See *Gerhardy v Brown* (1985) 159 CLR 70, 92 (Mason J), 81 (Gibbs CJ); *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558, [12] (Doyle CJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). The Commission was granted leave to intervene in *Western Australia v Ward* (2002) 213 CLR 1 and its submissions are available at http://www.humanrights.gov.au/legal/submissions_court/guidelines/submission_miriuwung.html.

⁸ See *Gerhardy v Brown* (1985) 159 CLR 70, 81 (Gibbs CJ), 92-93 (Mason J) and 119 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [73].

⁹ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ); *Bropho v Western Australia* [2008] FCAFC 100, [64], [73].

¹⁰ *Gerhardy v Brown* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [70].

¹¹ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ).

¹² Section 8(1) provides:

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

¹³ Committee on the Elimination of Racial Discrimination, *General Recommendation 32*, [12]; see also Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *Am J. Int'l Law* 283 at 305; Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1980), 32.

¹⁴ *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J).

¹⁵ Department of Families, Housing, Community Services and Indigenous Affairs, Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response, (2009), pp 12-14. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (referred to in the Commission's submission on the Bill at fn 14)

Along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009

¹⁷ It also welcomed:

1. Redesigning the income management measures so that they are not applied on a racially discriminatory basis.
2. Redesigning the income management measures so that disability support pensions or age pensions are no longer being automatically income-managed, unless the recipient is determined to be a vulnerable welfare payment recipient.
3. Including provisions to enable affected individuals to apply for an exemption from income management where their circumstances so warrant as well as options for individuals to voluntarily participate in income management where they desire.
4. Enabling a shift from the blanket imposition of alcohol bans to restrictions that are tailored to the needs of communities.
5. Clarifying the objectives of five-year leases; and committing to move to voluntary leases through negotiations in good faith where requested.
6. Providing greater transparency in the community store licensing scheme.

¹⁸ The Commission also expressed broader concerns in relation to:

1. The broad reach of some categories of the new income management measure that could result in a disproportionate number of Aboriginal people being unnecessarily income-managed.
2. Insufficient clarity in the definition for 'vulnerable welfare payment recipient' under the income management measures.
3. The continuation of the compulsory five-year lease arrangements and their exclusion from the protections against discrimination under the RDA.

¹⁹ The Commission also submitted that the government should remove Item 4 of Schedule 1 of the Government Welfare Reform Bill (relating to retrospectivity and section 8 of the Acts Interpretation Act 1901) and reinstate state/ territory anti-discrimination legislation for all NTER measures no later than 1 July 2010.

²⁰ Australian Human Rights Commission submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills, 10 February 2010 at [66] (http://humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html#s7_4)

²¹ Commission submission at [127].

²² The RDA explicitly excludes from the 'special measures' exemption laws that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them (see ss 8(1), 10(3), RDA).

²³ Commission submission at [158].

²⁴ Commission submission at [167].

²⁵ Section 132(1), *Northern Territory National Emergency Response Act 2007 (Cth)*; section 4(1), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*; and section 4(1), (2) and (4), and section 6, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*

²⁷ Note that in her dissenting report, regarding the bills, Senator Rachel Siewert, stated:

In the case of the proposed changes to income management, the government has (unsuccessfully) sought to change the measures so it can claim that they do not directly discriminate on the basis of race. In relation to alcohol restrictions, prohibited material (pornography and violence) and five year leases the government has introduced minor amendments to allow it to continue to assert these are 'special measures'. In the case of suspension of consideration of 'customary law' in sentencing, the government has conveniently ignored the ongoing suspension of the Racial Discrimination Act and continues to deny Aboriginal people in the Northern Territory the right to have all relevant matters considered in a court of law. In all three instances the evidence to the committee makes a compelling case that the Racial Discrimination Act is not being fully restored and that Aboriginal Australians in the Northern Territory will not be able to exercise their right to be free from discrimination in the same manner they could prior to the introduction of the NTER laws. The Government bills do not fully restore the operation of the RDA to the NTER. The bills represent an unacceptable fundamental shift in social security policy, an approach that there is no evidence to support and about which the Government has not consulted the Australian community.

She made the following recommendations:

1. The legislation is amended to include a 'not withstanding' clause which clearly indicates that the Racial Discrimination Act is intended to prevail over the provisions of the NTER.
2. All existing discriminatory measures are amended to ensure that they comply with the provisions of the Racial Discrimination Act, and that those intended to be special measures legitimately meet the requirements of 'special measures' through a process that ensures full informed consent in the development of new community-based measures.
3. If these changes are not made, then the legislation should be opposed
4. The legislative package is separated so that the restoration of the RDA is dealt with separately to changes to social security that expand income management.
5. The Commonwealth amend the NTER Act to revoke the provisions relating to compulsory leases, and negotiate leases in good faith under the existing provision of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

²⁸ The Senate Committee also recommended that:

- The Department of Families, Housing, Community Services and Indigenous Affairs should consult with relevant non-government organisations, peak advocacy groups and other stakeholders in developing the legislative instruments associated with the legislation.

- The evaluation of the proposed income management measure in the Northern Territory be well-resourced, include community consultation in the design of the evaluation, feature the collection of baseline data prior to implementation, include robust quantitative data analysis and be undertaken by an independent research organisation.

²⁹ Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) sch 1

³⁰ See ss 6A, 30A and 91 A of the NTER Act which purport to enable special measures to be taken to: reduce alcohol related harm in Indigenous communities in the Northern Territory, improve the delivery of services in Indigenous communities in the Northern Territory; promote economic and social development in those communities and to promote food security for certain Indigenous communities in the Northern Territory and enhance the contribution made by community stores in the Northern Territory to achieving food security for certain Indigenous communities.

³¹ See s. 98A *Classification (Publications, Films and Computer Games) Act 1995* which states that: 'the main object of this Part is to enable special measures to be taken to protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material'.

³² For further discussion of these issues see the concluding observations of the Committee on the Elimination of Racial Discrimination, Seventy-seventh session (27 August 2010) with respect to the NTER and special measures:

The Committee takes notes the State party will complete the reinstatement of the Racial Discrimination Act in December 2010, but is concerned by the continuing difficulties in using the Act to challenge and provide remedies for racially discriminatory NTER measures.

³³ For further discussion see Amnesty International submission to the UN Committee on the Elimination of racial Discrimination 77th session (August 2010) p. 18

³⁴ For further discussion see *Social Justice Report 2007*, p. 305.

³⁵ For further discussion of these issues see the concluding observations of the Committee on the Elimination of Racial Discrimination, Seventy-seventh session (27 August 2010) with respect to the NTER and special measures:

16. The Committee expresses its concern that the package of legislation under the Northern Territory Emergency Response (NTER) continues to discriminate on the basis of race as well as the use of so called "special measures" by the State party. ...It also urges the State party to guarantee that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee's general recommendation No. 32 on Special Measures (2009).

³⁶ It is important to note the continuing disjunction between domestic legal jurisprudence regarding the level of consultation and evidence that is needed to for a 'special measure' to be compliant with the RDA and the requirement for consent and consultation in relation to the imposition of special measures in International law which recognises that consent and consultation are imperative.

³⁷ Post-implementation consultation, even if adequate, cannot be used to retrospectively justify measures as 'special measures' if they were not developed with the participation and consent of affected Aboriginal individuals and communities and if there is insufficient evidence to demonstrate that the measures will be for the benefit of Aboriginal peoples and secure the advancement of the realisation of other human rights. For further discussion see Australian Non-governmental Organisations' Submission to the 77th ICERD Committee Co-ordinated by the National Human Rights Network of the National Association (2010) Paras 117-120.

³⁸ Senate Community Affairs Legislation Committee, *Report into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and Others*, March 2010, 24