

**Submission to the
Standing Committee on Legal and Constitutional Affairs
Inquiry into the Northern Territory
National Emergency Response Bill 2007 and Related Bills**

This submission is provided on behalf of the Human Rights Law Resource Centre (*HRLRC*) to the Standing Committee on Legal and Constitutional Affairs in relation to the five bills comprising the legislative package for the Australian Government's response to the 'national emergency' relating to the welfare of Indigenous children in the Northern Territory (*Proposed Legislation*).

The HRLRC considers that the Proposed Legislation raises serious concerns in relation to Australia's international obligations to respect and promote the human rights of Indigenous Australians. These obligations are found in a number of the major international human rights treaties to which Australia is a party.¹

The HRLRC is particularly concerned about the human rights issues in respect of the following aspects of the Proposed Legislation:

(a) *The proposed emergency measures are discriminatory*

The broad legislative measures will impact specifically on Indigenous people. This raises concerns in relation to the right to equality and freedom from discrimination, which is an integral component of the international human rights normative framework.

The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination is set out in article 26 of the ICCPR:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹ The International Covenant on Civil and Political Rights (*ICCPR*), the International Covenant on Economic, Social and Cultural Rights (*ICESCR*); the International Covenant on the Elimination of All Forms of Racial Discrimination (*CERD*) and the Convention on the Rights of the Child (*CROC*).

Although 'discrimination' is not defined in the ICCPR, the UN Human Rights Committee has defined it as:

... any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of all rights and freedoms.²

The norm of non-discrimination is also enshrined in article 2(1) of the ICCPR and article 2(2) of ICESCR which provide that:

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

In addition to being enshrined in other international human rights treaties, like articles 2 and 5 of the CERD, the norm of non-discrimination probably constitutes a peremptory (or non-derogable) principle of customary international law.³ In the *Namibia Case*, Ammoun J of the International Court of Justice stated:

One right which must be considered a pre-existing binding customary norm which the *Universal Declaration of Human Rights* codified is the right to equality.⁴

The provisions that exempt the Proposed Legislation from the application of the *Racial Discrimination Act 1975* (Cth) and the Northern Territory anti-discrimination legislation confirm that the effect and impact of the Proposed Legislation will be discriminatory.

Indeed, the HRLRC notes that the UN Committee on the Elimination of Racial Discrimination recommends that States parties 'ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity'.⁵

² UN Human Rights Committee, *General Comment 18: Non-Discrimination*, 136, UN Doc HRI/GEN/1/Rev.5 (2001).

³ See, eg, K Parker and L B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411, 441–2.

⁴ *Namibia Case* [1971] ICJ Rep 16. See also *Barcelona Traction, Light and Power Company Limited Case (Belgium v Spain) Second Phase* [1970] ICJ Rep 3, 34.

⁵ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN Doc A/52/18 (1997), [4].

(b) *Arbitrary and unjust acquisition of land rights*

The compulsory acquisition and taking control of specified Aboriginal land and community living areas through renewable five year leases raises concerns in relation to the right to self determination (article 1 of the ICCPR and article 1 of the ICESCR).

Provisions of the Proposed Legislation also include replacing Indigenous community living arrangements with enforced normal tenancy agreements, which also raises concerns in relation to the right to self determination and the right to adequate housing (article 11 of the ICESCR). The HRLRC notes that the UN Committee on the Elimination of Racial Discrimination has called upon States parties to 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands'.⁶

In addition, the rights of Indigenous native title holders are not protected in the same way as other non-Indigenous rights, which raises concerns in relation to the right to freedom from discrimination (articles 2 and 26 of the ICCPR, article 2 of the ICESCR and articles 2 and 5 of the CERD).

Further, the Proposed Legislation does not guarantee compensation for landowners and lessees who are deprived of their property rights by the compulsory acquisition of land, which raises concerns in relation to section 51(xxxi) of the Australian Constitution.

(c) *Provisions relating to alcohol*

The powers conferred by the Proposed Legislation on police to make arrests without warrant are disproportionately wide and discretionary. Police members may, without warrant, apprehend and take into custody a person who on reasonable grounds they believe is intoxicated, including by entering private property and arresting a person for being intoxicated in their own home. The Proposed Legislation also provides for increased police presence in particular Indigenous communities.

Indigenous Australians, and particularly Indigenous women and children, are already among the most highly incarcerated peoples in the world. Particularly in light of the recommendations of the *Royal Commission on Aboriginal Deaths in Custody*,⁷ these provisions are likely to have a significant and devastating impact on Indigenous people. The striking over-representation of Indigenous Australians in prison, as well as the percentage of Indigenous deaths in custody and the lack of fair treatment under the criminal justice system, all raise serious concerns in relation to articles 6 (right to life), 7 (freedom from cruel treatment

⁶ Ibid, [5].

⁷ Commonwealth, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991).

or punishment), 9 (freedom from arbitrary detention), 10 (humane treatment in detention) and 14 (right to a fair hearing) of the ICCPR, as well as the principle that detention must be a measure of last resort for children (article 37 of the CROC).

The provisions of the Proposed Legislation relating to alcohol will impact specifically on Indigenous people, which raises concerns in relation to the right to freedom from discrimination (articles 2 and 26 of the ICCPR, article 2 of the ICESCR and articles 2 and 5 of the CERD) and the right to privacy (article 17 of the ICCPR).

(d) Social security

The Proposed Legislation provides for an income management regime, which includes measures such as quarantining 50% of welfare payments for food and other essentials and linking welfare payments to children's school attendance and to participating in clean up and repair activities. These measures raise particular concerns in relation to the right to social security under article 9 of ICESCR.

Access to a secure and adequate income is necessary to ensure a dignified human existence and good mental health. Although international human rights law does not prescribe social security payment levels, it does stipulate that benefits must not be reduced below a minimum threshold and must be available to 'cover all the risks involved in the loss of means of subsistence beyond a person's control'.⁸ Comparative law further provides that social security and income support must be sufficient to ensure a dignified human existence and to meet people's needs, particularly in relation to housing and health.⁹

The discriminatory social security measures also raise serious concerns regarding the right to freedom from discrimination (articles 2 and 26 of the ICCPR, article 2 of the ICESCR and articles 2 and 5 of the CERD) and the right to privacy (article 17 of the ICCPR).

(e) Bail and sentencing

The Proposed Legislation provides that customary law or cultural practices cannot be taken into consideration in the context of bail applications and conditions in determining criminal sentences. This raises concerns in relation to the right to self determination (article 1 of the ICCPR and article 1 of the ICESCR) and the right to freedom from discrimination (articles 2 and 26 of the ICCPR and articles 2 and 5 of the CERD).

⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic Social and Cultural Rights of Older Persons*, 43, UN Doc. HRI/GEN/1/Rev.5 (2001).

⁹ *Benefits Case* (1994) Constitutional Court of Hungary, Decision No 43/1995; *V v Einwohnergemeine X und Regierungsrat des Kantons Bern* (1995) Federal Court of Switzerland, BGE/ATF 121 I 367.

(f) Lack of Indigenous consultation and participation

Despite recommendations in the Northern Territory Government's *Little Children are Sacred* report,¹⁰ the Australian Government has entirely neglected to consult with Indigenous representatives and affected communities about the Proposed Legislation. This approach by the Australian Government contravenes its obligation to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.¹¹

The informed and active participation of people who are marginalised or disadvantaged in the development and implementation of laws, policies and practices to address that disadvantage is crucial in both an instrumental and developmental sense. In an instrumental sense, the participation of stakeholders is more likely to result in the development and implementation of laws and policies that are targeted, efficient, effective and meet people's needs. In a developmental sense, the participation of stakeholders can contribute to individual and community empowerment.¹²

As the UN Office of the High Commissioner for Human Rights has written in their *Guidelines on a Human Rights Approach to Poverty Reduction Strategies*:

Lack of political rights is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization...Active participation in political decision-making processes plays a role in expanding political freedoms and empowering people, which in turn contributes towards combating social exclusion and political marginalization.¹³

For strategies to be effective, Aboriginal communities must be empowered, have ownership of the programs and be provided with sufficient support to enable them to run effectively. A recently released report of the Combined Aboriginal Organisations of the Northern Territory warns that if the Australian Government's emergency measures are implemented without

¹⁰ Northern Territory Government, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (April 2007).

¹¹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN Doc A/52/18 (1997), [4].

¹² See generally, Mark Considine, *Making Public Policy: Institutions, Actors, Strategies* (2005) 186–206.

¹³ UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 48.

community consent and ownership, there is a risk that problems such as alcohol addiction 'will be driven underground and that initiatives to help prevent child sexual abuse and family violence will be resisted'.¹⁴

The treatment of Indigenous peoples in Australia is reaching a critical time. Government policy and legislation must address the very serious concerns in relation to child abuse in the Northern Territory in a human rights framework and with respect to the provisions of the international human rights treaties to which Australia is a party.

The HRLRC urges the Australian Government to implement as a matter of priority the recommendations contained in the *Little Children are Sacred* report.

The HRLRC endorses the submissions of Arnold Bloch Leibler and the Castan Centre for Human Rights dated 8 August 2007.

About the HRLRC

The Human Rights Law Resource Centre is Australia's premier human rights legal service. It aims to promote and protect human rights through casework, strategic litigation, advocacy, legal education and human rights capacity building.

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¹⁴ Combined Aboriginal Organisations of the Northern Territory, *A proposed Emergency Response and Development Plan to protect Aboriginal children in the Northern Territory: A preliminary response to the Australian Government's proposals* (July 2007), 8.