

NATSILS Submission
to the UN Human
Rights Council on
Australia's Universal
Periodic Review

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Victorian Aboriginal Legal Service Co-operative Ltd



Aboriginal Legal Service of Western Australia



Aboriginal Legal Rights Movement Inc

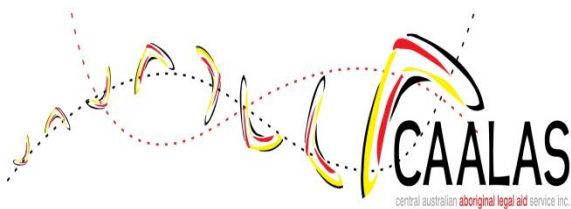


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INTRODUCTION

1. This is a joint submission from the Aboriginal and Torres Strait Islander Legal Services of Australia (ATSILS).¹

FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

2. The ATSILS endorse the Australian Human Rights Commission and the Joint Non-Governmental Organisations (NGOs) submissions in regards to the framework for the promotion and protection of human rights.
3. The ATSILS recommend the Government:
 - (a) develop a framework to implement and raise awareness about the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in consultation with Aboriginal and Torres Strait Islander peoples;
 - (b) initiate a process of constitutional reform to recognise and better protect the rights of Aboriginal and Torres Strait Islander peoples, including freedom from discrimination and equality before the law;
 - (c) withdraw its reservations to article 4(a) of the Convention on the Elimination of Racial Discrimination (CERD) and article 20 of the International Covenant on Civil and Political Rights (ICCPR); and
 - (d) ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

HUMAN RIGHTS ON THE GROUND: KEY INITIATIVES FOR IMPLEMENTATION

Over-Representation in the Criminal Justice System and High Incarceration

4. Aboriginal and Torres Strait Islander peoples in Australia are substantially over-represented in the criminal justice system.² This is caused by a number of complex factors including dispossession of land, structural disadvantage, systemic racism, intergenerational poverty, over-policing and tough-on-crime policies. This is exacerbated by lack of accountability in the handling of police complaints and effective remedies for systemic failure of service provision for Aboriginal and Torres Strait Islander peoples.
5. The ATSILS recommend the Government:
 - (a) incorporate targets to reduce the high involvement of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system into the Closing the Gap agenda;³
 - (b) implement Justice Reinvestment strategies that include therapeutic jurisprudence approaches, such as the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;⁴
 - (c) increase the use of non-custodial sentencing options (such as community based orders, community work orders, diversionary programs, cautioning and home detention);

- (d) abolish mandatory sentencing policies; and
- (e) establish independent bodies in each State and Territory to independently investigate and determine police complaints.

State of Detention Centres

6. Many Australian detention facilities, particularly in regional and remote areas, are dirty, overcrowded, lack air-conditioning, do not provide Aboriginal and Torres Strait Islander peoples in custody with access to culturally appropriate healing and/or rehabilitation programs, and place juveniles at risk of abuse by failing to always separate them from adults whilst in custody. Many detained persons receive inadequate medical and mental health care, which contributes to the ongoing incidence of deaths in custody.⁵ Prisoner transportation is also concerning because of the geographical expanse of Australia and remoteness of many Aboriginal and Torres Strait Islander communities. Detained persons are transported over hundreds of kilometres, amidst high temperatures, in vehicles that are not appropriately air-conditioned or monitored.⁶ Only Western Australia (WA) has an Inspector of Custodial Services to provide an independent, expert and fair inspection service that gives up-to-date reports and advice about custodial facilities and services.
7. The ATSILS recommend the Government:
 - (a) take steps to reduce the overall number of people in detention and address the disproportionate number of Aboriginal and Torres Strait Islander peoples in detention by implementing recommendations above at 5;
 - (b) ensure adequate medical care and living conditions are guaranteed for all people in detention, including during transport of detained persons;
 - (c) implement the Optional Protocol to the Convention Against Torture (OPCAT) into domestic law and establish National Preventative Mechanisms in consultation with the WA Office of the Inspector of Custodial Services;
 - (d) withdraw its reservations to article 10(2) and (3) of the ICCPR, and article 37(c) of the Convention on the Rights of the Child (CRC);
 - (e) reform death in custody investigations so they are carried out by an independent body; and
 - (f) introduce legislation that requires governments to act on Coronial recommendations.

Access to Justice

8. The ATSILS are the preferred and sometimes only legal aid option for Aboriginal and Torres Strait Islander peoples, many of whom experience language and cultural barriers, low levels of numeracy and literacy and distrust of the justice system. Despite Aboriginal and Torres Strait Islander incarceration rates increasing at an alarming rate over the past decade and the subsequent increase in demand for the ATSILS services, the amount of real funding provided has been declining. A recent one off budgetary increase provided to the ATSILS was greatly welcomed but does not nearly go far enough. In addition to the level of funding, cycles of funding are also of concern as their restricted lengths (one to three years) prevents long term strategic planning and on-going program development.
9. Of particular concern is the increasing demand for the following ATSILS services:

- civil services, especially in the area of tenancy advice given the enormous changes being made to Aboriginal and Torres Strait Islander housing;
 - social security law given the continuation and expansion of income management, which impacts disproportionately on Aboriginal and Torres Strait Islander peoples; and
 - representation to defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.⁷
10. Aboriginal and Torres Strait Islander women and children remain chronically disadvantaged in terms of their access to justice, especially in regards to situations of family violence. Family Violence Prevention Legal Services (FVPLS) are legal aid providers specialising in family violence. FVPLS most often exist in regional and remote areas and are not always funded to service urban areas where large proportions of Aboriginal and Torres Strait Islander peoples reside. The high incidence of family violence against Aboriginal and Torres Strait Islander women,⁸ combined with the conflict of interest policies of the ATSILS,⁹ means that often the FVPLS are the only culturally appropriate legal assistance option available to Aboriginal and Torres Strait Islander women.
11. The gross-underfunding of the ATSILS and the FVPLS, compared to mainstream legal aid service providers and departments of public prosecutions¹⁰ discriminates against Aboriginal and Torres Strait Islander peoples and denies equal access to justice.
12. The ATSILS recommend the Government:
- (a) ensure the funding of the ATSILS and FVPLS is proportionally increased to equal that of mainstream legal aid services and departments of public prosecutions;
 - (b) provide the ATSILS and the FVPLS with long term funding agreements, rather than three year agreements;
 - (c) implement initiatives, in consultation with Aboriginal and Torres Strait Islander communities, to reduce the high incidence of family violence; and
 - (d) provide additional funding to the ATSILS and FVPLS so that they can increasingly conduct human rights law, research and advocacy work at the local, national and international level.

Interpreters

13. Despite the right to an interpreter in criminal proceedings and in some civil proceedings being enshrined in numerous international human rights instruments to which Australia is a party,¹¹ Aboriginal and Torres Strait Islander peoples continue to be denied access to interpreter services.¹² This means that Aboriginal and Torres Strait Islander peoples can have great difficulty communicating with police, giving evidence, consulting with and giving instructions to their lawyer, and understanding court proceedings. As a result, Aboriginal and Torres Strait Islander peoples are often denied a fair trial.¹³
14. The ATSILS recommend the Government provide adequate resources for the establishment and ongoing delivery of a national Aboriginal and Torres Strait Islander interpreter service.

Stolen Generations and Stolen Wages

15. The forced removal of Aboriginal and Torres Strait Islander children from their families was official government policy from 1909 to 1969. Forced removal was highly traumatic for members of the Stolen Generations and their families. Once in care, high proportions were psychologically, physically and sexually abused. Consequently, depression, anxiety, post-traumatic stress and suicide are commonplace. The impact of this trauma has also passed on to successive generations. When members of the Stolen Generations have their own children they have few past role models of parenting to draw on which can often result in a tragic cycle where their children are also removed by child protection agencies.
16. From 1900 to the 1980s Australian State and Territory governments withheld wages and other payments from Aboriginal and Torres Strait Islander peoples under their care and protection. This has had economic, social, cultural, civil, political and historical implications for Aboriginal and Torres Strait Islander peoples and is directly related to the disadvantage and poverty experienced today. The Government has refused to compensate the Stolen Generations and their families and failed to establish a national scheme for the repayment of Stolen Wages.¹⁴
17. The ATSILS recommend the Government immediately implement:
 - (a) a national compensation scheme for members of the Stolen Generations and, where they are deceased, their descendants; and
 - (b) a national scheme for the return of all Stolen Wages to living victims and, where they are deceased, their descendants.

Racial Discrimination and Vilification

18. Aboriginal and Torres Strait Islander peoples historically, and in present day, suffer from direct and indirect systemic racial discrimination and vilification at high levels. A new emerging issue has been an increase in racial discrimination and vilification of Aboriginal and Torres Strait Islander peoples in the media and online.
19. The Northern Territory Emergency Response (NTER) was introduced to address reported child abuse in the Northern Territory (NT), yet actively discriminates against Aboriginal and Torres Strait Islander peoples and involves the suspension of the *Racial Discrimination Act 1975* (Cth).¹⁵ The discriminatory nature of the NTER was recognised by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.¹⁶ The NTER vilifies and stigmatises Aboriginal and Torres Strait Islander peoples as being incapable of managing their money and looking after their families. Despite recent amendments to widen the application of compulsory welfare quarantining to non-Aboriginal and Torres Strait Islander communities in the NT, the NTER still disproportionately affects Aboriginal and Torres Strait Islander peoples due to the high population of Aboriginal peoples in the NT and high incidence of welfare dependence. The discrimination evident in the NTER forms part of a wider framework of systemic racism against Aboriginal and Torres Strait Islander peoples.
20. The ATSILS recommend the Government:
 - (a) abolish compulsory welfare quarantining, or where quarantining continues, that it be available on a voluntary basis, or employed only as a measure of last resort, applied on an evidence-based, case-by-case basis, that maintains full recourse to administrative and judicial review;

- (b) review all policies and legislation in order to identify and eliminate structural discrimination against Aboriginal and Torres Strait Islander peoples and develop a national action plan to target systemic racism, including in the media and online; and
- (c) through the process of harmonising existing anti-discrimination legislation, grant the ATSILS and other representative bodies the standing to commence legal proceedings on behalf of aggrieved Aboriginal and Torres Strait Islander peoples collectively.

Child Protection

21. Aboriginal and Torres Strait Islander children are more than five times more likely to be the subject of child protection substantiations than non-Aboriginal and Torres Strait Islander children,¹⁷ which often leads to juvenile and adult involvement in the criminal justice system.¹⁸ It is widely accepted that there is a close link between child abuse and neglect and the broader issues of poverty, in all indicators of which Aboriginal and Torres Strait Islander peoples rate as the most disadvantaged peoples in Australia.¹⁹
22. The ATSILS recommend the Government:
- (a) implement a holistic approach to child protection incorporating a public health and prevention model to reduce the over-representation of Aboriginal and Torres Strait Islander children in the system and address the underlying causes of child abuse and neglect; and
 - (b) adhere to the Indigenous Child Placement Principles at all levels of government and provide clarification of the definitions for compliance.

Self-Determination

23. There continues to be a lack of genuine collaboration in effective and meaningful consultation with Aboriginal and Torres Strait Islander peoples.²⁰
24. The ATSILS recommend the Government commit to obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects their communities, and to genuine collaboration by developing and implementing a framework for self-determination, outlining consultation protocols, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance.

ATTACHMENT 1 - REFERENCES

- ¹ Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
Aboriginal Legal Rights Movement Inc.
Aboriginal Legal Service (NSW/ACT)
Aboriginal Legal Service of Western Australia (Inc.)
Central Australian Aboriginal Legal Aid Service
North Australian Aboriginal Justice Agency
Victorian Aboriginal Legal Service Co-operative Limited
- ² The rate of imprisonment for Aboriginal and Torres Strait Islander adults was 14 times higher than the rate for non-Aboriginal and Torres Strait Islander adults at 30 June 2009 (Australian Bureau of Statistics, *Prisoners in Australia* 2009). Between 2000 and 2008, the Aboriginal and Torres Strait Islander adult imprisonment rate in Australia rose by approximately 40 percent (Australian Bureau of Statistics, *Prisoners in Australia* 2008). Aboriginal and Torres Strait Islander juveniles comprise 54 per cent of all juveniles in detention, despite comprising only 5 per cent of the 10-17 year old age group, and are detained at a rate 26 times higher than that of non-Aboriginal and Torres Strait Islander juveniles (Australian Institute of Criminology, *Australian Crime: Facts and Figures* 2009, 113).
- ³ The Closing the Gap agenda is the series of targets committed to by the Australian Government in regards to reducing the disproportionate levels of disadvantage faced by Aboriginal and Torres Strait Islander peoples.
- ⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma explains justice reinvestment as:

a localised criminal justice policy approach that diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services in communities where these issues are most acute in order to address the underlying causes of crime in those communities.

Justice reinvestment still retains prison as a measure for dangerous and serious offenders but actively shifts the culture away from imprisonment and starts providing community wide services that prevent offending. Justice reinvestment is not just about reforming the criminal justice system but trying to prevent people from getting there in the first place.

Justice reinvestment is a model that has as much in common with economics as social policy. Justice reinvestment asks the question: is imprisonment good value for money? The simple answer is that it is not. We are spending ever increasing amounts on imprisonment while at the same time, prisoners are not being rehabilitated, recidivism rates are high and return to prison rates are creating overcrowded prisons (Tom Calma, *Social Justice Report 2009 Aboriginal and Torres Strait Islander Social Justice Commissioner* (2009) 9).
- ⁵ These issues are of particular importance given that incarcerated peoples' liberties have been taken away and thus the standard of care provided to them must increase. This principle applies to everyone in prison.
- ⁶ On 27 January 2008, a respected Ngaanyatjarra Aboriginal Elder named Mr Ward (whose first name cannot be used for cultural reasons), was placed in the back of a prison transport van for up to four and half hours while temperatures outside exceeded 40 degrees Celsius. Mr Ward was being transferred from Laverton to Kalgoorlie in remote WA to face a charge of driving under the influence. Mr Ward was

found unconscious in the back of the van, having suffered heat stroke. He subsequently died in hospital. The van's air-conditioning system was faulty. A coronial inquest into Mr Ward's death revealed systemic failings which contributed to the death. These included over policing, denial of bail, inhumane prisoner transport, lack of training of justices of the peace, police and private contractor staff, lack of governmental supervision of contractual duties and inadequate funding. Findings were delivered in June 2009, where the WA Coroner found that articles 7 and 10 of the International Covenant on Civil and Political Rights had been breached.

⁷ Except for in very limited circumstances, the ATSILS are not funded to provide legal advice and representation to defendants of Domestic Violence Orders or Apprehended Violence orders. Where there is some correlation to present criminal matter/s, or where the breach of an order has resulted in criminal charges, the ATSILS can provide some advice and assistance to Aboriginal and Torres Strait Islander defendants. However, while the ATSILS' criminal sections can assist Aboriginal and Torres Strait Islander defendants in relation to criminal charges stemming from the breach of an order, they are largely unable to provide services in relation to defending orders at the initial point of application, or as a general rule, in relation to applications for variations of orders. Domestic Violence Order and Apprehended Violence Order matters can be quite complicated, especially when they involve issues of property, children, leases and the like in addition to the language, cultural and educational barriers faced by Aboriginal and Torres Strait Islander peoples. Providing an adequate service to Aboriginal and Torres Strait Islander defendants would require the provision of significant additional resources to the ATSILS. In urban areas it would require both an advice and duty service, and in remote areas it would require dedicated lawyers, support staff and a sufficient budget so as to enable travel to all remote courts.

⁸ Aboriginal and Torres Strait Islander women are 35 times more likely than non-Aboriginal and Torres Strait Islander women to be hospitalised due to family violence related assaults (Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2009 Overview*, 24).

⁹ FVPLS are crucial in terms of access to justice due to the fact that the conflict of interest policies to which the ATSILS are bound, often restrict their ability to assist Aboriginal and Torres Strait Islander peoples in family violence matters. These conflict of interest policies often mean that the ATSILS cannot act for either party in a matter between Aboriginal or Torres Strait Islander peoples, cannot represent victims of family violence if they have already represented the perpetrator in the past, and that they are required to give priority to defending criminal cases over other matters. Given that Aboriginal and Torres Strait Islander women often need legal assistance in relation to matters of family violence and family law, and that such disputes often involve other Aboriginal and Torres Strait Islander people, it is easy to see how the FVPLS are often the only legal assistance option available to Aboriginal and Torres Strait Islander women experiencing family violence issues. It should be noted however that some of the ATSILS, such as the Northern Australian Aboriginal Justice Association (NAAJA) for example, are able to provide legal advice to significant numbers of female victims of crime through the implementation of an information barrier or 'Chinese wall' between its Civil and Criminal sections. In fact, until recently NAAJA was the only service providing this assistance to women in most of the remote communities in its service area.

¹⁰ In 2003 the gap between existing funding and the funding needed for ATSILS to keep their services at the same level of mainstream services was in the vicinity of twenty-three million dollars (ATSIC Office of Evaluation & Audit, *Evaluation of the Legal and Preventative Services Program* (2003). In 2008, the Aboriginal Legal Rights Movement (ALRM) lodged a formal complaint to the United Nations about the treatment of Aboriginal and Torres Strait Islander peoples. At this time, ALRM Chairperson Frank Lampard reported that "Aboriginal Legal Aid has been static for more than a decade, meaning it has fallen by about 40 per cent in real terms" and that this shortfall constitutes "discrimination because mainstream

legal aid has increased by 120 per cent in the same time” (ABC News, *Indigenous rights complaint lodged with UN* (2008) ABC News <www.abc.net.au/news/stories/2008/09/16/2366190.htm?section=australia> at 25 June 2010). The formal complaint concludes:

It is our submission that the Special Rapporteur should make the Australian Government aware of its obligations to Indigenous Australians. Repeated requests to the Government for additional funding to support our programs for the benefit of the Aboriginal people over at least the last 8 years have been denied, and all avenues for our complaints have been exhausted within Australia. We wish for the Government to be made to respond formally to our complaint, and thus to be held accountable for its lack of spending on Aboriginal legal aid to Aboriginal people (Aboriginal Legal Rights Movement letter to the Special Rapporteur on the Human Rights of Indigenous Peoples re Complaint Regarding the Discriminatory Underfunding of the Aboriginal Legal Rights Movement in Australia, 20 June 2008).

Since 2003, the demand for the ATSILS’ services has increased as has the cost of providing those services. Despite recent one-off budgetary increases, and in contrast to increases in funding for mainstream legal aid services and departments of public prosecutions, the ATSILS have not received any meaningful increase in funding since this time. Thus, the situation has significantly worsened since 2003 and the funding gap between the ATSILS and mainstream legal aid services has no doubt further widened.

¹¹ See for example the ICCPR article 14(3)(a)(b) and (f) which provide that in criminal cases all should “... be informed promptly and in detail, in a language which he understands of the nature and cause of the charge against him”, be able to communicate with counsel in the preparation of one’s defence and “have the free assistance of an interpreter if he cannot understand the language used in court.” Also see the UDHR articles 7 and 10, the CERD article 5(a), the ICCPR article 9 (2), the CRC articles 2 (1), 9 (2), 12, 40 (b)(vi) and the UNDRIP article 13.

¹² Only a handful of Aboriginal and Torres Strait Islander interpreter services exist, including the Kimberley Interpreting Service in Western Australia and the Aboriginal Interpreter Service in the Northern Territory. These services receive funding from several government bodies yet are so poorly resourced that they are unable to service all courts and locations in their respective jurisdictions. The ATSILS often find it difficult and sometimes impossible to access an appropriate Aboriginal or Torres Strait Islander interpreter.

¹³ There is significant evidence that Aboriginal and Torres Strait Islander peoples who cannot speak English are being denied the right to a fair trial. Numerous examples of this can be found in Australian case law. For example in *Frank v Police* (2007) SASC 288, the Supreme Court of South Australia overturned an earlier sentence against a 27-year old Aboriginal man from the Anangu, Pitjantjatjara and Yankunytjatjara Lands on the basis that repeated failures to provide the man with a qualified interpreter meant that he had not received a fair hearing. Also, in *Ebatarinja v Deland* (1998) HCA 62 the accused was facing a committal hearing in the High Court of Australia in relation to a charge of murder. He was a deaf mute Aboriginal man from Central Australia who was not capable of understanding committal proceedings and was unable to communicate with lawyers. The High Court held that as the defendant was not capable of understanding the proceedings, the Court had no power to continue with the committal proceedings and the murder charge was permanently stayed. Further, in *R v Willie* (1885) 7 QLJ (NC) N108, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them.

In addition to interpreters in spoken Aboriginal and Torres Strait Island languages, there is also a significant need for interpreters for Aboriginal and Torres Strait Islander peoples with hearing loss whose first language is not English. Aboriginal and Torres Strait Islander peoples suffer ear diseases and hearing

loss at a rate 10 times higher than non-Aboriginal and Torres Strait Islander peoples in Australia, and arguably at the highest rate of any peoples in the world. This high rate of hearing loss in combination with the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system means that there is a high incidence of Aboriginal and Torres Strait Islander peoples moving through the criminal justice system experiencing communication difficulties because of hearing loss. This has led to serious miscarriages of justice and violations of the right of Aboriginal and Torres Strait Islander peoples to a fair trial. For example, in February 2010 Tristan Ray, Manager of The Central Australian Youth Link Up Service, gave the following evidence to the Senate Community Affairs References Committee in its Inquiry into Hearing Health in Australia:

One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, 'Good' and 'Yes'—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's participation in the criminal justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on (Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray]).

In conjunction with addressing the lack of interpreters for Aboriginal and Torres Strait Islander peoples with hearing loss, the Australian Government should also look at addressing the high rate of ear disease and hearing loss that is at the root of the problem.

¹⁴ Despite election promises and a formal National Apology, a national compensation scheme for members of the Stolen Generations was ruled out by the current Government in 2008. Some schemes exist however, including an official Stolen Generations compensation scheme in Tasmania, more general compensation schemes for both Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander children who suffered harm while in state care in Queensland and Western Australia, and specific Stolen Wages repayment schemes in Queensland and New South Wales. These schemes however, require documented evidence of suffering or withheld wages, which can often be lost or very difficult to locate, usually only take applications for a limited amount of time, do not always allow compensation to be paid to descendants of deceased victims, and pay only a limited amount of compensation that does not necessarily reflect the true harm that was inflicted or comparative loss suffered in terms of wages. Also, Aboriginal and Torres Strait Islander peoples in remote communities are not always aware of the existence of these schemes and they can be difficult to access for Aboriginal and Torres Strait Islander peoples.

¹⁵ An independent review of consultations regarding the NTER found that:

[t]he NTER is constituted by a comprehensive suite of measures of extraordinary scope and gravity that impact on almost every aspect of the lives of Aboriginal and Torres Strait Islander peoples in the Northern Territory. The measures range from those that impact on Aboriginal and Torres Strait Islander peoples individually, including income quarantining, liquor restrictions and interaction with the criminal justice system, to control of Aboriginal and Torres Strait Islander organisations, assets and land by Government employees, and the undermining of land rights and the rights of traditional owners (Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be heard – A response to the NTER Consultations June to August 2009* (2009) 12).

The NTER is a clear example of racial discrimination, and violates the rights of Aboriginal and Torres Strait Islander peoples to be free from racial discrimination, collective self-determination, social security,

freedom, dignity, individual autonomy in regards to family and other matters, privacy, due process, land tenure and property, and cultural integrity which are fundamental human rights guaranteed in numerous international human rights instruments to which Australia is a party.

Despite recent amendments to the NTER designed to allow for the reinstatement of the *Racial Discrimination Act 1975* they do not go far enough so as to allow for the full reinstatement of the *Act*. There are a range of NTER measures that will continue to remain immune from challenge under the *Act* in spite of the Government's amendments. These include, compulsory five-year leases of Aboriginal and Torres Strait Islander land, the retention of unreasonable Business Management Area powers, the creation of a public right of access to Aboriginal and Torres Strait Islander land, and the retention of the Australian Crime Commission's additional powers.

¹⁶ James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, UN Doc A/HRC/15/ (2010).

¹⁷ Kelly Richards, 'Juveniles Contact with the Criminal Justice System in Australia', AIC Monitoring Reports 07, 2009, 19. In Queensland for example, Aboriginal and Torres Strait Islander children comprise only 6.3 per cent of the child population yet comprise 31.5 per cent of all children in the child protection system. This over-representation continues to increase.

¹⁸ Brenda Bailey, *Special Commission of Inquiry into Child Protection Services in NSW* (2008) 2-3; Anna Stewart, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) Office of Crime Statistics and Research <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf> at 24 May 2010. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.

¹⁹ Approximately 40 per cent of Aboriginal and Torres Strait Islander peoples living in major cities, outer regional, remote and very remote areas of Australia live below the poverty line and this rate increases to over 50 per cent in inner regional areas (B. Hunter, *Assessing the evidence on Indigenous socioeconomic outcomes: A focus on the 2002 NATSISS* (2006) 100). The Steering Committee for the Review of Government Service Provision in its *Overcoming Indigenous Disadvantage: Key Indicators 2009 Overview* found that:

- The life expectancy of Aboriginal and Torres Strait Islander peoples is currently 12 years less for males and 10 years less for females than non-Aboriginal and Torres Strait Islander males and females (p.13).
- The infant mortality rate is between two to three times higher for Aboriginal and Torres Strait Islander infants than non-Aboriginal and Torres Strait Islander infants and the child mortality rate is between two to four times higher for Aboriginal and Torres Strait Islander children than non-Aboriginal and Torres Strait Islander children (p.14).
- The rate of hospitalisation of children under the age of five for potentially preventable diseases and injuries is twice as high for Aboriginal and Torres Strait Islander children than non-Aboriginal and Torres Strait Islander children (p.30).

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- The death rate from external causes and preventable diseases for children aged less than five years is two to five times as high for Aboriginal and Torres Strait Islander children than non-Aboriginal and Torres Strait Islander children (p.30).
 - The adult Aboriginal and Torres Strait Islander hospitalisation rate for potentially preventable chronic conditions is six times higher than the rate for non-Aboriginal and Torres Strait Islander adults (p.38).
 - Aboriginal and Torres Strait Islander men and women are five and four times as likely as non-Aboriginal and Torres Strait Islander men and women to die from avoidable causes (p.39).
 - Aboriginal and Torres Strait Islander peoples are five times as likely to die from heart attack, twice as likely to die from cancer, 18 times as likely to die from diabetes, and twice as likely to die from suicide as non-Aboriginal and Torres Strait Islander people (p.39).
 - Aboriginal and Torres Strait Islander peoples have higher treatment rates for mental health issues in community clinics, residential care facilities and hospitals compared with non-Aboriginal and Torres Strait Islander people (p.41).
 - Aboriginal and Torres Strait Islander females and males are 35 and 21 times as likely to be hospitalised due to family violence related assaults as non-Aboriginal and Torres Strait Islander females and males (p.24).
 - 47 per cent of Aboriginal and Torres Strait Islander students stay at secondary school until their final year compared to 76 per cent of non-Aboriginal and Torres Strait Islander students (p.18).
 - Aboriginal and Torres Strait Islander peoples aged 20–24 years attend university at about one-fifth the rate of non-Aboriginal and Torres Strait Islander people and attend Technical and Further Education facilities at two-thirds the rate of non-Aboriginal and Torres Strait Islander people (p.20).
 - Unemployment is over three times higher for Aboriginal and Torres Strait Islander peoples than for non-Aboriginal and Torres Strait Islander people (p.19).
 - The average income of Aboriginal and Torres Strait Islander households is only 65 per cent of the average income of non-Aboriginal and Torre Strait Islander households (p.22).
 - Aboriginal and Torres Strait Islander peoples are five times more likely to live in overcrowded households than non-Aboriginal and Torres Strait Islander people (p.49).

²⁰ In 2009 the Australian Government conducted a process of consultation with Aboriginal and Torres Strait Islander communities in the Northern Territory in relation to the implementation of measures to amend the racially discriminatory NTER. Following the consultations the Government declared that the consultations revealed that Aboriginal and Torres Strait Islander communities in the Northern Territory were mostly in favour of the Government’s proposed amendments, including the retainment of welfare quarantining. However, an independent review of the Australian Government’s public consultation process found that the process was fundamentally flawed and that it could not be relied upon as evidence of the consent of Aboriginal and Torres Strait Islander peoples in the Northern Territory to the ‘special measures’ related to the NTER. The review found that the NTER consultations took place on plans and decisions already made by the Australian Government, lacked Aboriginal and Torres Strait Islander

involvement in the design of the consultation process, did not adequately utilise interpreters, did not provide Aboriginal and Torres Strait Islander communities with sufficient notice which meant that all relevant stakeholders were not able to attend, did not properly explain the full range of amended NTER measures, and failed to explain complex legal concepts including the meaning of 'special measures' (Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be Heard-a response to the NTER Consultations June to August 2009*).

There has also been documented evidence to support concerns regarding the Australian Government's motives for conducting the consultation. In late March 2009, the Minister responsible for the consultation received advice from her Department that recommended against formal consultation with Aboriginal and Torres Strait Islander peoples in the Northern Territory because of the likelihood that the consultations would not result in consent being given by Aboriginal and Torres Strait Islander peoples and thus, the implementation of the Government's proposed amendments could not be justified (Brief from the Department of Families Housing Community Services and Indigenous Affairs to the Minister for Families Housing Community Services and Indigenous Affairs (2009) <www.nit.com.au/downloads/files/Download_211.pdf>). This shows a lack of commitment to a genuine consultation process leading to informed consent and suggests that the consultation process was initiated in order to avoid legal challenges to the Government's actions. This interpretation of the Government's motives is supported by the inadequacy of the consultation process described above.

Further investigations of the consultation process have found that many participants of the consultations expressed concern over the proposed amendments, especially in regards to the ineffectiveness of measures such as welfare quarantining, yet this information seemed to be ignored in the final report by the Government and did not seem to be taken into account in decision-making processes. Many participants have indicated that rather than a genuine consultation process, the NTER consultations were more of a notification process on behalf of the Government, an exercise in 'checking the box'.