



**Comments on Australian Government response to
Concluding Observations of the UN Committee on
the Elimination of Racial Discrimination**

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Overview

1. On 27 August 2010 the UN Committee on the Elimination of Racial Discrimination (**Committee**) adopted its Concluding Observations on Australia. The Committee asked Australia to follow up with detailed information within 12 months on three of the recommendations, concerning:
 - (a) the role and functions of the Race Discrimination Commissioner and the powers of the Australian Human Rights Commission (**AHRC**);
 - (b) developments related to the Northern Territory Emergency Response (**Northern Territory Intervention**); and
 - (c) racially motivated violence, particularly against international students.
2. The Australian Government has released “Draft language for the Australian Government’s response to 27 August 2010 concluding observations of the UN Committee on the Elimination of Racial Discrimination (CERD)” (**draft Government Response**).
3. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to provide feedback on the draft Government response. This submission sets out in turn our comments in relation to each of the conclusions identified by the Committee. This submission supplements the information contained in the comprehensive NGO report provided to the Committee, entitled *Freedom, Respect, Equality, Dignity: Action*.¹
4. This submission is being provided both to the Australian Government and to CERD.

2. Race Discrimination Commissioner (Concluding Observation 11)

2.1 Race Discrimination Commissioner

5. The Committee urged Australia to appoint a full time Race Discrimination Commissioner. The HRLC welcomes that the Australian Government has restored the stand-alone position of the Race Discrimination Commissioner. The absence of a full time Race Discrimination Commissioner since 1999 has been a considerable concern, particularly given the considerable issues concerning race discrimination in Australia reflected in CERD’s Concluding Observations. The HRLC welcomes the appointment of Dr Helen Szoke as the full time Race Discrimination Commissioner, which was announced on 3 August 2011.

¹ *Freedom, Respect, Equality, Dignity: Action*. NGO Submission to the UN Committee on the Elimination of Racial Discrimination (June 2010), available at <http://www.hrlrc.org.au/files/NGO-CERD-Report-Final.pdf>.

2.2 The Powers and Functions of the AHRC

6. The Committee also requested that the Australian Government consider expanding the powers, functions and funding of the AHRC. The Australian Government has not undertaken that consideration in relation to the powers and function of the AHRC.
7. The AHRC is Australia's National Human Rights Institution (**NHRI**). The AHRC investigates and conciliates complaints under federal anti-discrimination legislation (including the *Racial Discrimination Act 1975*), conducts inquiries, publishes annual reports on Aboriginal peoples' social justice and native title, advises parliaments and governments about the development of laws, programs and policies to protect human rights, and increases public awareness of human rights through education and public discussion.²
8. The AHRC's powers and function are still limited by the scope of its constitutive act. For example:
 - (a) The AHRC does not have the power to independently initiate complaints. Therefore individuals themselves are responsible for asserting their rights and ensuring that the RDA is complied with. This reactive, complaints based approach is not adequately effective in identifying and addressing race discrimination, particularly discrimination that is systemic or structural in nature.
 - (b) In relation to complaints of human rights breaches, the AHRC cannot provide affected persons with effective or enforceable remedies.³
 - (c) The AHRC produces reports that indicate when Australia is not meeting its international human rights obligations under the treaties that it has ratified. However, these reports are not binding on Government. The National Human Rights Consultation report recommended that the Australian Government table a response to any AHRC report on complaints within six months of receiving the report.⁴ This has not been done. In many respects, therefore, the AHRC is only as effective as the government of the day allows it to be.⁵

² AHRC website, <http://www.hreoc.gov.au>.

³ Elizabeth Evatt, 'Meeting Universal Human Rights Standards: The Australian Experience' (Speech delivered at Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 22 May 1998) at page 7.

⁴ *Report of the National Human Rights Consultation* (2009), Recommendation 13.

⁵ Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (Doctoral Thesis, Monash University, 2004) pages 12-14.

Recommendations

THAT the Australian Government expand the function and powers of the Australian Human Rights Commission so that it meets the standards for proper performance under the Paris Principles and can effectively:

- consider (on its own motion) and report on the human rights implications of any existing or proposed federal, state or territory legislation;
- initiate investigations of its own motion and conduct those investigations appropriately, including using powers to enter and search premises and to compel the production of information and evidence where necessary;
- on its own motion, seek to enforce conciliation agreements;
- make binding codes of conduct or guidelines setting out the process for the resolution of complaints;
- intervene in all proceedings where significant human rights issues arise; and

THAT the Australian Government table in Federal Parliament reports of the Australian Human Rights Commission, including reports prepared by the Commission after the conduct of inquiries and the annual Social Justice Report and Native Title Report, and that the Government substantively respond to any such report within six months.

3. The Northern Territory Intervention (Concluding Observation 16)

9. In paragraph 16 of the Concluding Observations, the Committee:
- (a) noted that Australia would complete the reinstatement of the *Racial Discrimination Act 1975* (Cth) in December 2010;
 - (b) expressed concern that the Northern Territory Intervention measures continue to discriminate on the basis of race, including through the use of so-called “special measures”, as well as concern about the continuing difficulties in accessing remedies for discriminatory measures;
 - (c) urged Australia to guarantee that all special measures are in accordance with the Committee’s General Recommendation No 32; and
 - (d) encouraged Australia to:
 - (i) continue to address the unacceptably high level of disadvantage and social dislocation being experienced by ATSI peoples;

- (ii) reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
- (iii) ensure that Government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act

10. Notwithstanding the information provided to the Committee by the Australian Government during the Committee's review in August 2010, including the fact that the amendments to the Northern Territory Intervention has been passed on 21 June 2010, the Committee remained of the strong view that the package of legislation comprising the Northern Territory Intervention continues to discriminate against Aboriginal and Torres Strait Islander peoples.
11. Since the Committee's Concluding Observations were issued, the Australian Government has not made any amendments to the Northern Territory Intervention legislation. During this time, evidence is continuing to emerge that the Intervention's measures are having a discriminatory and negative effect on many Aboriginal peoples.

3.1 Reinstatement of the Racial Discrimination Act

12. As explained in the NGO Report, amendments to the Northern Territory Intervention legislation were introduced in June 2010 that reinstated the operation of the Racial Discrimination Act with effect from 1 January 2011. While the Australian Government's statement that the Racial Discrimination Act is now fully reinstated is accurate, there remain difficulties in using the Act to challenge and provide remedies for racially discriminatory measures, including:
- (a) the absence of a "notwithstanding" clause to ensure that the provisions of the Racial Discrimination Act prevail over any inconsistent (racially discriminatory) provisions in the Northern Territory Intervention legislation. The objects clauses contained in the legislation (which identify that the purpose of the measures is "to enable special measures to be taken") make it very difficult to successfully challenge any of the intervention measures as Australian courts are required to interpret legislation consistently with its purpose; and
 - (b) the reinstatement does not have retrospective application, meaning that any racially discriminatory acts or decisions made prior to the reinstatement of the Racial Discrimination Act cannot be challenged.
13. The Northern Territory Intervention legislation continues to raise difficulties for aggrieved individuals to challenge any of the Intervention measures and does not afford an "effective remedy" for many CERD violations.

3.2 Income Management Scheme

14. The Australian Government asserts that the revised income management scheme is non-discriminatory as it no longer is targeted at Aboriginal and Torres Strait Islander peoples. Following the June 2010 amendments, instead of applying in prescribed Aboriginal communities in the Northern Territory, compulsory income quarantining now applies to the following groups of people in prescribed areas:
- (a) “disengaged youth” (people aged 15 to 24 receiving welfare for more than 13 weeks in the last 26 weeks);
 - (b) “long-term welfare recipients” (people aged 25 and above who have been receiving welfare in the long-term); and
 - (c) people assessed as being “vulnerable”.
15. People falling within these categories may be given an exemption if they can provide evidence of “socially responsible behaviour” (such as engagement in study or a sustained pattern of employment) or “responsible parenting” (based on school enrolment and attendance).
16. While the revised income management scheme may on its face appear to be non-discriminatory, it is clear that the operation of compulsory income management has a disproportionate impact on Aboriginal peoples. As at 22 April 2011:
- (a) 92% of individuals on compulsory income management in the Northern Territory are Aboriginal people; and
 - (b) of the 2,130 exemptions from compulsory income management granted, only 25% were granted to Aboriginal people.⁶
17. The Australian Government also continues to rely on the “extensive consultations with Indigenous people across the Northern Territory” which it undertook in mid-2009 as a basis for the imposition of compulsory income management. As explained in the NGO Report, however, there have been serious concerns raised regarding significant procedural and substantive failures of the consultation process undertaken by the Government, including:
- (a) lack of independence;
 - (b) lack of notice to communities about the consultations;
 - (c) the absence of interpreters and inadequate explanations of the Northern Territory Intervention measures and complex legal concepts;

⁶ Information obtained during Senate Budget Estimates Hearing on 1 June 2011, available at <http://www.aph.gov.au/senate/estimates/index.htm>.

- (d) the fact that the consultations were on matters which the government had already implemented and determined would continue, such as compulsory income management; and
- (e) inadequate recording and reporting of consultations.⁷

18. It is therefore very difficult for the Australian Government to maintain that the compulsory income management provisions of the Northern Territory Intervention are compliant with CERD and the Racial Discrimination Act.

3.3 Five-year Leases

19. The Australian Government states that it is not continuing the five year leases that were compulsorily acquired under the Northern Territory Intervention legislation and it is instead working with communities on the negotiation of voluntary, longer term leases. However, there have been concerns expressed by some Aboriginal communities that they have been pressured into signing these longer term leases against their will. In the case of leases over the Alice Springs Town Camps, members of 16 Aboriginal communities initiated court proceedings against the Australian Government in an attempt to prevent 40-year leases from being signed. The proceedings were commenced following a threat from the Minister for Indigenous Affairs that the land would be compulsorily acquired under powers granted to her by the Northern Territory Intervention legislation if the communities did not sign the leases. Ultimately the proceedings were unsuccessful, with the court determining that 40-year leases were more in the communities "best interests" than the only other option of compulsory acquisition.⁸

20. Another concern is that the Australian Government is making the provision of basic goods and services – such as housing – conditional on obtaining 40-leases over Aboriginal land. The National Partnership Agreements that comprise the Close the Gap policy require that the obligation of the Commonwealth Government to provide funding for housing is "conditional on secure land tenure being settled".⁹ The Minister for Indigenous Affairs has set out three key requirements that determine whether secure land tenure has been settled:¹⁰

⁷ Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be Heard? — A Response to the NTER Consultations June to August 2009* (November 2009). See also, Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation Final Report* (September 2009).

⁸ See *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (26 November 2009), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2009/1397.html>.

⁹ *National Partnership Agreement on Remote Indigenous Housing*, clause 15(a).

¹⁰ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *2009 Native Title Report* (2009) 156.

- (a) the Government must have access to and control of the land on which construction will proceed for a minimum period of 40 years;
 - (b) tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the state housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required; and
 - (c) native title issues must also have been resolved, in that any applicable process required by the Native Title Act has been conducted.
21. These are provisions that are directed at, and apply only to, Aboriginal communities, which therefore raise serious concerns in relation to CERD and the realisation of a number of other fundamental human rights.

3.4 Next Steps

22. The Australian Government has indicated that it will undertake further consultations with Aboriginal communities on future plans to tackle disadvantage and has released a discussion paper entitled *Stronger Futures in the Northern Territory*. However, concerns have already been expressed about the nature of the proposed consultation process, including:
- (a) the haste with which it is intended to conduct the consultations; and
 - (b) as with the previous consultations, that they have been designed to persuade communities to accept what has been pre-determined by the Government and is therefore not in the spirit of genuine engagement with and involvement of Aboriginal people.
23. In response to the Government's proposed consultations, Rev. Djinyini Gondarra (who briefed the CERD Committee in August 2010) stated that:¹¹

The Aboriginal people of the Northern Territory will only endorse a new initiative by the Government to improve the lives of Aboriginal people if the Government first establishes a diplomatic and respectful dialogue, negotiation and relationship with the traditional lawmen and lawwomen in the communities to be affected. These are the people that are seen as the true leaders by their communities, who are charged with maintaining ceremony, language, law and order. They must be properly consulted before any new initiative can take place in their communities.

¹¹ Statement released by Rev Dr Djinyini Gondarra, *Response to the Prime Minister Julia Gillard's Announcement of a Second Intervention in the Northern Territory and a further Round of Consultations in the NT Starting this Week*, 26 June 2011.

4. Racially Motivated Violence (Concluding Observation 23)

24. The CERD Committee recommended that Australia:
- (a) intensify its efforts to combat racially motivated violence, including by requiring law enforcement officers to collect data on the nationality and ethnicity of victims of crime; and
 - (b) provide updated statistical data on the number and nature of reported hate crimes.
25. The draft Australian Response clearly states that police forces in Australia do not collect data on victims' nationality, ethnicity or immigration status, and the report only recognises the need for credible data on international students. There is no indication that the data sought by the CERD Committee will be collected or provided. Without these statistics, the prevalence of hate crime and any trends in terms of the nationality or ethnicity of victims will be unavailable.
26. The efforts in the report that are stated to be made to combat racially motivated violence include increased police presence and increased police search powers in Victoria. These powers allow police to search people in a designated area without any suspicion of wrongdoing.¹² Far from combating racially motivated violence, these laws give unnecessary powers to police that breach the right to privacy¹³ and risk the violation of the right to non-discrimination, including on the basis of race. Similar laws in the UK have been found to be used disproportionately against black people, in some areas up to 10 times as often.¹⁴

Recommendations

THAT the Australian Government take immediate steps, including through intergovernmental mechanisms if necessary, to ensure that police forces in all Australian jurisdictions collect data on the nationality and ethnicity of victims of crime.

¹² *Control of Weapons Act 1990 (Vic)*

¹³ The Victorian Government admitted as much in its statement of compatibility that accompanied the amendment bill: see Statement of Compatibility in *Hansard*, Thursday 12 November 2009,.

¹⁴ Vikram Dodd, 'Police forces face threat of 'racist' label over stop and searches', *The Guardian*, <http://www.guardian.co.uk/uk/2010/mar/10/racism-police-stop-search/print>.