Chapter 3:
Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement

3.1 Introduction

On 3 April 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs (Minister for Indigenous Affairs) delivered a formal statement in support of the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration).[1] In this statement, the Minister acknowledged that '[w]e need to find more ways of hearing Indigenous voices'.[2]

This acknowledgement was long overdue.

There is an urgent need for governments to improve their approach to engaging with Aboriginal and Torres Strait Islander peoples. As the New South Wales Aboriginal Land Council (NSWALC) has observed:

> Government processes for engagement barely reach a threshold that could be appropriately characterised as consultative in nature. It is even rarer for Government engagement processes to reach a threshold that could be described as involving negotiation with Indigenous peoples, or involving the free, prior and informed consent of Indigenous peoples.[3]

Over the years, the failures of governments to engage with us effectively have been the subject of international scrutiny. International human rights bodies have repeatedly called upon Australia to consult with us adequately before adopting laws and policies that affect our right to our lands, territories and resources.

For example, the Committee on the Elimination of Racial Discrimination (CERD) recommended in 2005 that Australia 'make every effort to seek

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 29 September 2009).

2 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 29 September 2010).

3 D Lee, Intervention on behalf of the New South Wales Aboriginal Land Council to the Expert Mechanism on the Rights of Indigenous Peoples, 3rd session, agenda item 3 (12 July 2010). At http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH0100/5b640305.dir/EM10david012.pdf (viewed 29 September 2010).

the informed consent of indigenous peoples before adopting decisions relating to their rights to land'.[4]

In 2010, CERD again encouraged Australia to 'reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership', and recommended that Australia 'enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources'.[5]

In this Chapter, I examine how the Australian Government could improve its consultation processes in relation to measures that affect our rights to our lands, territories and resources.

Specifically, I explore the practical steps that governments can take to ensure that consultation processes are meaningful and effective. I also analyse the relevance of consultation and consent to the design and implementation of 'special measures' under the *Racial Discrimination Act 1975* (Cth) (RDA).

Finally, I analyse the consultation processes in relation to:

- the Native Title Amendment Bill (No 2) 2009 (Cth)
- the amendments to the provisions of the *Northern Territory National Emergency Response Act 2007* (Cth) concerning the power of the Government to compulsorily acquire five-year leases over certain land.

I argue that the consultation processes concerning these measures were inadequate in several key respects. Further, the inadequacy of the consultation processes calls into question whether these measures can properly be regarded as special measures under the *Racial Discrimination Act 1975* (Cth).

In summary, I am pleased that the Australian Government is committed to ensuring that the principle of 'strong engagement with Indigenous people … underpins all our Indigenous policies and the implementation of programs'.[6] However, events during the Reporting Period have demonstrated that there is much room for improvement in the Government's approach to engaging with Aboriginal and Torres Strait Islander peoples.

3.2 What are the features of a meaningful and effective consultation process?

As I discuss in Chapter 1, Aboriginal and Torres Strait Islander peoples have the right to participate in decision-making in matters that affect our rights. Governments are under a duty to consult 'whenever a State decision may affect indigenous peoples in ways not felt by others in society', even if our rights have not been recognised in domestic law.[7] This duty requires governments to consult effectively with us before adopting or implementing measures that may affect our rights.

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4 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At http://www2.ohchr.org/english/bodies/cerd/cerds66.htm (viewed 29 September 2010).

5 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), paras 16, 18.

6 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Budget 2010–11: Closing the Gap Between Indigenous and Non-Indigenous Australians* (Statement, 11 May 2010). At http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget10_11/Documents/indig_statement.htm (viewed 29 September 2010).

7 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

I am concerned that governments do not fully understand what genuine and effective consultation looks like. Until this issue is addressed, governments will continue to impose laws and policies upon us in order to 'solve' our problems.

In a recent study on the duty to consult, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur) considered that the objective of consultations 'should be to obtain the consent or agreement of the indigenous peoples concerned'.[8]

He further considered that the 'strength or importance' of this objective will vary 'according to the circumstances and the indigenous interests involved'.[9] In some cases, a State will be required to obtain the free, prior and informed consent of the affected Indigenous peoples before proceeding with a proposed measure.[10] I consider this further in section 3.3, below.

Yet, in all cases, States should engage in '[a] good faith effort towards consensual decision-making'.[11] Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.[12]

This leads me to ask – what would a meaningful and effective consultation process look like?

The key features of the duty to consult and the standard of free, prior and informed consent have been set out in several international and domestic studies.[13] For example the United Nations Permanent Forum on Indigenous Issues (UNPFII) convened an

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8 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

9 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

10 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010). For example, free, prior and informed consent must be obtained when the measure involves relocating indigenous peoples from their lands or territories; or the storage or disposal of hazardous materials in the lands or territories of indigenous peoples: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 10, 29(2). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 29 September 2010).

11 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 50. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

12 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 48. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

13 For recent studies, see, for example, United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), para 46. At http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html (viewed 29 September 2010); J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009). At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010); Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010). At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 29 September 2010). See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), Appendix 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 29 September 2010).

international workshop on 'free, prior and informed consent' in 2005. In Appendix 3, I have extracted a list of the 'elements of a common understanding of free, prior and informed consent' that was developed at this workshop.

In this section, I build upon these studies to elaborate the key features of a meaningful and effective consultation process. In undertaking research for this section, I have asked Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Prescribed Bodies Corporate (PBCs) to consider what to them would constitute a meaningful and effective consultation process. I have also considered the views of NTRBs, NTSPs and other Aboriginal and Torres Strait Islander peoples' organisations as expressed in their submissions to recent public inquiries and international processes.

Based on the perspectives and experiences of these organisations, and informed by international standards, I consider that at minimum:

- consultation processes should be products of consensus
- consultations should be in the nature of negotiations
- consultations need to begin early and should, where necessary, be ongoing
- Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- adequate timeframes should be built into consultation processes
- consultation processes should be coordinated across government departments
- consultation processes need to reach the affected communities
- consultation processes need to respect Aboriginal and Torres Strait Islander representative and decision-making structures
- governments must provide all relevant information and do so in an accessible way.

I describe these features in turn below. In doing so, I am aware that a rigid consultation 'checklist' would not be conducive to relationship-building or to effective consultation. Nor would it be consistent with the right of Indigenous peoples to self-determination. Further, as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) emphasises, the Declaration 'requires "effective" participation, not pro forma consultations, the goal of which is to obtain the free, prior and informed consent of indigenous peoples'.[14]

I therefore do not advocate a 'one-size-fits-all' model of consultation. However, I consider that the features set out below can be used to guide the development of appropriate processes on a case-by-case basis.

(a) Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on Indigenous

14 Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), para 89. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 29 September 2010).

peoples.[15] Indeed, the Special Rapporteur emphasises that a consultation procedure should itself be the product of consensus. This can help ensure that the procedure is effective.[16]

Similarly, the Cape York Land Council (CYLC) lists 'an agreed structure for the consultation process' as one of the essential features of an adequate and effective consultation process.[17]

I believe that this principle should underpin any government efforts to engage with Aboriginal and Torres Strait Islander peoples. Before commencing consultations, governments should work with the affected peoples to determine the appropriate nature and level of consultations, and to agree upon a process.

(b) Consultations should be in the nature of negotiations

Too often, government 'consultations' do not allow us to genuinely participate in decision-making in matters that may affect our lands, territories and resources.

For example, the Carpentaria Land Council Aboriginal Corporation (CLCAC) has expressed its concern that:

> The so-called consultation that occurs is often merely a cloak to conceal that decisions have already been made by Government agencies without taking any Aboriginal input into account. It is not unusual for Government departments to hold meetings, relied upon as 'consultation', which are in effect only information sessions with Aboriginal people.[18]

To engage in genuine consultation, governments need to do more than provide information about measures that they have developed on our behalf and without our input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.

As NSWALC submitted to the UNPFII, '[g]enuine and effective consultation does not just involve discussion; it requires active and informed participation in the decision making process'.[19]

Accordingly, I consider that the requirement to consult must reflect, in a practical sense, a requirement to negotiate.

This will require a shift in the way that governments approach consultations. As the CYLC identifies, there needs to be '[f]lexibility in government policies and procedures to ensure that internal processes allow for practical negotiation'.[20]

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15 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 45. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

16 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 51, 68. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

17 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

18 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.9. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010)

19 New South Wales Aboriginal Land Council, *The Northern Territory Intervention: Compliance with the UN Declaration on the Rights of Indigenous Peoples: Submission to the United Nations Permanent Forum on Indigenous Issues*, *Ninth Session, 19–30 April 2010* (2010), p 17. This report was prepared by Ben Schokman for the New South Wales Aboriginal Land Council.

20 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

Governments need to be willing and flexible enough to accommodate our concerns, and work with us in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on our rights and that the affected peoples do not agree to the measure.

At the very least, governments need to commit 'to carefully consider the views expressed and comments made, and to use their best endeavours to incorporate those views into the final product'.[21]

In this way, governments can ensure that consultation processes are more 'in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures'[22] than the information sessions to which we have become accustomed.

(c) Consultations need to begin early and should, where necessary, be ongoing

Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

This does not always occur. As the CLCAC explains:

> Rather than go to native title holders and their representatives to develop proposals upfront, the project is developed, consultants retained, contracts entered to, and then, when the project is about to commence the native title process commences. This has the inevitable consequence that the native title holders are only provided with input into a proposal at a point where it is essentially concluded. This makes any consultation a farce and makes consultations subject to strict timeframes coupled with the pressure of cost blow-outs …[23]

Early consultation can prevent problems from occurring 'down the track'. As the Torres Strait Regional Authority (TSRA) states, '[e]arly undertaking of consultative processes can facilitate accurate identification of traditional landholdings and the resolution of community disputes, should they arise'.[24]

Early engagement also creates the opportunity for long-term, positive relationships to grow. This is important because our right to participate in decision-making imposes ongoing obligations upon governments. For example, if a proposal changes, affected peoples should again be consulted in order to obtain their free, prior and informed consent. Additionally, one NTSP has emphasised that '[o]utcomes from consultations should also provide for future/renewed consultations where necessary'.[25]

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21 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

22 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (15 July 2009), para 46. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

23 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 4.9. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 29 September 2010).

24 J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 10 August 2010.

25 P Agius, CEO, South Australian Native Title Services, Correspondence to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 1 October 2010.

(d) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

The Declaration affirms:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.[26]

Such assistance is, in many instances, essential to ensure that we are able to enjoy our right to participate in decision-making. The UNPFII has even suggested that the

> principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.[27]

The capacity of our communities to engage in consultative processes can be hindered by our lack of resources. Even the most well-intentioned consultation procedure will fail if we are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to our communities or access appropriate expert advice, we cannot possibly be expected to consent to or comment on any proposal in a fully informed manner.

As the CYLC highlights, governments need to provide 'adequate resources to ensure that those people potentially affected are given the opportunity to be directly involved'.[28]

As I discussed in Chapter 1, problems relating to the lack of capacity of Traditional Owners and their representatives exist throughout the native title system. The problem is particularly acute for PBCs, who are required to consult with, and obtain the consent of, common law native title holders before making a 'native title decision'.[29]

Although they are the 'statutory interface between the proponents of future acts and the native title holders … [n]o resources are provided to enable PBCs to canvas issues with native title holders'.[30] This can create barriers to the effective discharge of a PBC's statutory obligations.

I therefore consider it important that governments or proponents provide Aboriginal and Torres Strait Islander peoples with adequate resources to enable them to participate effectively in consultation processes.

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26 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 30 September 2010).

27 United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 30 September 2010).

28 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

29 Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth), reg 8(2). As defined in reg 8(1), a 'native title decision' means a decision to:

- surrender native title rights and interests in relation to land or waters or
- do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.

30 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.10. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

(e) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision

Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain our consent.[31]

As the CLCAC has stated '[c]onsultation does not occur … where Aboriginal people are pressured to decide an issue a particular way under threat of a negative impact or sanctions'.[32] It is therefore unacceptable for governments to adopt a 'take it or leave it' approach to consultations.

In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes. For example, genuine consultation cannot occur when Aboriginal and Torres Strait Islander peoples are told 'if you don't decide now, you'll miss out'.

(f) Adequate timeframes should be built into the consultation process

Native title is a notoriously complex and legalistic regime. However, Aboriginal and Torres Strait Islander peoples are frequently faced with unreasonably short deadlines for commenting on discussion papers and draft legislation.[33]

Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, we may not be able to respond to such proposals in a fully informed manner.

Consultation timelines need to be 'inclusive of Aboriginal community internal processes and respect … community protocols and cultural practice'.[34] As the Yamatji Marpla Aboriginal Corporation (YMAC) emphasised to me, NTRBs and NTSPs need to consult with Traditional Owners before providing submissions to government processes on their behalf.[35] Governments need to take this into account when designing consultation processes.

Further, the Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC has submitted that native title parties require adequate time to:

- obtain third party advice if necessary or desired
- inform, discuss and consult with other members of the native title party

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31 United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), para 46. At http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html (viewed 30 September 2010).

32 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.11. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

33 See, for example, the consultation processes concerning the Native Title Amendment Bill (No 2) 2009 (Cth). I examine these processes in section 3.4, below.

34 P Agius, CEO, South Australian Native Title Services, Correspondence to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 1 October 2010.

35 S Hawkins, CEO, Yamatji Marpla Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

- translate or develop information into culturally appropriate forms for members of the native title party so as to allow genuine discussions and informed consent.[36]

(g) Consultation processes should be coordinated across government departments

Consultation processes should be coordinated in order to ease the 'consultation burden' that is caused by multiple discussion papers and reform proposals.

YMAC suggests that:

> Government departments and agencies need to plan their consultation processes to ensure they are not duplicating others running concurrently and/or creating competing deadlines.[37]

To achieve this, I believe that governments should adopt a 'whole of government' approach to native title reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies.

(h) Consultation processes need to reach the affected communities

For a consultation process to be genuine, it needs to reach the communities that may be affected by a measure. As the Special Rapporteur states:

> [M]easures that affect particular indigenous peoples or communities … will require consultation procedures focused on the interests of, and engagement with, those particularly affected groups.[38]

Government consultation processes need to directly reach people 'on the ground'. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them.

For example, it is often inadequate for a government to just hold consultation sessions in capital cities or regional centres. Such locations may be 'hundreds or thousands of kilometers away from the relevant Aboriginal community making it impossible for members of that community to attend'.[39]

Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that may be affected by a proposed measure.

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36 T Wright, Acting CEO, Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC, Correspondence to C Edwards, Manager – Land Reform Branch, Department of Families, Housing, Community Services and Indigenous Affairs, 4 September 2009. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform#submissions1 (viewed 30 September 2010).

37 S Hawkins, CEO, Yamatji Marpla Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

38 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 45. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 30 September 2010).

39 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.11. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

(i) Consultation processes need to respect representative and decision-making structures

The Declaration requires consultation to be undertaken with 'the indigenous peoples concerned through their own representative organisations'.[40] The UNPFII has emphasised that free, prior and informed consent must 'be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their behalf'.[41]

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision-making mechanisms. As the CLCAC notes, consultation should take 'traditional laws and customs … regarding decision making' into account.[42]

The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

(j) Governments must provide all relevant information and do so in an accessible way

EMRIP has observed that '[c]onsistent and wide dissemination of information to indigenous peoples in culturally appropriate ways, and in a timely manner, is often lacking'.[43]

To ensure that we are able to exercise our rights to participate in decision-making in a fully informed way, governments must provide us with full and accurate information about the proposed measure and its potential impact.[44]

This information needs to be clear, accessible and easy to understand. Information should be provided in plain English and, where necessary, in language.

For example, YMAC considers:

> Those who are drafting discussion papers should be careful to structure the document so that it can be read and accessed by audiences with a range of literacy levels and limit the number of questions requiring a response.[45]

Similarly, the Goldfields Land and Sea Council recognises that 'language used in explaining legislative or administrative measures needs to be clear, transparent and understandable and not ambiguous and overly legal in terminology'.[46]

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40 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 19. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 30 September 2010).

41 United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 30 September 2010).

42 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 38. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 30 September 2010).

43 Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), para 99. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 30 September 2010).

44 See Appendix 3: 'Elements of a common understanding of free, prior and informed consent' for examples of the information that should be provided to Aboriginal and Torres Strait Islander peoples.

45 S Hawkins, CEO, Yamatji Marpla Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

46 Goldfields Land and Sea Council, 'Information requested for the *Native Title Report 2010*' (30 September 2010).

3.3 The relationship between consultation, consent and special measures

In the previous section, I explain that governments are under a duty to consult 'whenever a State decision may affect indigenous peoples in ways not felt by others in society'.[47] The Special Rapporteur further states that:

> A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.[48]

The Australian Human Rights Commission considers that governments should pay particular attention to issues of consultation and consent when developing and implementing special measures that affect the rights of Aboriginal and Torres Strait Islander peoples.

The concept of 'special measures' as it applies to Aboriginal and Torres Strait Islander peoples must be understood consistently with the right of Indigenous peoples to self-determination. In particular, it is inconsistent with the right to self-determination for a government to impose a measure that limits the rights of an Indigenous group without the consent of the group.[49]

(a) What is a 'special measure'?

The term 'special measures' is generally understood to apply to positive measures taken to redress the disadvantage, and secure the 'full and equal enjoyment of human rights and fundamental freedoms', of a particular racial group.[50]

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)[51] recognises that different treatment designed to ensure the equal enjoyment of rights is not discriminatory. Special measures undertaken for this purpose are essential to achieving substantive equality, advancing human dignity and eliminating racial discrimination.[52] The relevant articles of the ICERD are set out in Text Box 3.1.

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47 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 43. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

48 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

49 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 91. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

50 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), paras 11–12. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 19 November 2010).

51 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, arts 1(4), 2(2). At http://www2.ohchr.org/english/law/cerd.htm (viewed 21 September 2010).

52 See, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 20. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 28 July 2010).

Text Box 3.1: Extracts from the ICERD regarding special measures

Article 1(4)

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2)

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The RDA also provides for the development of special measures (see Text Box 3.2).[53]

Text Box 3.2: Extracts from the RDA regarding special measures

Part II – Prohibition of Racial Discrimination

Section 8: Exceptions

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 subsection 10(1) applies by virtue of subsection 10(3).

   …

Section 10: Rights to equality before the law

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

53 For further information on the operation of the RDA, see Australian Human Rights Commission, *Federal Discrimination Law* (2010), ch 3. At http://www.humanrights.gov.au/legal/FDL/index.html (viewed 21 September 2010).

> (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.

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 the adequate advancement of the beneficiaries so they may enjoy and exercise their human rights and fundamental freedoms equally with others
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights and fundamental freedoms equally with others
- the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups.[54]

(b) What is the relevance of consultation and consent to a special measure?

CERD has stated that:

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[55]

In particular, it is necessary to pay attention to issues of consultation and consent when assessing whether the measure is for the 'sole purpose of securing adequate advancement' of the beneficiaries. To the extent that the impact of the measures upon group members may differ, the specific wishes of those persons who are the intended beneficiaries of the measure must be considered closely. As the Australian Human Rights Commission has previously submitted, '[t]o take any other approach contemplates a paternalism that considers irrelevant the views of a group as to their wellbeing and decisions materially affecting them'.[56]

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54 See *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 1(4). At http://www2.ohchr.org/english/law/cerd.htm (viewed 3 August 2010). For discussion of the indicia of a special measure, see *Gerhardy v Brown* (1985) 159 CLR 70, 130–140 (Brennan J).

55 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 18. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 28 July 2010).

56 Human Rights and Equal Opportunity Commission, 'Submissions of the Human Rights and Equal Opportunity Commission on Grounds of Appeal', Submission in *Bella Bropho v Western Australia*, WAD90 of 2007, 3 September 2007, para 37. At http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html (viewed 22 September 2010).

Under Australian law, it has been recognised that the wishes of the intended beneficiaries are of great importance in establishing whether a measure is a special measure. In *Gerhardy v Brown*, Brennan J stated:

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. *The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.* The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[57]

The desirability of consultation has recently been confirmed by the Queensland Court of Appeal.[58]

The Commission is of the view that the level of consultation required, and whether consent is necessary, for a measure to be considered a special measure will vary depending on whether the measure involves a limitation on rights or is entirely beneficial in nature.[59]

In the Commission's view, a measure that seeks to provide a benefit to a racial group or members of it, but operates by limiting certain rights of some or all of that group, is unlikely to be a special measure if the consent of the group has not been obtained.[60] This is consistent with the right of Indigenous peoples to self-determination.[61]

Consent is particularly important in the context of measures that affect property owned by Aboriginal and Torres Strait Islander peoples. The 'special measures' exception in the RDA does not apply to a provision in a law that:

- authorises property owned by an Aboriginal or Torres Strait Islander person to be managed by another without their consent

or

- prevents or restricts an Aboriginal or Torres Strait Islander person from terminating the management by another person of property owned by the Aboriginal person

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57 *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J) (emphasis added). This view was rejected by Nicholson J in *Bropho v Western Australia* [2007] FCA 519 (13 April 2007), para 569.

58 *Morton v Queensland Police Service* (2010) 240 FLR 269, 279–280 (McMurdo P), 298 (Chesterman JA) (*Morton*). See also *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 237 FLR 369, 402–403 (McMurdo P), 431–432, 441 (Keane JA), 451–452 (Philippides J) (*Aurukun*). President McMurdo considered that the desirability of consultation is supported by article 1 of the *International Covenant on Civil and Political Rights* and articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* (which affirm the right of Indigenous peoples to self-determination): *Morton*, above, 279–280. The High Court refused special leave to appeal the *Aurukun* decision on 12 November 2010: Transcript of proceedings, *Aurukun Shire Council v CEO, Liquor Gaming & Racing in Dept of Treasury; Kowanyama Aboriginal Shire Council v CEO of Liquor, Gaming & Racing* [2010] HCATrans 293 (12 November 2010). At http://www.austlii.edu.au/au/other/HCATrans/2010/293.html (viewed 1 December 2010).

59 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 84. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

60 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 89. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

61 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 3. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 21 September 2010).

where that provision is not one that applies to persons generally without regard to their race, colour, or national or ethnic origin.[62]

(c) 'Special measures' during the Reporting Period

Australian law is not yet fully settled on the question of the significance of 'consultation' and 'consent' to the development and implementation of a special measure. However, in light of the comments of CERD and the rights of Indigenous peoples as affirmed by the Declaration, the Commission believes that issues of consultation and consent should be central to an assessment of whether a measure is indeed a special measure.

During the Reporting Period, the Australian Government referred to the concept of 'special measures' in the context of certain legislative reforms that affect our rights to our lands, territories and resources. In the following section, I explore the issues of consultation and consent in relation to two law reform processes that occurred during the Reporting Period.

3.4 Are government consultation processes meaningful and effective?

I am pleased that the Australian Government has been willing to consult with us regarding laws and policies that would affect our rights to our lands, territories and resources.

During 2009–2010, the Australian Government invited comment on a range of proposals relating to our lands, territories and resources.[63] The Government also continued to hold periodic meetings with organisations involved in the native title system.[64] For example, the Attorney-General's Department convenes the Native Title Consultative Forum (NTCF), which consists of representatives from:

- the Attorney-General's Department
- the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
- the Federal Court of Australia
- the National Native Title Tribunal
- state, territory and local governments
- NTRBs and NTSPs
- pastoral, fishing, mining and petroleum industries
- the Australian Human Rights Commission.[65]

The NTCF met twice during the Reporting Period.

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62 *Racial Discrimination Act 1975* (Cth), ss 8(1), 10(3).

63 See, for example, Attorney-General's Department, *Native title reform*, http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform (viewed 5 October 2010); Department of Families, Housing, Community Services and Indigenous Affairs, *Prescribed Bodies Corporate*, http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Pages/prescribed_bodies_corporate.aspx (viewed 5 October 2010).

64 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

65 For further information on the NTCF, see Attorney-General's Department, *Native title system coordination and consultation*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlesystemcoordinationandconsultation (viewed 5 October 2010).

However, as demonstrated during the Reporting Period, there is clear scope for the Australian Government to improve its approach to consultation and negotiation processes regarding law and policy reforms. In this section, I review the consultation processes concerning the following law reform initiatives:

- the Native Title Amendment Bill (No 2) 2009 (Cth) (Amendment Bill (No 2))
- the amendments to the *Northern Territory National Emergency Response Act 2007* (NTNER Act) concerning the power to compulsorily acquire five-year leases over certain land.

In analysing these measures, I have been guided by the features of a meaningful and effective consultation process discussed in section 3.2 and the criteria for special measures set out in section 3.3.

(a) Consultations regarding the Native Title Amendment Bill (No 2) 2009 (Cth)

The Amendment Bill (No 2) was introduced into the Commonwealth Parliament in October 2009. The purpose of the Bill was to insert a new future act process in the Native Title Act in order to facilitate the construction of public housing and infrastructure on Aboriginal land.

In Chapter 2, I analyse the procedural safeguards contained in this new future act process, and consider how this process could detract from agreement-making. In this section, I argue that the public consultation process concerning the Amendment Bill (No 2) lacked many of the essential elements of a meaningful and effective engagement process. In particular, I consider that the Australian Government did not:

- allow sufficient time for consultations
- provide sufficient opportunities for Aboriginal and Torres Strait Islander peoples to participate in consultations
- respond sufficiently to the concerns expressed by Aboriginal and Torres Strait Islander peoples.

(i) Were the timeframes for consultation on the proposed amendments adequate?

The public were twice given the opportunity to comment on the proposed reforms.

First, the Australian Government conducted consultations in relation to a discussion paper released by the Attorney-General and the Minister for Indigenous Affairs on *Possible housing and infrastructure native title amendments* (Housing Discussion Paper).[66]

Secondly, the Senate Legal and Constitutional Affairs Legislation Committee (Legal and Constitutional Affairs Committee) conducted an inquiry into the Amendment Bill (No 2).

The stages in the public consultations on the Amendment Bill (No 2) are set out in Table 3.1, below.

66 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform#2009Bill (viewed 5 October 2010).

Table 3.1: Public consultation timetable – Native Title Amendment Bill (No 2) 2009 (Cth)

Date	Event
13 August 2009	The Attorney-General and the Minister for Indigenous Affairs release the Housing Discussion Paper.[67]
24 August 2009– 2 September 2009	The Attorney-General's Department and FaHCSIA hold information sessions on the proposed amendments in Darwin, Alice Springs, Perth, Adelaide, Sydney, Brisbane and Cairns. An information session planned for Broome is cancelled due to 'lack of interest'.[68]
4 September 2009	Submissions on the Housing Discussion Paper are due. The Australian Government receives 27 submissions.[69]
21 October 2009	The Amendment Bill (No 2) is introduced into the House of Representatives.
29 October 2009	The Senate refers the provisions of the Amendment Bill (No 2) to the Legal and Constitutional Affairs Committee for inquiry and report by 2 February 2010.
24 November 2009	Submissions to the Legal and Constitutional Affairs Committee regarding the Amendment Bill (No 2) are due. The Amendment Bill (No 2) is passed by the House of Representatives.
26 November 2009	The Amendment Bill is (No 2) introduced into the Senate.
28 January 2010	The Legal and Constitutional Affairs Committee holds a public hearing in Sydney.
2 February 2010	The Senate agrees to extend the Legal and Constitutional Affairs Committee's reporting date to 23 February 2010.
24 February 2010	The report of the Legal and Constitutional Affairs Committee's inquiry into the Amendment Bill (No 2) is released.[70]

67 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_native titlereform#2009Bill (viewed 5 October 2010).

68 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 5 October 2010). However, the Attorney-General's Department informs me that a teleconference was held with the Kimberley Land Council on 7 September 2009 to discuss the proposal: P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

69 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

70 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on the Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010). At http://www.aph.gov.au/Senate/committee/legcon_ctte/nativetitle_two/report/report.pdf (viewed 5 October 2010).

In section 3.2, above, I express the view that governments must allow sufficient time in consultation processes to enable Aboriginal and Torres Strait Islander peoples to develop a fully informed response to a proposed measure. However, the timeframes for submissions in relation to the Housing Discussion Paper (3 weeks) and the Legal and Constitutional Affairs Committee's inquiry (3.5 weeks) were unreasonably short.

NTRBs and NTSPs submitted that this unrealistic timeframe prevented them from ascertaining the views of native title holders,[71] 'denied Indigenous communities across Australia an opportunity to effectively participate in the decision-making process'[72] and meant that 'indigenous people … had no meaningful opportunity to negotiate with the Commonwealth'.[73] The CLCAC regarded this as 'simply unacceptable'.[74]

These limited timeframes are especially problematic in light of the resource constraints faced by NTRBs, NTSPs and PBCS (see further discussion in Chapter 1). It is very difficult for such organisations to analyse proposed legal reforms, inform Traditional Owners of the potential impact of the reforms, and provide submissions to government on top of their existing workloads. In addition to ensuring that consultation timeframes are sufficient, governments must ensure that Aboriginal and Torres Strait Islander peoples and their representatives are adequately resourced to participate in consultation processes.

The short timeframes allowed for consultations gave the appearance that the Australian Government believed that the Amendment Bill (No 2) should be enacted as a matter of urgency. Yet, the Amendment Bill (No 2) had not been enacted by the time the federal election was called in July 2010.[75] This leads me to question why such demands were placed on the limited resources of native title stakeholders to attend consultation sessions and prepare submissions in such short timeframes.

(ii) Were there sufficient opportunities for Aboriginal and Torres Strait Islander peoples to attend consultation sessions?

Eleven NTRBs and NTSPs attended a consultation session and / or provided a written submission in response to the Housing Discussion Paper.[76]

However, NTRBs and NTSPs have expressed concern that the public information sessions did not reach the communities that were likely to be affected by the

71 Torres Strait Regional Authority, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (21 December 2009), np. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=10e5d762-ea65-470f-9e9b-7adaeb4b4ce2 (viewed 5 October 2010).

72 NTSCORP, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (27 November 2009), para 18. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e8cbcf54-d770-497a-b3fc-9b86884627be (viewed 5 October 2010).

73 Cape York Land Council, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), p 6. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=d2fb685c-44c1-4ff8-a14b-9336289cd0d6 (viewed 5 October 2010).

74 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 14. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

75 The Native Title Amendment Bill (No 2) 2009 (Cth) lapsed on 28 September 2010. The Native Title Amendment Bill (No 1) 2010 (Cth), which is almost identical to the original Bill, received assent on 15 December 2010 as the *Native Title Report 2010* was in the final stages of preparation. Throughout the *Native Title Report 2010*, I refer to the original Bill as it was introduced during the Reporting Period.

76 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

proposed amendments.[77] The sessions were concentrated in capital cities and regional centres, meaning that Traditional Owners outside of these areas had limited opportunities to participate.

For example, the CLCAC informed the Legal and Constitutional Affairs Committee that the Government did not 'directly consult with or offer to consult with Aboriginal communities in the southern Gulf of Carpentaria' and that the closest public consultation session was 'held over 1000 kilometres away in Cairns', only two days before submissions were due.[78]

Further, the only public hearing conducted by the Legal and Constitutional Affairs Committee in relation to the Amendment Bill (No 2) was held in Sydney. Hearings were not held in the states most likely to be affected by the amendments. The Australian Government only clarified late in the Legal and Constitutional Affairs Committee's inquiry process that the Amendment Bill (No 2) would be most relevant to Western Australia and Queensland.[79]

Senator Siewert, of the Australian Greens and a member of the Legal and Constitutional Affairs Committee, expressed concern that this information was not made available in the Explanatory Memorandum or the Attorney-General's Second Reading Speech. This meant that

> this crucial fact did not inform the committee's terms of reference nor its hearing program (hearings were not held in Queensland or WA) … [and] there was no engagement with native title representative bodies, land councils or Aboriginal organisations in WA.[80]

This reflects a concern that Aboriginal and Torres Strait Islander peoples' organisations identified during my research for the *Native Title Report 2010* – too often, governments do not go to communities, but expect communities to come to them. However, communities rarely possess sufficient resources to do so.

(iii) Did the Australian Government respond sufficiently to the concerns of Aboriginal and Torres Strait Islander peoples?

The Australian Government did refine the future act process in response to the public consultations on the Housing Discussion Paper. For example, the Government has stated that the procedural requirements of the Amendment Bill (No 2) were developed in light of public consultation. Additional consultation mechanisms were drafted into the Bill as a result of stakeholder feedback. Also, the future act process

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77 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 10. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

78 See Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 10. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

79 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 5 October 2010). The Law Council of Australia had highlighted the limited scope of the Amendment Bill (No 2) during the Committee's public hearing: Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 29 (R Webb QC, Law Council of Australia). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

80 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 39 (Dissenting Report of the Australian Greens). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/d02.pdf (viewed 5 October 2010).

was not confined to remote areas, as had been proposed in the Housing Discussion Paper.[81]

However, in their submissions in response to the Housing Discussion Paper, NTRBs and NTSPs questioned the need for, and desirability of, a new future act process. They emphasised that governments should facilitate the construction of public housing and infrastructure by entering into agreements with Aboriginal and Torres Strait Islander peoples.[82]

NTRBs and NTSPs further contended that the Government failed to provide sufficient evidence to justify the new future act process. Warren Mundine, CEO of NTSCORP, submitted that:

> For us the key objection to the bill is that there is insignificant identification of the need for the amendments. In fact, insignificant evidence has been provided with regard to the Native Title Act processes being a source of delay.[83]

The Legal and Constitutional Affairs Committee also received strong objections to the Amendment Bill (No 2), including that:

- Indigenous Land Use Agreements (ILUAs) should be the preferred mechanism for negotiating arrangements regarding public housing and infrastructure
- the Amendment Bill (No 2) is racially discriminatory
- the proposed process would result in de facto extinguishment.[84]

In fact, there was 'nearly unanimous rejection of the Bill by native title holder representative bodies'.[85]

NTRBs and NTSPs presented the Australian Government and the Legal and Constitutional Affairs Committee with options that would meet the Government's objectives and have less impact on the rights of Traditional Owners. These options included the development of template ILUAs[86] and amending the Amendment Bill

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81 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 6. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 5 October 2010); P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

82 See, for example, National Native Title Council, *Submission: Possible Housing and Infrastructure Native Title Amendments* (4 September 2009). At www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~National+Native+Title+Council+-+Possible+housing+and+infrastructure+amendments+NNTC+submission.PDF/$file/National+Native+Title+Council+-+Possible+housing+and+infrastructure+amendments+NNTC+submission.PDF (viewed 5 October 2010).

83 Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 2 (W Mundine, NTSCORP). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

84 For a summary of the concerns expressed in relation to the Amendment Bill (No 2), see Department of Parliamentary Services, Parliament of Australia, 'Native Title Amendment Bill (No 2) 2009', *Bills Digest*, no 118 (24 February 2010), pp 8–14. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/4JZV6/upload_binary/4jzv62.pdf;fileType=application%2Fpdf#search=%22r4230%22 (viewed 5 October 2010).

85 See Department of Parliamentary Services, Parliament of Australia, 'Native Title Amendment Bill (No 2) 2009', *Bills Digest*, no 118 (24 February 2010), p 19. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/4JZV6/upload_binary/4jzv62.pdf;fileType=application%2Fpdf#search=%22r4230%22 (viewed 5 October 2010).

86 See, for example, Queensland South Native Title Services, *Submission on the Possible Housing and Infrastructure Native Title Amendments Discussion Paper* (September 2009), pp 7–8. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Queensland+South+native+Title+Services+-+Submission.pdf/$file/Queensland+South+native+Title+Services+-+Submission.pdf (viewed 5 October 2010).

(No 2) such that the right to negotiate regime would apply to the new future act process.[87]

These recommendations were not adopted by the majority of the Legal and Constitutional Affairs Committee or the Australian Government.[88] However, the Legal and Constitutional Affairs Committee and the Government responded favourably to certain concerns that had been raised by the states. For example, the Queensland Government expressed concern that the proposed future act process did not cover housing for staff involved with the provision of public housing and infrastructure.[89] The Legal and Constitutional Affairs Committee recommended that the Amendment Bill (No 2) be amended 'to include the provision of staff housing as part of the new future acts process'.[90]

In a dissenting report, Senator Siewert observed that:

> [T]here appears to be a major disconnect between the evidence presented, the concerns discussed and arguments evaluated within the [majority] report on the one hand, and its final conclusions on the other.[91]

It is seriously concerning that the objections of NTRBs and NTSPs, and the alternatives that they proposed, do not appear to have been given sufficient consideration by the Australian Government or the Legal and Constitutional Affairs Committee.

(iv) Was there sufficient consultation to address the elements of a 'special measure'?

Given the fundamental importance of ensuring that the rights of Aboriginal and Torres Strait Islander peoples are protected in the implementation of legislative or administrative measures, it is disappointing that the Housing Discussion Paper did not raise for consideration the implications of the proposed amendments in terms of their potentially racially discriminatory effect.

The Attorney-General's Department informed the Legal and Constitutional Affairs Committee that it considered the Amendment Bill (No 2) to be consistent with the RDA, but admitted that it did not have legal advice to this effect.[92]

In a supplementary submission to the Legal and Constitutional Affairs Committee, FaHCSIA and the Attorney-General's Department stated:

> The Government sees the NTA as a special measure under the *Racial Discrimination Act 1975*. … The new process is similar to the existing future acts processes in the

87 See, for example, B Wyatt, Chairperson, National Native Title Council, Correspondence to the Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, 12 February 2010. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8397a353-dc5a-48ae-9ce7-ba8c983adef4 (viewed 5 October 2010).

88 But see recommendation 1 of the Liberal Senators, and the recommendations of Senator Siewert (Australian Greens): Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), pp 35 (Liberal Senators), 44–45 (Senator Siewert). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

89 S Robertson MP and D Boyle MP, Correspondence to P Hallahan, Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, undated. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=1a692ae9-def5-4dd2-9cfe-e70ba24fc63a (viewed 5 October 2010).

90 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 33 (recommendation 1). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010). The *Native Title Amendment Act (No 1) 2010* (Cth) covers staff housing.

91 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 38. At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

92 Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 44 (T Harvey, Attorney-General's Department). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

> NTA with a relatively small adjustment to meet the urgent need for housing and public infrastructure in Indigenous communities. The adjustment of the arrangements must be considered in that context, and will be part of that special measure.[93]

The Legal and Constitutional Affairs Committee accepted that the Amendment Bill (No 2) was a special measure.[94]

It is beyond the scope of the *Native Title Report 2010* to examine the complex interaction between the Native Title Act, the RDA and special measures (see section 3.3, above, for discussion of the elements of a special measure). However, I note that the preamble to the Native Title Act states that the Act,

> together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.[95]

Yet, CERD found in 1999 that the amended Native Title Act

> appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2) of the Convention …[96]

Since then, CERD has clarified the relationship between our rights to land and special measures:

> Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, … the rights of indigenous peoples, including rights to lands traditionally occupied by them, …Such rights are permanent rights, recognized as such in human rights instruments, …States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.[97]

In this context, I am concerned that the Australian Government and the Legal and Constitutional Affairs Committee did not provide adequate analysis to support their finding that the Amendment Bill (No 2) is a special measure.

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93 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), pp 4–5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 5 October 2010). See also Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 43 (T Harvey, Attorney-General's Department; A Cattermole, Department of Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

94 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 33. At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

95 *Native Title Act 1993* (Cth), preamble.

96 Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, UN Doc A/54/18 (1999) 6, p 7 (para 8). For further information on special measures and the amended Native Title Act, see Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), pp 69–72. At http://www.humanrights.gov.au/pdf/social_justice/native_title_report_98.pdf (viewed 7 October 2010).

97 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 15. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 19 October 2010).

Further, the Australian Human Rights Commission believes that provisions which limit the rights of some, or all, of a racial group, are unlikely to be a special measure if the consent of the group has not been obtained.[98] As discussed above, I believe that the consultation processes concerning the Amendment Bill (No 2) were inadequate. In addition, NTRBs and NTSPs expressed strong opposition to the Amendment Bill (No 2). I therefore question whether the new future act process can properly be regarded as a special measure.

The deficiencies in the consultation process are particularly concerning in light of the potentially far-reaching impact of these amendments upon the rights of Traditional Owners. For example, while the future act process provides for the application of the non-extinguishment principle, the long-term nature of the acts that are covered by the new future act process (for example, the construction of housing and public infrastructure) suggests that it may be a significant time before any native title rights and interests will again have full effect. NTRBs, NTSPs and others expressed concerns that this would amount to 'practical extinguishment'.[99]

In addition, Traditional Owners may not be the beneficiaries of the public housing or other public facilities that are built pursuant to the proposed process, and for which purpose their rights have been suspended. For example, Traditional Owners may not live on the land on which the housing is built.

(v) Conclusion

As I have detailed in this section, the Australian Government did not:

- allow sufficient time for consultations
- provide sufficient opportunities for Aboriginal and Torres Strait Islander peoples to participate in consultations
- respond sufficiently to the concerns expressed by Aboriginal and Torres Strait Islander peoples.

I therefore do not believe that the consultation processes regarding the Amendment Bill (No 2) were adequate.

The impact of the future act regime of the Native Title Act on the human rights of Aboriginal and Torres Strait Islander peoples has been analysed and criticised extensively.[100] It is therefore concerning that, despite its stated commitment to strong engagement and partnership, the Australian Government has seen fit to extend the future act regime without adequate consultation and without the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

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98 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 89. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 5 October 2010).

99 See, for example, B Wyatt, Chairperson, National Native Title Council, Correspondence to the Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, 12 February 2010. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8397a353-dc5a-48ae-9ce7-ba8c983adef4 (viewed 5 October 2010); Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (23 December 2009), p 7. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=50b8cf7e-3d2b-483a-8c5c-652e856d5c13 (viewed 5 October 2010).

100 See, for example, W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2001), ch 5. At http://www.humanrights.gov.au/pdf/social_justice/nt-report2000.pdf (viewed 5 October 2010); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission (2002), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport01/chap1.html (viewed 5 October 2010).

(b) Reforms to the Northern Territory Emergency Response measures

The second consultation process that I will examine concerns the 2010 amendments to the Northern Territory Emergency Response (NTER) measures. These amendments 'redesigned' the NTER measures.[101] Specifically, I will consider the amendments to the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act) that concern the power to compulsorily acquire five-year leases.[102]

I first outline the background to the amendments. I then discuss the 'redesigned' NTER measures and assess the consultation process that preceded the introduction of the amendments to these measures, with a particular focus on the measures that affect rights to lands, territories and resources. Finally, I consider whether there was sufficient consultation for the legislative provisions regarding five-year leases to be properly considered to be special measures.

I set out the key milestones in the history of the NTER in Table 3.2.

Table 3.2: Key milestones – Northern Territory Emergency Response (NTER)

Date	Event
15 June 2007	The *Little Children are Sacred*[103] report is publicly released by the Northern Territory Government.
21 June 2007	The Australian Government announces the introduction of the Northern Territory Emergency Response measures.
7 August 2007	The following Bills are introduced into, and passed by the House of Representatives: ▪ Northern Territory National Emergency Response Bill 2007 ▪ Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) ▪ Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth) ▪ Appropriation (Northern Territory National Emergency Response) Bill (No 1) 2007–2008 (Cth) ▪ Appropriation (Northern Territory National Emergency Response) Bill (No 2) 2007–2008 (Cth).

101 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth). At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

102 *Northern Territory National Emergency Response Act 2007* (Cth), s 31. For discussion of the other NTER measures, see 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 http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/download.html (viewed 22 September 2010).

103 National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007). At http://www.inquirysaac.nt.gov. au/pdf/bipacsa_final_report.pdf (viewed 19 October 2010).

9 August 2007	The Senate refers the five Bills to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee received 154 submissions.[104]
10 August 2007	The Senate Standing Committee on Legal and Constitutional Affairs conducts its sole public hearing for this inquiry.
13 August 2007	The report of the Senate Standing Committee on Legal and Constitutional Affairs is tabled in Parliament.
17 August 2007	All five Bills pass the Senate and receive assent. The five Acts are referred to as the NTER.
June 2008	The Rudd Government commissions an independent review of the NTER.
October 2008	The NTER Review Board reports to the Australian Government.[105]
23 October 2008	The Australian Government issues its initial response to the Report of the NTER Review Board.[106]
21 May 2009	The Australian Government issues its final response to the Report of the NTER Review Board.[107] The Australian Government releases the *Future Directions for the Northern Territory Emergency Response: Discussion paper.*[108]
June–August 2009	The Australian Government consults with Aboriginal communities on ways that certain identified NTER measures could be redesigned.
23 November 2009	The Australian Government releases its *Report on the Northern Territory Emergency Response Redesign Consultations* and the independent report it commissioned from the Cultural and Indigenous Research Centre Australia (CIRCA).[109]

104 Parliament of Australia, *Submissions and Additional Information received by the Committee as at 28 August 2007*, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm (viewed 19 October 2010).

105 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008). At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 19 October 2010).

106 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nter_measure_23oct08.aspx (viewed 2 December 2010). The Government accepted the three overarching recommendations of the Review Report.

107 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

108 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 19 October 2010).

109 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 19 October 2010); Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

24 November 2009	The Australian Government releases its policy statement on the proposed redesigned NTER measures.[110]
25 November 2009	The Australian Government introduces the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) (Welfare Reform Bill) into the House of Representatives.[111]
26 November 2009	The Senate refers the Welfare Reform Bill to the Senate Community Affairs Legislation Committee along with the Families, Housing, Community Services and Indigenous Affairs and other Legislation Amendment (2009 Measures) Bill 2009 (Cth) and Senator Siewert's private senator's Bill (the Families, Housing, Community Affairs and Other Legislation (Restoration of Racial Discrimination Act) Bill 2009 (Cth)).
1 February 2010	Submissions to the Senate Community Affairs Legislation Committee's Inquiry are due. The Committee receives 95 submissions.[112]
4, 11, 15, 17, 22, 25, 26 February 2010	The Senate Community Affairs Legislation Committee holds public hearings.
24 February 2010	The House of Representatives passes the Welfare Reform Bill.
10 March 2010	The Senate Community Affairs Legislation Committee reports on its inquiry.[113]
21 June 2010	The Senate passes the Welfare Reform Bill.
29 June 2010	The Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010 (Cth) receives assent.
1 July 2010	The amendments to the five-year lease provisions commence.[114]
31 December 2010	The provisions lifting the suspension of the RDA over the NTER legislation and actions under it are scheduled to commence.[115]

110 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

111 The Government also introduced the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth).

112 Parliament of Australia, *Submissions received by the Committee*, http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sublist.htm (viewed 19 October 2010).

113 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 19 October 2010).

114 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 5.

115 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 1. For a discussion of the applicability of the RDA to new income management measures see 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), paras 50–53. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 November 2010).

(i) The original NTER measures

On 21 June 2007, the Howard Government announced a number of measures to combat child sex abuse in Aboriginal communities in the Northern Territory. This became known as the NTER or the 'Intervention'.

The NTER measures were implemented by a suite of Acts including the NTNER Act.[116]

This legislation was implemented in great haste. The Howard Government made no attempt to obtain the free, prior and informed consent of the Aboriginal peoples affected by the legislation.

The Bills were introduced into, and passed by, the House of Representatives on 7 August 2007. The Senate Standing Committee on Legal and Constitutional Affairs was given only five days to conduct an inquiry into the Bills. A public hearing was held on 10 August, and the report of the Committee was tabled on 13 August 2007. The Bills were passed by the Senate on 17 August 2007 and received assent that day.[117] I will refer to these Acts collectively as the 'NTER legislation'.

Suspension of the RDA and deeming of special measures

In relation to the operation of the RDA, the original NTER legislation:

- deemed the measures contained in each Act, and any acts done under or for the purposes of those provisions, to be special measures for the purposes of the RDA
- suspended the operation of Part II of the RDA[118] in relation to the provisions of the Acts and any acts done under or for the purposes of those provisions.[119]

The Social Justice Commissioner considered the implications of the suspension of the RDA in the *Social Justice Report 2007.*[120] In essence, the provisions stated that all of the measures introduced through the legislation were to be characterised as 'beneficial' and therefore exempt from the prohibition of racial discrimination in Part II of the RDA.

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116 The other Bills were: Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth); Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007–2008 (Cth); Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007–2008 (Cth).

117 For a more detailed timeline, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 209–211. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/download.html (viewed 22 September 2010).

118 Part II of the RDA makes it unlawful to discriminate against a person on the basis of their race.

119 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4; *Northern Territory National Emergency Response Act 2007* (Cth), s 132; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4, 6. The original NTER legislation also exempted the operation of the Northern Territory's anti-discrimination laws: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 5; *Northern Territory National Emergency Response Act 2007* (Cth), s 133; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 5, 7. But see *Northern Territory National Emergency Response Act 2007* (Cth), Notes, Table A: 'Application, saving or transitional provisions' (*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4(3)).

120 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2010).

The suspension of the RDA meant that even if the NTER measures were not special measures, the protections of the RDA did not apply. This meant individuals had no right to bring a complaint under the RDA with respect to provisions of the legislation or any acts done under or for the purposes of those provisions. Nor could section 10 of the RDA be used to challenge the validity of any laws introduced by the Northern Territory Government under the auspices of the NTER legislation.

Significantly, the Special Rapporteur did not accept that the discriminatory aspects of the original NTER measures had not been shown to qualify as special measures. He observed that the Australian Government did not engage in adequate consultation before the measures were enacted. Nor did the Special Rapporteur consider that the measures were proportional or necessary to the stated objectives of the NTER.[121]

Measures affecting rights to lands, territories and resources

As part of the NTER, the Howard Government introduced measures that affected the rights of Aboriginal people to their lands, territories and resources, including:

- the compulsory acquisition of leases for a term of five years over prescribed areas, including Aboriginal land and specified community living areas[122]
- empowering the Australian Government to compulsorily acquire rights, titles and interests relating to town camps[123]
- providing that the future acts regime under the Native Title Act does not apply to acts done by, under, or in accordance with certain provisions of the NTNER Act[124]
- providing for the acquisition (by the Australian or Northern Territory Governments or their authorities) of extensive statutory rights in relation to areas of Aboriginal land designated as construction areas (statutory rights provisions).[125]

In previous *Native Title Reports* and *Social Justice Reports*, the Social Justice Commissioner examined the NTER and its effect on land rights and native title. The

121 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, paras 20–23. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

122 *Northern Territory National Emergency Response Act 2007* (Cth), ss 31(1), (2). For further information, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 188–196. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010); 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), paras 137–150. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

123 *Northern Territory National Emergency Response Act 2007* (Cth), pt 4, div 2. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 196–199. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

124 *Northern Territory National Emergency Response Act 2007* (Cth), s 51. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 200–201. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

125 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), pt IIB. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 202–206. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

Commissioner expressed concern about the lack of consultation that preceded the introduction of the NTER, and highlighted the discriminatory impact of some of the measures on Aboriginal people.[126]

In the following sections, I will focus on the legislative provisions regarding the compulsory acquisition of five-year leases. The Australian Government currently holds five-year leases over 64 communities. These leases will expire in August 2012.[127]

The compulsory acquisition of the five-year leases undercuts the Australian Government's message of strong engagement with Aboriginal and Torres Strait Islander peoples. Normally, the terms of a lease are negotiated by the parties. However, the terms and conditions of the five-year leases made pursuant to the NTNER Act are determined by the Government.[128]

The NTER measures apply to people and land within 'prescribed areas' which 'are specified "Aboriginal land" and other designated areas that are populated almost entirely by indigenous people'.[129] Accordingly, the Special Rapporteur has also said that the NTER measures, including the five-year leases, distinguish on the basis of race[130] and 'undermine indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy'.[131]

(ii) The 'redesigned' NTER measures

In June 2008, the Rudd Government commissioned an independent review of the NTER. This Review was conducted by the Northern Territory Emergency Review Board (NTER Review Board), comprised of Peter Yu, Marcia Ella Duncan and Bill Gray AM.[132]

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126 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 187–207. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–158. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2010).

127 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

128 *Northern Territory National Emergency Response Act 2007* (Cth), ss 35, 36. Also see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 151. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

129 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 15. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

130 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 15. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

131 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 13. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

132 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated), p 1. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_report NTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

The NTER Review Board reported to the Government in October 2008. As part of its three 'overarching' recommendations, the NTER Review Board recommended that the Australian and Northern Territory governments 'acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership'.[133] The Australian Government accepted the three overarching recommendations.[134]

From June to August 2009, the Australian Government consulted with Aboriginal communities on ways that a limited number of NTER measures could be redesigned.[135]

Following these consultations, the Australian Government introduced the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) (Welfare Reform Bill) into Parliament on 25 November 2009. This included changes to the five-year lease provisions under Part 4 of the NTNER Act.

The Senate referred this Bill to the Senate Community Affairs Legislation Committee (Community Affairs Committee) on 26 November 2009. This Committee reported on 10 March 2010.[136] The Welfare Reform Bill received assent on 29 June 2010.

Changes to the NTER measures concerning five-year leases

The *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (NTNER Amendment Act) provides for the repeal of the provisions which suspend the operation of the RDA with respect to the NTER legislation, and actions under it, from 31 December 2010. It also provides for the removal of those provisions that deem the legislation and actions done under it to be special measures.[137]

In addition, the Australian Government states that several of the NTER measures have been redesigned so they are:

- improved and strengthened
- sustainable over the long-term

133 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 12. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 22 September 2010). The NTER Review Board also made the following overarching recommendations:

- that the Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory
- that government actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975* (Cth).

134 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated), p 1. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_report NTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

135 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 3 (C Halbert, Department of Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/hearings/index.htm (viewed 22 September 2010).

136 The transcripts of the Senate Community Affairs Legislation Committee's public hearings can be found at http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/hearings/index.htm (viewed 22 September 2010).

137 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 1, items 1–3. This also repeals the sections exempting the operation of the Northern Territory's anti-discrimination laws.

- 'more clearly special measures or non-discriminatory within the terms of the *Racial Discrimination Act 1975*'.[138]

However, the core measures of the NTER have been retained.[139] For example, the NTNER Amendment Act made some minor changes to the provisions of the NTNER Act concerning the five-year leases. However, these provisions have not been 'redesigned' in any significant way.

Further, while the entire NTNER Act is no longer deemed to be a special measure, the NTNER Act now provides that the object of Part 4 of the Act is to enable special measures to be taken.[140] Part 4 contains the provisions relating to the acquisition of rights, titles and interests in land, including the five-year lease provisions.

I provide a summary of these changes in Text Box 3.3.

Text Box 3.3: Amendments to the five-year lease provisions of the NTNER Act

First, the NTNER Amendment Act inserted a new object clause into Part 4 of the NTNER Act, which concerns the acquisition of rights, titles and interests in land (including the five-year lease provisions).

Section 30A of the NTNER Act now provides that the object of Part 4 of the NTNER Act is to enable special measures to be taken to:

- improve the delivery of services in Indigenous communities in the Northern Territory
- promote economic and social development in those communities.[141]

Secondly, section 35(2A) of the NTNER Act now provides that the Commonwealth is only entitled to use, and to permit the use of, land covered by a five-year lease for any use that the Commonwealth considers is consistent with the fulfilment of the object of the Part. This 'does not entitle the Commonwealth to engage in, or to permit, exploration or mining in respect of land covered by a lease granted under section 31'.[142]

Thirdly, the new section 35A of the NTNER Act will require the Minister to make, by legislative instrument, guidelines that specify the matters the Commonwealth must have regard to when subleasing, licensing, parting with possession of, or otherwise dealing with its interest in the five-year lease.[143]

Fourthly, the NTNER Act now specifies that regard must be had to the body of traditions, observances, customs and beliefs of Indigenous persons when administering five-year leases.[144]

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138 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline. At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

139 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline. At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

140 *Northern Territory National Emergency Response Act 2007* (Cth), s 30A.

141 *Northern Territory National Emergency Response Act 2007* (Cth), s 30A.

142 *Northern Territory National Emergency Response Act 2007* (Cth), s 35(2B). However, this does not limit Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976*, which concerns mining on Aboriginal land: *Northern Territory National Emergency Response Act 2007* (Cth), s 35(2D).

143 At the time of writing, section 35A had yet to commence. Section 35A will commence on a date fixed by Proclamation. However, if it has not commenced within 6 months of the date the NTNER Amendment Act received Royal Assent (29 June 2010), it commences on the day after this period: *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 2.

144 *Northern Territory National Emergency Response Act 2007* (Cth), s 36A.

> Finally, the relevant owner of land subject to a five-year lease may request the Commonwealth to enter into good faith negotiations on the terms and conditions of another lease covering all or part of the land. If requested to do so by the owner, the Commonwealth must enter into such good faith negotiations.[145]

The Australian Government has said that it will retain the existing five-year leases until they expire in August 2012. However, it has also committed to progressively transition to voluntary leases during this period.[146] While this intention is positive, the Government must commit to this process by devoting the time and resources necessary to planning and coordinating the roll-out of voluntary leases, including making lease applications.[147]

In a further welcome development, the Australian Government announced on 25 May 2010 that it had started to pay rent to Aboriginal land owners in 45 of the 64 communities subject to five-year leases. The rent will be backdated to the commencement of the leases in 2007. Rent payments for the leases concerning two communities in the Tiwi Islands, Milikapiti and Pirlangimpi, began in September 2009.[148]

While these are positive developments, I remain concerned that there is no legislative guarantee against the compulsory acquisition of further leases.

I am also concerned that, at the time of writing, no announcement has been made concerning compensation payments for the compulsory acquisition of these leases. In *Wurridjal v Commonwealth*[149] the High Court found that the Australian Government is required to pay just terms compensation for the five-year leases.[150]

The Australian Government has acknowledged that '[t]he payment of rent does not preclude continuing discussions with the land owners in relation to the provision

145 *Northern Territory National Emergency Response Act 2007* (Cth), s 37A.

146 Commonwealth, *Parliamentary Debates,* House of Representatives, 25 November 2009, p 12787 (The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/hansard/reps/dailys/dr251109.pdf (viewed 22 September 2010); Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), pp 10–11. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 15 October 2010).

147 The Central Land Council reports that in the last financial year the Commonwealth requested s 19A leases over three communities in its region, however each of those applications were rejected. It states the Commonwealth has not provided revised applications: Central Land Council, *CLC Annual Report 2009–2010* (2010), pp 76–77. At http://www.clc.org.au/Media/annualrepts/CLC_annual_report_2009_2010.pdf (viewed 2 December 2010).

148 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon W Snowdon MP, Minister for Indigenous Health, Rural and Regional Health and Regional Services Delivery, 'Rent payments for NTER five-year leases' (Media Release, 25 May 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/rent_nter_25may10.aspx (viewed 22 September 2010). The amount of rent was determined by the Northern Territory Valuer-General. The Government also stated that it was 'standing by' to make payments to the remaining 16 Aboriginal corporations which hold title to community living areas, and that the lease over Northern Territory Crown land at Canteen Creek did not involve a rent payment.

149 (2009) 237 CLR 309.

150 For discussion of this decision, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 26–31, 153. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

of reasonable compensation provided for under the legislation'.[151] I encourage the Government to progress discussions with Aboriginal land owners with a view to reaching agreement on appropriate compensation.[152]

(iii) Assessing the Australian Government's consultation process

The Australian Government's consultations about the proposed redesigned measures were based on a discussion paper titled *Future Directions for the Northern Territory Emergency Response* (Future Directions Discussion Paper).[153] The consultations covered the 73 NTER communities[154] plus a number of town camps.

The Australian Government estimates the consultation processes reached a total of 3000–4000 people.[155] The Government employed a four-tiered approach to the consultations:

- Tier 1 was an ongoing process in which individuals, families and small groups in communities were able to provide their views to government business managers. There were 444 of these meetings.
- Tier 2 involved whole-of-community meetings led by Indigenous Coordination Centre Managers and Government Business Managers. There were 109 of these meetings.
- Tier 3 involved regional workshops of two to three days. These meetings involved a more detailed examination of issues. Six of these meetings were held and 176 people attended.
- Finally, Tier 4 involved five workshops with major Indigenous stakeholder organisations, which 101 people attended.[156]

This process presented a real opportunity for meaningful engagement. With the financial and organisational support of the Australian Government, such wide-scale endeavours have the potential to create a constructive dialogue between the Government and Aboriginal communities. This potential was not realised.

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151 Department of Families, Housing, Community Services and Indigenous Affairs, *Five-year leases on Aboriginal townships*, http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leases_aboriginal_townships.aspx (viewed 22 September 2010).

152 I note that the previous Social Justice Commissioner did not accept that a reasonable amount of rent based on the unimproved value of the land represents just terms compensation for the compulsory acquisition of Aboriginal land under five-year leases: T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 154. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

153 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 19 October 2010).

154 Section 4 of the NTNER Act allows the Government to prescribe areas in which the NTER measures will apply. There are 73 such targeted communities, see Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 3. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

155 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 28 (Bruce Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

156 For details of the engagement process, see Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), pp 16–19. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

The consultation processes regarding the redesigned NTER measures have been analysed extensively.[157] A number of parties have argued that the consultation process was limited.[158] I am also aware of concerns that some areas, such as 'the bush', had minimal consultation.[159] I acknowledge that the Australian Government has responded to a number of these criticisms in Senate Committee hearings.[160]

It is beyond the scope of this Chapter to detail all facets of this consultation process. However, in this section, I survey some of the features of the consultation process and question whether Aboriginal peoples were able to participate effectively in the decision-making processes regarding the redesigned measures. Specifically, I consider:

- the Australian Government's overall approach to the consultation process
- whether the Australian Government was open to addressing the concerns of Aboriginal people regarding the measures affecting their rights to their lands, territories and resources
- the accessibility of information presented during the consultations.

Were there any steps in the right direction?

Certainly, the consultation process displayed some positive features.

First, the scale of consultation that the Australian Government embarked upon should be applauded. Reaching such a large number of people across large areas of remote territory is not easy.

Secondly, the Government contracted the Cultural and Indigenous Research Centre Australia (CIRCA) to review the engagement and communication strategy for the redesign consultations. CIRCA released its final *Report on the NTER Redesign Engagement Strategy and Implementation* (CIRCA Report) in September 2009.[161]

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157 See, for example, Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 22 September 2010); Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010); A Nicholson, L Behrendt, A Vivian, N Watson & M Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (2009). At http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf (viewed 22 September 2010).

158 For a summary of the criticisms of the consultation process, see Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), pp 28–34. At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 22 September 2010).

159 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (15 February 2010), pp 27–28 (V Patullo, North Australian Aboriginal Justice Agency).

160 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), pp 51–54 (B Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

161 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 22 September 2010).

The Australian Government has reported that it adjusted the consultation process in response to early feedback from CIRCA.[162] However, Alison Vivian has noted that CIRCA was contracted to assess whether the 'consultations were undertaken in accordance with the engagement and communication strategy, rather than in accordance with best practice indicia for consultation with Indigenous communities'.[163] Further, the Government did not respond to some of the serious concerns raised by CIRCA 'in relation to the openness and fairness of the meetings and workshops, and the content covered during those meetings'.[164]

I am pleased that the Government was prepared to review its processes, and was open to adjusting these processes where necessary. However, there were several ways that this process could have been improved to ensure that it was consistent with best practice standards for consultation and engagement, including those considered in section 3.2, above, and in Appendix 4.

How did the Australian Government approach the consultations?

As I discuss in section 3.2, above, the objective of a consultation process should always be 'to obtain the consent or agreement of the indigenous peoples concerned'.[165] Further, consultation procedures should themselves be the product of consensus.

There has been criticism that this consultation process was not the product of consensus, and that it 'was going to be problematic given the absence of Indigenous involvement in its design and implementation'.[166] As I discuss at section 3.2, the involvement of affected Aboriginal and Torres Strait Islander peoples in the design and implementation of consultation processes is essential.

It is concerning that the Australian Government did not appear to approach the consultations on the redesigned NTER measures with the objective of obtaining the free, prior and informed consent of the peoples affected by the measures. As stated in the Future Directions Discussion Paper, the Government believed that the current measures should continue but it wanted to 'hear community views about continuing the NTER measures and how they could be changed to deliver greater benefits'.[167] This is worrying given the 'current measures' the Government proposed to continue were implemented without consultation.

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162 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 18. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

163 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 55. Also see Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 5. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

164 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 56.

165 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

166 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 58.

167 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 23. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

When asked by the Community Affairs Committee whether the Australian Government's purpose in undertaking the consultations was to obtain the free, prior and informed consent of the peoples affected by these measures, a representative of FaHCSIA responded:

> The answer is no. The reason for that is because the purpose of the consultations is set out in the discussion paper and the other documents. Those purposes related to resetting the relationship continuing the Northern Territory Emergency Response and reinstating the Racial Discrimination Act, ... That was the purpose that the consultations were entered into for ...[168]

If this was the Government's starting point, I question how much scope there was within the consultation process for Aboriginal people to genuinely influence the Government's decision-making processes.

Was the Australian Government open to responding to the concerns of Aboriginal people affected by the measures?

In several respects, it appeared as if the Australian Government had a predetermined outcome in mind in entering into the consultations and that it was not truly open to responding to the concerns of Aboriginal people. A number of stakeholders raised this concern during the Community Affairs Committee's hearings.[169] Overall, the Government proposed that 'the individual measures should continue to operate in much the same way as they have been operating'.[170]

The Government's engagement and communication strategy had two overarching objectives:

> The first is to reset the relationship between the Government and the Indigenous people in the NT. It will do this by:
>
> - Reiterating the original purpose of the NTER;
> - Reiterating the major achievements to date;
> - Reiterating this Government's commitments including what it has delivered to date;
> - Explaining the Government's current position on the NTER, in particular its position on each of the specific measures;
> - Explaining why the Government is conducting these consultations; and
> - Explaining the longer term agenda.
>
> The second objective is to collect and record feedback from stakeholders on the benefits of the various NTER measures, and how they could be made to work better.[171]

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168 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 58 (A Field, Department of Families, Housing, Community Services and Indigenous Affairs).

169 See, for example, Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), pp 38–39 (A Vivian, Jumbunna Indigenous House of Learning (Research Unit), University of Technology, Sydney), 41 (J Altman); (15 February 2010), p 32 (A Pengilley, North Australian Aboriginal Justice Agency).

170 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 9. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

171 Australian Government, quoted in Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 7. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/sec2.htm (viewed 25 November 2010).

This framework appears to limit the type of feedback the Government would consider as part of its process to 'redesign' the NTER. Noticeably absent from this framework is the objective of involving Aboriginal peoples in the decision-making process as to whether the NTER measures should be redesigned, removed or retained.

Some issues were not even open for discussion as part of the consultation process. For instance, the Future Directions Discussion Paper did not invite people to comment on the powers to compulsorily acquire Aboriginal town camps and to obtain statutory rights over Aboriginal land. These provisions have not been 'redesigned'.

While the statutory provisions regarding the five-year leases were reviewed as part of the consultation process, the Government did not appear to be open to considering any significant redesign or the removal of these provisions.

In the Future Directions Discussion Paper, the Government proposed only minor changes to the legislative provisions relating to the five-year leases. The question of whether the provisions should continue was not part of the 'Questions for discussion during consultation' set out in the Future Directions Discussion Paper.[172] In the *Native Title Report 2009*, the previous Social Justice Commissioner expressed concern that community residents were only being asked for comment on the proposed amendments, as the Australian Government had already formed the view that the five-year leases had operated for the benefit of Aboriginal residents and proposed to continue them.[173]

As a representative of the Central Land Council (CLC) submitted to the Community Affairs Committee,

> it is misleading to simply put to a community, 'What are your views about the five-year leases, because they have been of benefit and if we did not have the five-year leases, we would not be able to carry out all these things in your communities'. It was not presented as though the five-year leases were not in fact leases but compulsory acquisitions of Aboriginal land … How you present information is critical to the feedback that you receive. This is where we have concerns about the consultation process. It was designed to emphasise the benefits of the measures. There is no evidence that we can see that shows that there was a balanced approach to try and give people the full suite of information you may need to make, for example, a decision around something like five-year leases or land tenure arrangements.[174]

The Government has stated that the Future Directions Discussion Paper was only a starting point for discussions, and that 'the consultations were conducted in the spirit of genuine consultation and engagement'.[175]

This does not appear to have been the case with respect to the five-year lease provisions. As the Government reports, the changes to the five-year lease provisions

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172 See Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 18. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

173 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 154–155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

174 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (17 February 2010), p 10 (J Weepers, Central Land Council).

175 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 3. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 22 September 2010).

were 'in line with those proposed in the [Future Directions] Discussion Paper'.[176] It is therefore questionable whether the Government created a space for Aboriginal peoples to be genuinely involved in the decision-making processes as to whether the provisions regarding the five-year leases should be 'redesigned', retained or removed altogether.

Were the consultations conducted, and was the information provided, in an accessible way?

The NTER legislation, and its relationship to the RDA, is complex and difficult to understand. A representative of FaHCSIA informed the Community Affairs Committee that considerable effort was taken to draft the Future Directions Discussion Paper in plain English to ensure that measures were clearly explained. Government Business Managers and Indigenous Engagement Officers were also available to explain the consultations.[177]

Yet, I am concerned that some people affected by the NTER measures were not always able to participate in the consultations in a fully informed manner. For example, CIRCA found that the Future Directions Discussion Paper:

- was not accessible for those with limited English language skills
- did not have any visual imagery to assist understanding or engage the audience
- used formal 'government' language.

Also, insufficient time was provided for people to read the Future Directions Discussion Paper in the Tier 3 meeting that CIRCA observed.[178]

In addition, the Australian Government has recognised that, during the consultations:

> There were frequent comments that people did not understand the leasing arrangements and there was some confusion between five-year leases, township leasing and voluntary leasing.[179]

This confusion may be attributed, in part, to the complexity of the measures and how difficult it is to explain them in the timeframe allowed for consultations. For example, the CIRCA Report found that

> it was difficult in the Tier 2 meetings to have an open discussion as the level of understanding and knowledge of the measure varied, and there was not time to fully explain the measure. This was true for five-year leases …[180]

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176 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 22 September 2010).

177 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 53 (R Heferen, Department of Families, Housing, Community Services and Indigenous Affairs).

178 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 18. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

179 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 11. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 3 August 2010).

180 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 13. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 3 August 2010).

The lack of appropriate interpreting services was a further barrier to effective communication. The *Will they be heard?* report on the NTER consultations found that 'a number of the consultations were seemingly conducted with a presumption of English proficiency' and without interpreters.[181] This is especially problematic given the complexity of some of the measures under review. It is also important that affected communities have sufficient time to digest the information before providing feedback.

FaHCSIA noted that it had engaged interpreters on a 'wide-ranging basis'[182] and worked closely with the Northern Territory Aboriginal Interpreter Service to ensure interpreters were available as much as possible. However, FaHCSIA observed that interpreters were sometimes not available to attend consultation meetings, and that governments acknowledge that more has to be done to build the capacity of interpreting services.[183]

The Community Affairs Committee recognised these concerns. It recommended that the Australian Government maintain its commitment to increase the capacity of Indigenous interpretative services in the Northern Territory and in Aboriginal and Torres Strait Islander communities across Australia.[184]

As I discussed in section 3.2, above, governments need to provide full and accessible information about a measure to ensure that Aboriginal and Torres Strait Islander peoples can participate in decision-making in an informed way. It is impossible for anyone to give their free, prior and informed consent to a measure if they do not fully understand the issue and the possible impact of the measure.

Was there sufficient consultation to address the elements of a special measure?

The Australian Government has claimed that it has 'delivered on its commitment' to reinstate the RDA.[185] Yet, the statutory provisions regarding the five-year leases remain inconsistent with the RDA.[186]

As explained above, the NTNER Act now provides that the object of the statutory provisions regarding the five-year leases is to enable special measures to be undertaken. However, the absence of consent and the limitations of the Government's

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181 A Nicholson, L Behrendt, A Vivian, N Watson & M Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (2009), p 11. At http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf (viewed 3 August 2010).

182 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 12 (B Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

183 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 53 (R Heferen, Department of Families, Housing, Community Services and Indigenous Affairs).

184 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), p xi (recommendation 1). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 22 September 2010).

185 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Racial Discrimination Act to be restored in the Northern Territory' (Media Release, 22 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/jm_m_rda_22june2010.aspx (viewed 22 September 2010).

186 See 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), paras 31–49. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

consultation process brings into question the characterisation of the five-year lease provisions as special measures.

As stated above, the Special Rapporteur noted that the original NTER measures were not preceded by adequate consultations. He did not accept that the discriminatory aspects of the original NTER measures qualified as special measures. The Special Rapporteur further noted that, with respect to the redesigned measures, there are

> significant criticisms against the very consultative process that the Government contends meets the standard of free, prior and informed consent. Thus, open to question is the extent to which the Government's proposed NTER reforms can indeed be said to count on broad support among the affected indigenous people.[187]

The Special Rapporteur noted that the Australian Government's own report of the results of the consultations showed 'that there is an absence of broad or even substantial acceptance by indigenous communities of the rights-impairing aspects of the NTER measures'.[188]

Indeed, the Government has reported mixed views on the five-year lease provisions. Some participants 'expressed frustration and confusion over lease arrangements'.[189] In this context, I agree with the Law Council of Australia that it is

> very difficult to comprehend how [the five-year lease provisions] can conceivably be characterised as special measures in circumstances where a majority of those consulted simply did not understand or did not see any benefit in them.[190]

Some organisations have gone further to suggest that five-year leases are directly against the wishes of Aboriginal residents.[191] For instance, the CLC conducted a survey of six communities in 2008 to document the experiences and opinions of Aboriginal people in Central Australia in relation to the NTER. The CLC found:

> The overwhelming majority of respondents (85 percent) were opposed to 5 year leases. Reasons for opposition to 5 year leases included: the leases gave government more control over communities…the leases overrode the rights of traditional landowners, the leases were put in place without any consultation and the boundaries of the leases were inappropriate…[192]

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187 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

188 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 34. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

189 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 46. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

190 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (25 February 2010), p 12 (S Pritchard, Law Council of Australia).

191 ANTaR, 'Concerns remain about the Northern Territory Emergency Response' (Media Release, 25 November 2009). At http://www.antar.org.au/media/concerns_remain_about_the_NTER (viewed 2 August 2010). See also *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (17 February 2010), p 5 (D Avery, Central Land Council).

192 Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities* (2008), p 6. At http://www.clc.org.au/Media/issues/intervention/CLC_REPORTweb.pdf (viewed 18 October 2010).

In addition, the Australian Human Rights Commission believes that the five-year lease provisions cannot constitute special measures under the RDA.[193] As explained above at section 3.3, laws that:

- authorise property owned by an Aboriginal or Torres Strait Islander to be managed by another without their consent

or

- prevent or restrict an Aboriginal or Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander

are specifically excluded from the special measures exemption in the RDA.[194]

However, the Community Affairs Committee found that the redesigned measures are special measures. The redesigned income management measures were the exception to this finding, as the Committee accepted that these measures were non-discriminatory.[195]

I remain of the view that, to be consistent with the RDA, measures relating to the management of land must be taken with the consent of the landowners. Therefore the redesigned provisions regarding the five-year leases remain inconsistent with the RDA in this respect.[196]

(iv) Conclusion

During the consultations on the redesigned NTER measures, Laynhapuy Homeland Mala Leaders at Yirrkala told the Australian Government that:

> Our responses to your questions in this consultation must not be used by the Australian Government to argue for the continuation of the NTER, Intervention or justify what has been done to date.[197]

Similar concerns were expressed to CERD in its August 2010 examination of Australia (see Text Box 3.4).

193 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 http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 18 October 2010).

194 *Racial Discrimination Act 1975* (Cth), ss 8(1), 10(3).

195 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions]; Families and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), p 24. At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/report.pdf (viewed 22 September 2010).

196 See 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), para 146. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 2 August 2010).

197 concerned Australians, *This Is What We Said: Australian Aboriginal people give their views on the Northern Territory Intervention* (2010), p 54.

Text Box 3.4: Graeme Innes, Race Discrimination Commissioner, appears before the Committee on the Elimination of Racial Discrimination[198]

I now turn to Rosie and Djiniyini, two Aboriginal elders who have traveled from Central Australia to deliver an urgent message about the survival of their Aboriginal brothers and sisters, and sons and daughters, living under the Northern Territory Emergency Response. You have both told me you decided to participate because you hoped it could ease your own, and your communities, despair. You both told me you have felt a need to step back from developments with the Northern Territory Intervention, to see and I quote "what is left of us mob".

Rosie and Djiniyini, you are descendants of ancient peoples, the world's oldest continuing culture, and you do not need me, or the Australian Government, to speak for you. But may I repeat your messages:

You did not consent to the Northern Territory Intervention.

You said that the Intervention is not a special measure.

You said that it is not a positive or concrete measure to strengthen your communities, culture or customary practice. It has had the opposite effect. It has removed people from their lands, and their own distinct practices and world values. And you said that without land and community at your spiritual centre, every Aboriginal person in Australia will be lost.

I am concerned that voices such as these were not heeded during the consultation process. As I have discussed in this section:

- the people affected by the NTER measures were not always able to participate in the consultations in a fully informed manner
- the Australian Government did not appear to approach the consultations with the objective of obtaining free, prior and informed consent
- the consultations did not appear to create a space for Aboriginal peoples to be genuinely involved in the decision-making processes as to whether the five-year leases should be retained, removed or redesigned.

As such, the consultation process did not reflect the principles for meaningful and effective consultation, such as those set out in section 3.2 and Appendix 4.

I fully support the Special Rapportuer's call for the Australian Government to

> fully purge the NTER of its racially discriminatory character and conform it to relevant international standards, through a process genuinely driven by the voices of the affected indigenous people.[199]

(c) What can we learn from these consultation processes?

Undoubtedly, the Australian Government has taken some important steps towards improving its relationship with Aboriginal and Torres Strait Islander peoples. However,

198 G Innes, *Commissioner appears before CERD Committee at the UN* (Speech delivered at the 77th session of the Committee on the Elimination of Racial Discrimination, Geneva, 11 August 2010). At http://www.humanrights.gov.au/about/media/speeches/race/2010/20100811_CERD.html (viewed 18 October 2010).

199 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 66. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

the consultation processes profiled in this Chapter illustrate that the Government can further improve the way it engages with us in several important respects.

(i) There is a need for a new consultation and engagement framework

In this Chapter, I have highlighted the need for the Australian Government to make additional efforts to ensure that its consultation processes are meaningful and effective.

For example, the Australian Government needs to ensure that Aboriginal and Torres Strait Islander peoples have access to adequate information about the nature and potential impact of a proposed measure. This information needs to be accessible and easy for the communities affected by the measure to understand. This may require further funding and support for translation and interpretation services.

The Government must also structure consultation processes such that we are afforded adequate time and resources to engage in our own decision-making processes. Further, the Government needs to choose the location of consultation sessions carefully in order to ensure that those most affected by a proposed measure are able to participate and have their views considered.

Most importantly, the Government needs to work with us from the outset to design appropriate consultation processes. The Government needs to work in partnership with us to build consultation processes from the ground up if it is serious about rebuilding relationships with us.

I believe that there is a clear need for a framework to guide governments in the development of consultation processes regarding reforms to law, policies, programs and development processes that may affect our rights.

I recommend that the Australian Government work with Aboriginal and Torres Strait Islander peoples and our representatives to develop a new, comprehensive consultation and engagement framework.

While specific consultation processes should always be the product of consensus, such a framework could guide the development of appropriate processes on a case-by-case basis. The framework should apply across federal ministries, departments and agencies, with consideration given as to how best to promote the framework at a state and territory level and among parliamentary committees.

I believe that the elements of effective and meaningful consultation identified in this Chapter provide a useful starting point for discussions. Further, this framework should explicitly acknowledge the minimum standards affirmed in the Declaration. In this way, the framework would be a powerful way of implementing the Declaration.

(ii) There needs to be a cultural change within governments

Creating a meaningful and effective consultation process is not just about ensuring adequate timeframes and providing sufficient resources. Governments need to fundamentally change the way they approach consultations.

We cannot build relationships based on partnership and mutual respect if consultations are simply an exchange of information concerning a fixed, predetermined policy position. Governments need to be truly prepared to listen to us and accommodate our concerns. They cannot approach consultations with a set legislative or policy outcome in mind.

In order to find long-term solutions to the problems facing our communities, we need to be effective participants in decision-making processes that affect our rights to our lands, territories and resources. I do not believe that this was the case in the two consultations processes that I have profiled in this Chapter.

In short, governments need to change the way they do business. They need to build their own cultural competencies, and their ability to work with us. This highlights the need for greater education and training within governments about our human rights.

As discussed in Chapter 1, as Social Justice Commissioner I will seek to build an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia. I believe that the process of developing a new consultation and engagement framework could itself facilitate the emergence of a deeper understanding of our rights within governments. Our human rights need to be a primary consideration in any consultation process.

I am concerned that the Australian Government appears to have continued a disturbing trend of characterising as a 'special measure' certain legislation that in fact limits our human rights.[200] As the Special Rapporteur has stated:

> [I]t would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.[201]

I am concerned that the Australian Government appears to have asserted that the reforms reviewed in this Chapter are special measures without sufficiently considering the basis for this claim. Of utmost concern is the fact that the Government does not appear to have given due consideration to the issues of consultation and consent in its assessment of whether these reforms are special measures.

The Australian Government should ensure that any consultation document regarding a proposed legislative or policy measure that may affect our rights contains a statement that details whether the proposed measure is compatible with international human rights standards. This analysis should:

- explain whether, in the Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

Such a statement could promote an open dialogue about the impact of the proposed measure on our rights, and encourage the Australian Government to explicitly consider our human rights at the earliest stages of law and policy-making. It can also equip us with the information that we need to engage in consultations, and to test the Government's assertions, in a fully informed way.

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200 For further discussion, see J Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, p 63.

201 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 21. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

3.5 Conclusion

In this Chapter, I have illustrated several ingredients of a meaningful and effective consultation process. I have also considered whether the Australian Government has paid adequate attention to issues of consultation and consent in relation to two law reform initiatives that were pursued during the Reporting Period. I consider that there is a clear need for the Australian Government to change the way that it engages with us in relation to matters that would affect our rights to our lands, territories and resources.

Meaningful consultation can forge new relationships between Aboriginal and Torres Strait Islander peoples and governments. It can also lead to the development of lasting and effective policy solutions. Yet, as observed by the CLCAC, '[i]t is unfortunate that consultation of this nature is so rare'.[202]

I believe that the nature and quality of the Australian Government's consultation processes can indicate the strength of its commitment to 'reset' its relationship with us. If it is serious about developing relationships based on partnership and mutual respect, the Government must engage with us in a meaningful way before adopting or implementing matters that would affect our rights to our lands, territories and resources. By working with us and respecting our rights, rather than imposing laws and policies upon us, governments can go a considerable way towards building stronger relationships with us.

There is some cause for optimism. For example, the Chairperson of the South West Aboriginal Land and Sea Council (SWALSC), Graeme Miniter, has commented:

> SWALSC seemed to be drawn into more and more discussions and consulted in ever increasing ways … We should never be complacent, but there are signs that the work done to try to faithfully represent Noongars on major issues is beginning to influence the way governments and industry engage with Noongars. We are always aiming for strong and respectful two way relationships. This is not always possible but seems to be more common than it was.[203]

I am particularly pleased that the National Congress of Australia's First Peoples was established during the Reporting Period.[204] I believe that this organisation will play a crucial role in building and strengthening relationships, and in supporting effective engagement, between governments and Aboriginal and Torres Strait Islander peoples.

As I stated in Chapter 1, one of my priorities as Social Justice Commissioner is to promote effective engagement between governments and Aboriginal and Torres Strait Islander peoples. To this end I will continue to monitor the adequacy of government consultation processes during my term.

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202 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.12. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

203 G Miniter, 'Chairperson's Report' in South West Aboriginal Land and Sea Council, *Annual Report 2009* (2009), p 5. At http://www.noongar.org.au/images/pdf/annual-reports/Annualreport_2009.pdf (viewed 30 September 2010).

204 National Congress of Australia's First Peoples, `New Congress to Represent Aboriginal and Torres Strait Islanders' (Media Release, 2 May 2010). At http://www.humanrights.gov.au/about/media/media_releases/2010/41_10.html (viewed 11 January 2010).

Recommendations

3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should:

- explain whether, in the Australian Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.

3.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, that the Australian Government commit to using this framework to guide the development of consultation processes on a case-by-case basis, in partnership with the Aboriginal and Torres Strait Islander peoples that may be affected by a proposed legislative or policy measure.

3.4 That Part 4 of the NTNER Act be amended to remove the capacity to compulsorily acquire any further five-year leases. Further, in respect of the existing five-year lease arrangements, that the Australian Government implement its commitment to transition to voluntary leases with the free, prior and informed consent of the Indigenous peoples affected; and that it ensure that existing leases are subject to the *Racial Discrimination Act 1975* (Cth).