

SUSPENDING THE RACIAL DISCRIMINATION ACT, 1975 (CTH): DOMESTIC AND INTERNATIONAL DIMENSIONS

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Introduction

This article is concerned with the suspension of the *Racial Discrimination Act 1975* (Cth) (the ‘RDA’) under the Northern Territory Intervention legislation (intervention legislation) introduced in August 2007. The Intervention legislation required the RDA to be suspended on the basis that the Intervention constituted a ‘special measure’, allowing the government to pass discriminatory legislation under certain circumstances. The RDA is the domestic legislation incorporating Australia’s international obligations assumed under the Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD). The Australian Social Justice Commissioner at the time, Tom Calma, rejected the government’s argument that the Intervention constituted a ‘special measure’.¹ It is the opinion of the Committee on the Elimination of Racial Discrimination that the intervention did not constitute a special measure.² At the domestic and international level there is consensus that the government’s argument that the Intervention could be legitimately characterised as a special measure is incorrect.³ This article draws attention to the lack of analysis or debate at the time the legislation was enacted. In doing so this article argues that the Intervention constitutes a problematic moment in both Australian domestic and international policy. It demonstrates that the legislative process was bereft of a legitimate consideration of domestic anti-discrimination protection. It also demonstrates that the Australian Government did not consider their international human rights obligations. Both the domestic and international protective instruments against racial discrimination were ignored at the time highly discriminatory legislation passed through the Australian Parliament suggesting that domestic anti-discrimination laws are not effective as a check on legislation and policy-making. These actions also suggest that international legal obligations assumed by the Australian Government do not act as a check on domestic legislation or policies, having broader implications

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¹ Australian Human Rights Commission, ‘Chapter 3: The Northern Territory ‘Emergency Response’ Intervention – A human rights analysis’ in *The Social Justice Report 2007* (Report 1/2008 Aboriginal and Torres Strait Islander Social Justice Commissioner).

² Committee for the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee (Australia)*, (UN Doc CCPR/C/AUS/C/5) (2 April 2009).

³ See, for example, the Australian Human Rights Commission report, above n 1. The international legal viewpoint is expressed in the report of the CERD Committee in their concluding observations on Australia’s Report on the Elimination of Racial Discrimination.

for the role of anti-discrimination laws specifically, and human rights more generally, in policies for all Australians.

In order to implement their emergency response to child sexual abuse in the Northern Territory, the Howard Government tabled lengthy, complex legislation in the House of Representatives. The government did so by exercising the legislative powers under sections 51 (xxvi), 109 (state and federal law inconsistencies provision) and 122 (federal powers to make laws for the territories provision) of the Commonwealth Constitution. Section 51 (xxvi) is the highly controversial ‘races’ provision that allows the federal government to make ‘special laws’ for the people of any race.⁴ The ‘legislative package’ comprised of five Acts⁵ applying to ‘prescribed areas’ of the Northern Territory and all land subject to the *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)*; land comprising over 600 000 sq km. In practical terms, the legislation affected 500 Aboriginal communities in the Northern Territory. The Report of the Intervention Review Board states that 70 per cent of Aboriginal people in the Northern Territory live in these prescribed areas, and that the legislation affected approximately 45,500 Aboriginal people.⁶ To enact this legislation, the Federal Government had to suspend the *Racial Discrimination Act 1975 (Cth)* as the Intervention legislation was prima facie discriminatory and targeted explicitly at a particular racial group. The suspension removed an integral piece of anti-discrimination legislation and the protection it confers to Australian citizens from a large group of people. This paper is concerned with the suspension of the RDA and two particular aspects of the suspension. In Part I of the article I outline the federal government response and Intervention measures and why the RDA was suspended. In Part II the article discusses the criticism of the intervention as a ‘special measure’. Part III of the article highlights the lack of consideration by the Federal Parliament of the RDA and international obligations assumed under the CERD. Part IV contextualises the international obligations assumed under CERD. Part V draws attention to the recent concluding remarks of the CERD Committee on the Intervention and specifically on the government’s position that the suspension of the RDA constitutes a ‘special measure’. The article concludes by emphasising that the position that the suspension of the RDA is a special measure is not supported by any domestic or international human rights bodies.

⁴ *Commonwealth Constitution Act 1900 (Cth)* s 51 (xxvi).

⁵ The *Northern Territory National Emergency Response Act 2007 (Cth)*; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*; *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007-2008 (Cth)* and the *Appropriation (Northern Territory National Emergency Response Act (No 2) 2007-2008 (Cth)*.

⁶ *Report of the NTER Review Board October 2008* (Commonwealth, 20 September 2008), [1.2].

Part 1

On 21 June 2007, Prime Minister John Howard and the Minister for Indigenous Affairs, Mal Brough, declared a national emergency in the Northern Territory. The Coalition Government was motivated by the inquiry into child sexual abuse in the Northern Territory, the findings of which were published in the report '*Ampe Akelyernemane Meke Mekarle*' or '*Little Children Are Sacred*' report (the Report).⁷ The Report detailed findings about child sexual abuse as well as issues such as disadvantage, poverty, discrimination, health, education and welfare.⁸ The recommendations of the Report advocated a coordinated Federal and Northern Territory government response to child sexual abuse⁹ and a whole of government approach across all relevant departments, including family and children's services, law enforcement, education, health and welfare. This approach demonstrates that the Report situated child sexual abuse in the context of a much larger nexus of disadvantage and neglect. It is the opinion of the Report's authors that this kind of approach was the most effective strategy to decrease the rate of child sexual abuse. The recommendations were accepted by the Chief Minister of the Northern Territory, Clare Martin, whose Labor Government had commissioned the Report. On 15 June 2007, Martin stated that the Northern Territory government was committed to implementing all 97 recommendations.¹⁰ However, on 27 June 2007, in direct conflict with the coordinated Federal and Northern Territory approach advocated by the Report, John Howard and Mal Brough held a press conference to announce that they were declaring a national emergency. They stated they were unhappy with the response of the Northern Territory Government and only a federal emergency intervention could adequately respond to the crisis of child sexual abuse.¹¹ It is important to highlight that although the government often referred to the Report in media interviews and Parliament,¹² the emergency response was inconsistent with the Report's recommendations. At no time does the Report state that an emergency intervention involving the armed forces was required. The Report is unequivocal in communicating that child safety, welfare and health in Northern Territory Aboriginal communities is urgent, though nowhere in the Report are

⁷ Pat Anderson and Rex Wild, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

⁸ Ibid.

⁹ Ibid, 21.

¹⁰ Clare Martin (Northern Territory Chief Minister), 'Untitled' (Press Statement, 15 June 2007).

¹¹ Mal Brough (Minister for Families, Community Services and Indigenous Affairs), 'National emergency response to protect children in the NT' (Media Release, 21 June 2007).

¹² See, for eg, Lateline, 'PM criticises inaction of states on Indigenous child abuse' ABC 21 June 2007, Lateline, 'Government rejects criticism of Indigenous plans' ABC (25 June 2007); 7:30 Report, 'Fed Govt plans radical overhaul of Aboriginal townships' ABC (21 June 2007).

there any explicit or implicit statements that a suspension of basic anti-discrimination legislation would be required to address child sexual abuse in an urgent manner. Nowhere in the Report do the authors suggest that the RDA may need to be suspended, even given the urgency and seriousness of child sexual abuse in the Northern Territory.

It is important to understand the operation of the RDA as it relates to the enactment of government legislation. Sections of the RDA make unlawful the acts of individuals or groups with respect generally to racial discrimination. Section 6 of the RDA makes clear that the RDA binds the Crown and the States and Territories and does so with respect to the enactment of legislation. Section 9 (1) is the key provision that sets out the prohibition on racially discriminatory actions, and states it is unlawful for any person:

... to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

The only exception to this is found in section 8 of the RDA, which is comparable with Article 1 (4) of CERD and sets out a provision for when the state may legitimately discriminate on the basis of race. This can only be done as a 'special measure'; the only object of which can be for the advancement of a racial or ethnic group in order for them to enjoy their human rights, and must end when that object has been achieved.¹³ The 'special measures' provision can be understood to allow for 'positive discrimination', or as it is often called in the United States, 'affirmative action.' For the Intervention legislation to be characterised as a special measure, and for the RDA to be suspended in pursuance of this, the Intervention had to be capable of characterisation as a special measure.

The Intervention legislation is complex and covers a wide range of matters. For the purposes of this paper, the significant discriminatory measures to be implemented by the legislation are:

- The bans on the sale of alcohol in prescribed areas;
- Bans on the possession and supply of pornography in prescribed areas?
- The compulsory acquisition of five-year leases by the Commonwealth;
- The exclusion of customary law and cultural practice as a relevant

¹³ Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 249.

- factor in bail and sentencing;
- The quarantining of welfare for residents of prescribed areas;
- The removal of review for decisions about social security benefits by the Social Security Tribunal; and
- Modifications to the permit system for access to Aboriginal land.¹⁴

Part II

The Intervention ‘measures’ have been the most criticised from both a human rights perspective and as characterised ‘special measures’.¹⁵ Two key reports have criticised the intervention on these grounds, the first by the Social Justice Commissioner, Tom Calma, who is responsible for the oversight of the RDA. Adopting a human rights perspective, the *Social Justice Report 2007* criticised the intervention for its inconsistency with human rights setting out a ten-point action plan for amending the intervention legislation, and the intervention activities that would make it consistent with Australian human rights legislation, including the RDA.¹⁶ The ten-point plan changes recommended included:

- The restoration of procedural fairness review and external merits review under the NTER package legislation;
- Removing the suspension of the RDA in the Northern Territory;
- Amending the legislative provision that characterise the intervention as a ‘special measure’;
- Reinstating discrimination protection in the Northern Territory;
- Obtaining consent by members of affected communities; and
- Amending to the compulsory property acquisition to ensure ‘just terms’ compensation.¹⁷

Tom Calma states that these are ‘basic democratic protections’ and that no justification can be made that removing these rights was necessary for child protection.¹⁸

The second key report to criticise the Intervention was written by a group of

¹⁴ Jonathan 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* 30, 59-60.

¹⁵ Ibid and see also UN, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee (Australia), (UN Doc CCPR/C/AUS/C/5) (2 April 2009); Louise Pounder, ‘Never Mind Human Rights, Let’s Save the Children: The Australian Government’s Emergency Intervention in the Northern Territory’ (2008) 12 (2) *Australian Indigenous Law Review* 21.

¹⁶ *Social Justice Report 2007*.

¹⁷ Ibid.

¹⁸ Tom Calma, ‘Indigenous Rights: the debate over a charter of rights’ (2008) 33 (2) *Alternative Law Journal* 105, 105.

lawyers and academics and was submitted to the CERD Committee.¹⁹ In Australia individual human rights complaints against other individuals or government bodies or agencies are first directed to the Human Rights and Equal Opportunity Commission.²⁰ This includes complaints of racial discrimination unlawful under the RDA.²¹ In addition, The CERD has an individual complaints procedure that can be pursued by individual citizens of states that have signed the Convention where there is an allegation of serious threat of racism as a result of the action of that state against its citizens.²² The CERD urgent action response complaint mechanism allows for individual persons resident in a state that has signed the CERD to complain directly to the Committee. The request submitted to the Committee by a group of lawyers highlights the numerous discriminatory effects of the Intervention for Indigenous people living in the prescribed areas that constitute ‘serious, massive and persistent’ racial discrimination.²³ These effects, include, but are not limited to, the threat to Indigenous cultural norms and collective ownership of land, restrictions to social security benefits solely on the basis of race and the hardship the Intervention caused to Indigenous people.²⁴ For example, the quarantining of welfare payments has meant that isolated community residents have had to travel for up to four hours to buy basic food supplies from community stores. The authors of the Request believed that they had solid grounds to establish that ‘serious, massive and persistent racism’ (the threshold requirement for making a direct complaint) was present in communities where the Intervention legislation had been implemented.²⁵ As evidence of serious, massive and persistent racism the authors in particular highlighted:

- The suspension of the RDA;
- The lack of consultation with affected communities;
- The compulsory quarantining of income;
- The compulsory acquisition of five year leases by the Commonwealth;

¹⁹ Request for Urgent Action under the *International Convention on the Elimination of All Forms of Racial Discrimination*, Submission in relation to the Commonwealth Government of Australia (28 January 2009).

²⁰ Section 20(1) of the Australian Human Rights Commission Act 1986 confers the power for the Human Rights Commission to investigate complaints made by individuals in Australia.

²¹ *Racial Discrimination Act 1975*, section 20.

²² CERD Committee, Guidelines for the Early Warning and Urgent Action Procedures, Annual Report A/62/18 Annexes, Chapter III (Guidelines adopted at the CERD Committee 71st session in August 2007 on the Early Warning and Urgent Action Procedure (EWUAP)).

²³ The Authors Legal Representatives, Request for urgent action under the International Convention on the Elimination of All forms of Racial Discrimination, Submission in Relation to the Commonwealth of Australia (28 January 2009).

²⁴ *Ibid* [20].

²⁵ Professor Larissa Behrendt and Alison Vivian, ‘Northern Territory Emergency Response Request to the Committee on the Elimination of Racial Discrimination for ‘urgent action’’ (2009) [Power Point prepared for students enrolled in Human Rights and Indigenous Peoples, Melbourne Law School, 2009].

- The power given to Ministers over Indigenous councils and organisations; and
- The removal of judicial discretion in considering customary law and tradition in sentencing and determining bail.²⁶

The report was highly critical of the characterisation of the Intervention as a special measure.²⁷ The report's authors reiterated that at international law, a special measure for a particular racial group should only be 'the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals ... to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms' as per Article 1 (4) of the CERD.²⁸ The authors submitted that this sole purpose definition, the necessity of the special measure to achieve the sole purpose and temporariness are the 3 core principles underpinning special measures.²⁹ Furthermore, any special measures should be implemented only after consultation with individuals or communities affected has taken place.³⁰ The authors of the report submitted that the Intervention was not a special measure in particular because:

- The Intervention was not for the sole purpose of advancing the rights and fundamental freedoms of Aboriginal people in the Northern Territory;
- The Federal Government had not satisfactorily made out a case for the necessity of the intervention;
- Many Intervention measures were not temporary; and
- There had not been consultation with affected communities.

More generally, the authors of the report submitted that the suspension of the RDA raised serious concerns about Australia's obligation to implement the CERD under Article 2, the provision of the CERD that sets out the state parties' obligation to implement the Convention in domestic law.³¹ The report's authors conclude their submission by requesting that the CERD Committee request that the Australian government restore the RDA and that no positive actions or implementation of the Intervention take place until all Intervention measures could be properly characterised as special measures.³²

When the CERD Committee receives an Urgent Action Request, they review the information and allegations in the spirit and principles of the CERD. In response to the Request, a letter was issued to the Australian government on 13 March 2009, from Fatimah-Binta Victoire Dah, the Chairperson of the CERD

²⁶ Ibid, 7 [22] [23] and [24].

²⁷ Ibid, 30-32.

²⁸ Ibid, 30 [121].

²⁹ Ibid, 30 [124].

³⁰ Ibid, 30 [125].

³¹ Ibid, 37.

³² Ibid, 61.

Committee. The letter noted that a key concern was the suspension of the RDA and that it did not constitute a ‘special measure’ as understood in international law. It is beyond the scope of this article to consider the wealth of academic commentary and reports by human rights bodies that detail the discriminatory substance and effect of the Intervention legislation and the problematic contention by the Australian Government that the suspension of the RDA constituted a ‘special measure’.

The two reports discussed here however are typical of the robust criticism by human rights bodies domestically and internationally that the Intervention could be characterised as a ‘special measure’ under either domestic law, or as it is understood at international law. Together, the uniformity of academic and expert opinion stands in stark contrast to the government’s position on the Intervention as a special measure.

Part III

It is critical to note that when the legislation was tabled before the House Representatives the RDA was hardly mentioned. As Jonathan Hunyor notes, ‘the claim that the NT Intervention is properly characterised as being a special measure is not one that found support outside Parliament.’³³ On 7 August 2007, the 480 pages of legislation that were tabled in the House of Representatives by Minister for Aboriginal Affairs Mal Brough were passed the same day.³⁴ The Intervention had bipartisan support from when it was announced on 21 June, and although the Opposition had proposed a number of amendments, without a legislative majority none of these amendments were successful. The fact that such significant, complex and lengthy legislation was passed in a single day is concerning. One might crudely argue that the RDA and the discriminatory substance and effect of the legislation was not the subject of debate because there was not any time. Mal Brough, did not mention the special measures provision of the RDA, but merely noted in passing that the RDA was important legislation and that the Intervention was consistent with it.³⁵ Only one Minister, Labor’s Daryl Melham, questioned on 7 August that the suspension of the RDA might not be a ‘special measure’. Without any analysis or detail, Jenny Macklin, Opposition spokesperson for Indigenous affairs stated that it was

³³ Hunyor, above n 14, 62.

³⁴ *The Northern Territory National Emergency Response Bill 2007 (Cth)*; *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)* and the *Appropriation (Northern Territory National Emergency Response Bill (No 2) 2007-2008 (Cth)*.

³⁵ House Hansard, 41 Parliament, First Session, 10th period, No 11, Tuesday 7 August 2007, 71.

Labor's position that the Intervention did constitute 'special measures.'³⁶ Macklin did state that it was Labor's position that a blanket removal of the RDA was not necessary or desirable and proposed an unsuccessful amendment to have the suspension removed from 3 of the 5 bills.³⁷ However, the proposed amendment does not compensate for Labor's lack of analysis or questioning about the legitimacy of the suspension of the RDA during this important parliamentary session.

Having passed through the House of Representatives, the Intervention legislation went to the Senate, where a Senate Legal and Constitutional Affairs Committee had a little over a week to receive and review submissions. As Melinda Hinkson notes, despite the efforts of Mal Brough to circumvent a Senate Inquiry³⁸, one day was set aside for submissions to be reviewed.³⁹ Time and time again the Howard Government argued that the emergency in the Northern Territory did not allow for time to 'talk'. The Government emphasised action over 'mere words'⁴⁰ and criticised any person or group who advocated consulting affected communities or maintaining due process and scrutiny of the legislative process. Over 50 submissions were received by the Senate Committee despite the ridiculously short timeframe. It is of course beyond the scope of this paper to analyse all the submissions, though it should be noted that while the majority of submissions were supportive of government action on child sexual abuse, were supportive of the approach the government took. In particular many submissions argued that if time were not taken to scrutinise legislation, human rights violations and discrimination would be inevitable. A submission by the Human Rights and Equal Opportunity Commission (HREOC) referred the submission to the definition of 'special measure' as articulated in Article 1(4) of the CERD and emphasised that this was inconsistent with the government's interpretation of 'special measure'.⁴¹ The HREOC submission highlighted that judicial consideration of the special measures provision in *Gerhardy v Brown*⁴² in the High Court of Australia had been read as supporting the granting of land rights, reinforcing the reading of

³⁶ Ibid.

³⁷ Ibid, 72.

³⁸ Senate Legal and Constitutional Affairs Committee, inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills, Call for submission (Canberra, 9 August 2007)

<http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/info.htm>.

³⁹ Melinda Hinkson, 'Introduction: In the Name of the Child' in Jon Altman and Melinda Hinkson (eds) *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 1, 2.

⁴⁰ See for example the interviews with John Howard and Mal Brough on the ABC 7.30 Report program on 21, 22 & 25 June 2007.

⁴¹ Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Legal and Constitutional Committee Submission on the Northern Territory National Emergency Response Legislation.

⁴² (1985) 159 CLR 70.

‘special measures’ as conferring positive rights or benefits. The HREOC submission argued that special measures could not be supported for legislation that was discriminatory and potentially negative for those affected, noting the conspicuous absence of consultation with the communities that were to be affected by the legislation and community groups that may have assisted with the Intervention process.⁴³ The HREOC submission also highlighted that the understanding of ‘special measures’ under CERD is that actions that can be classified as ‘positive discrimination’ or ‘affirmative action’ are designed to assist disadvantaged groups or individuals by challenges from members outside of that group.⁴⁴ The submission disagreed that the Intervention legislation could be characterised as ‘positive discrimination’. Domestic anti-discrimination legislation, enacted in 1975, was therefore not useful in acting as a check on the enactment of discriminatory legislation and it is reasonable to expect that the Australian Parliament should consider more seriously protective human rights legislation when enacting highly discriminatory legislation. It is also reasonable to expect that debate on this issue in the House of Representatives should have occurred over more than one day and that more time been set aside for the Senate Inquiry to consider the submissions of affected groups and organisations. The lack of consideration of the RDA and the ease with which it was suspended in this instance suggests that it is not effective as a protective instrument for Indigenous Australians.

Part IV

It is important to consider the suspension of the RDA as a contravention of Australia’s international obligations. The CERD came into force on the 4 January 1969⁴⁵ with Australia signing on the 13 October 1966 and ratifying it on 7 August 1975. The ratification was achieved by the incorporation of the CERD into Australian domestic law with the enactment of the *Racial Discrimination Act 1975 (Cth)* and a Federal statutory body, the Human Rights and Equal Opportunities Committee (HREOC), was set up under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. HREOC also has the conferred functions of investigating complaints made by groups or individuals, educating and promoting understanding of human rights and monitoring legislation for human rights compliance. The CERD is one of the most widely signed international human rights treaties. It sets out minimum standards for signatory states with respect to promoting and enforcing anti-discrimination legislation within their domestic legal regimes. Although not specific to Indigenous people, the CERD is a key component of the international human rights law framework that promotes state practice with

⁴³ Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency, Senate, Parliament of Australia, Canberra, (10 August 2007), [16]-[17].

⁴⁴ Ibid.

⁴⁵ 660 UNTS 195.

respect to racial discrimination, clearly something that has disproportionately affected indigenous groups around the world. Indigenous rights were recognised by the International Labour Organisation in the 1930s, which resulted in the first specific document on Indigenous Rights, the *Indigenous and Tribal Populations Convention 1958 (No 107)* (ILO 107).⁴⁶ In 1971 the United Nations responded to this by commissioning the Cobo report that examined the issue of discrimination against Indigenous people globally.⁴⁷ Developments such as this in the area of Indigenous rights resulted in the establishment of a UN Permanent Forum on Indigenous Issues.⁴⁸ Shortly after the NTER legislation was passed, the United Nations General Assembly (UNGA) on 13 September 2007, adopted the UN *Declaration on the Rights of Indigenous Peoples* (the Declaration). Four UN member states (Australia, New Zealand, Canada and United States) voted against the adoption though in April 2009 the Rudd Labor Government reversed the position of the Howard Government by formally stating their intention to support the Declaration.⁴⁹ More recently, Canada has formally reversed their vote against the Declaration⁵⁰ and on the 17 December 2010 at the White House Tribal Nations Conference US President Barack Obama formally stated that the US would reverse their vote against the Declaration also Only New Zealand has yet to reverse their vote against the Declaration.⁵¹

The adoption of the Declaration and the support from the UNGA represents an important advance in the recognition of Indigenous rights at the international level. However, the Declaration does not have the same binding force, level of obligations or institutional oversight and monitoring framework as the CERD. For this reason, I would argue the CERD remains at the international and domestic level (as incorporated in the RDA), the more fundamental instrument for the protection of Indigenous rights. This makes the suspension of the RDA in 2007 even more problematic.

An important aspect of the CERD is the multi-level monitoring by states that are party to the Convention. The Committee of the CERD oversees states' compliance with the obligations undertaken following signature of the

⁴⁶ Heather McRae et al, *Indigenous Legal Issues: commentary and materials* (2009) 651.

⁴⁷ *Study of the Problem of Discrimination Against Indigenous Populations, vol 5, Conclusions, Proposals and Recommendations*, UN Doc E/CN4/Sub2/1986/7 cited in Heather McRae et al, *Indigenous Legal Issues: commentary and materials* (2009) 652.

⁴⁸ *Resolution on the Establishment of a Permanent Forum on Indigenous Issues*, ESC Res, 2002 session, UN Doc E/RES/2002/22 (2002).

⁴⁹ HREOC, 'United we stand – Support for United Nations Indigenous Rights Declaration a watershed moment for Australia' (Press Statement, 3 April 2009).

⁵⁰ Indian and Northern Affairs Department of Canada, 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (12 November 2010) at <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>>.

⁵¹ The White House Office of the Press Secretary, 'Remarks by the President at the White House Tribal Nations Press Conference' (Press Statement, December 16 2010).

Convention. States must submit a report with details of their compliance every two years. The Committee considers the reports and then issues ‘concluding observations’. The observations are also informed by information submitted by non-government organisations and fact-finding reports by the Special Rapporteur. The Committee acts as an external check on the compliance of Australian domestic policy and legislation. In 2000, the CERD monitoring body issued a report to the Australian government that was highly critical of Australia’s adherence to CERD. It cited Australia’s treatment of members of the Stolen Generations and its attempts to eliminate native title rights as key areas where Australia was not meeting its international obligations.⁵² The Howard government response at the time was one of indignation and hostility, and from that point onwards the debate about human rights was shut down by the Howard government and right-wing media.⁵³ Megan Davis states that one of the lesser-known reasons for the dismantling of the Aboriginal and Torres Strait Islander Commission (ATSIC) under the Howard Government was the role the body played in holding the government to account with respect to obligations entered into through the signing of UN conventions and treaties.⁵⁴

As discussed, the CERD Committee is responsible for providing states’ party to the Convention with concluding comments on their compliance with CERD. The Committee most recently considered Australia at their seventy-seventh session on 2-27 August 2010.⁵⁵ Their concluding comments on Australia’s fifteenth-seventeenth periodic reports⁵⁶ are particularly critical of the Intervention. The Committee stated:

... the package of legislation under the Northern Territory Emergency Response (NTER) continues to discriminate on the basis of race as well as the use of so called “special measures” by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies.⁵⁷

On 29 June 2010 the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth)*⁵⁸ entered into force, providing for the reinstatement of the *RDA* from December 2010. This move was noted with approval by the CERD

⁵² Behrendt et al, above n. 13, 309.

⁵³ Ibid.

⁵⁴ Megan Davis, ‘Arguing Over Indigenous Rights: Australia and the United Nations’ in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 97.

⁵⁵ CERD/C/SR.2043.

⁵⁶ CERD/C/AUS/15-17.

⁵⁷ CERD/C/SR.2043.

⁵⁸ Act 2010-No 93 of 2010.

Committee,⁵⁹ however, they reiterated that the Government's position that the intervention had constituted a 'special measure' was still inconsistent with the Committee's understanding of a 'special measure' as articulated in their General Comment 32:

The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.⁶⁰

Two aspects of this statement are important. The first is that special measures as understood by the Committee must be to secure fundamental freedoms where disadvantage exists. The second is that these measures should be temporary. It is impossible to argue that the quarantining of welfare payments could be to secure fundamental freedoms or human rights. It is equally impossible to argue that removing sentencing discretion for Aboriginal people could be characterised as a measure to secure human rights. With respect to being temporary, there was no indication at the time the Intervention legislation was enacted how long the suspension of the RDA was for. The Committee also requires that any special measures implemented by a state party to the CERD be done in consultation with the effected community.⁶¹ This was not the case with the Intervention. For these reasons it was not open for the Australian government to argue that the suspension of the RDA was legitimated by the need to tackle child sexual abuse, or as an inevitable consequence of efforts to tackle this. This is not to suggest that the government should not have done everything in its power to address child sexual abuse in the Northern Territory. It is, however, inconsistent with the understanding of special measures at international law to argue that special measures can be constituted by a state of emergency or a crisis in law and order.

Conclusion

This article has argued that the suspension of the RDA and the Government's interpretation of 'special measures' under the RDA and the CERD is inconsistent with Australian domestic law and Australia's international legal obligations. I would like to conclude by making some observations about the importance of time. I have previously argued that the critical time for human rights legislation is when a government proposes to enact legislation or implement a policy that raises human rights concerns. Ideally, the protective instrument is considered by the government proposing the legislation and if inconsistencies or contraventions are discovered, the legislation or policy is

⁵⁹ CERD/C/SR.2043 at [16].

⁶⁰ General comment, 32 [11].

⁶¹ General comment, 32 [16].

either amended, or abandoned entirely. My argument here is not to suggest that the Intervention as a whole, or its aims, should have been abandoned. My argument has raised concerns that as a procedural matter, anti-discrimination legislation and international human rights law were not even considered by the Howard Government, or the Labor Opposition. It was of course argued by many at the time the Intervention was announced, that it was discriminatory and breached domestic and international human rights. Australia does have a core piece of federal legislation that is designed both to implement international law and to make illegal racial discrimination. It is also designed to act as a check on legislation that may have the same discriminatory effect as the actions of an individual. That is why section 8, the special measures section, only makes legal positive discrimination. In this instance the RDA and Australia's international obligations were not able to act as an effective check. The Intervention legislation, discriminatory in both substance and effect, entered into Australian law. Despite extensive research of domestic and international commentary, I have not been able to locate any commentary outside the comments of Government Ministers that support the contention that the intervention can legitimately be considered to be a 'special measure'. This is not to suggest that there is not support more generally for the Intervention. However, it does suggest that there is little or no support for the official government position that the Intervention was consistent with domestic or international anti-discrimination law. It is trite to point out the stark contrast between what played out and the insistence on 7 August 2007 that the Intervention legislation did not contravene anti-discrimination law. It is irrefutable that the Intervention legislation should not have suspended the RDA and that its suspension is both a contravention of Australian domestic law and Australia's international obligations. It is critical now, in my opinion, to question the efficacy of anti-discrimination legislation and the place of human rights protection in Australia. The suspension of the RDA and the lack of debate around such a controversial and fundamental removal of human rights protection resonates more generally than the Intervention and has implications for other human rights protection in Australia.