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Proximities of Justice: The theory of practice in global and local
contexts

Human Rights and the Northern Territory
Intervention

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Australians and particularly conservative Australians have an irrational fear of enforceable human rights. To me this is a strange paradox in a country that has in many ways been a world leader in promoting international human rights instruments and has not been slow to criticise human rights breaches by others. It does not seem to occur to most Australians who oppose a Bill of Rights that such criticisms would have much greater force if we paid the same regard for human rights within our country as we do in respect of others elsewhere.

What we fail to realise is that this country has developed an unenviable international reputation for the disregard of human rights particularly in respect of, but not confined to, its treatment of Indigenous people. Never has this been more apparent than during the period of the Howard Government from 1996 to 2007, but it must be remembered that despite the 2008 apology by the then prime Minister, Kevin Rudd, his Government and that of his successor, continues to disregard the human rights of both Indigenous people and asylum seekers amongst others. The attitude of the Opposition on these issues is that it is obviously prepared to endanger the national interest for short term political gain. Unfortunately the Government seems determined to follow its lead. I will discuss its current referendum proposal subsequently.

Australia is now one of the few countries that do **not** have a Bill of Rights. Of countries with a similar tradition to Australia, the United States enacted a Bill of Rights in 1791; Canada has had a Charter of Freedoms since 1982, New Zealand since 1990, South Africa since 1997 and the UK since 1998. Australia is the only western nation without a Bill of Rights and indeed only a few countries such as Brunei and Burma lack such a Bill.

Turning to Canada, it is a country with a very similar tradition to that of Australia. It appears that the 1982 Charter was passed largely by reason of the leadership of then Prime Minister Trudeau, with strong support from Parliament and the judiciary.¹

Clause 1 of the Charter:

“Guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The Charter goes on to deal with a number of fundamental freedoms such as religious freedom, freedom of thought and expression and freedom of association.

Section 24 provides:

¹ A useful summary and discussion of the Charter is to be found in an article by Justice R. Atkinson of the Supreme Court of Queensland; Are Anti-Discrimination Statutes a Model for a Bill of Rights? Lecture University of Queensland, 16 September 1999; <http://www.courts.qld.gov.au/publications/articles/articlestd.htm#Atkinson>

“(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

These are important provisions that not only render the Charter justiciable, but give its protection real meaning.

The United Kingdom Position

For many years the UK adopted a position similar to that of Australia, which was in substance that there was no need for a Bill of Rights because rights were adequately protected under the existing system by the courts and the common law.

However the participation by the UK in the European Union led to the European Court of Human Rights finding more human rights breaches on the part of the UK occurred more than in any other member country.

With strong political and judicial leadership and some media support, action was eventually taken to correct the situation in that country.

The Australian Position

What then of Australia?

It is important in this regard to point out that a constitutional amendment is in no way a condition precedent to the passage of a Bill of Rights at Federal or State level and Victoria and the ACT have already done so. A constitutional amendment would be preferable, because Parliament can always amend or repeal legislation that it has passed, as it did in the case of the Racial Discrimination Act in 2007 as part of the Northern Territory Emergency Response. However, given the lack of leadership shown by almost all Australian politicians on this issue, some sort of legislation is probably the best that we can hope for.

In Canada, legislation preceded the constitutional amendments included in the Canadian Charter of Rights and Freedoms and if this was to be done in Australia this might lead to a more ready acceptance of a constitutional amendment in due course.

There have been significant voices raised in support of the proposition for a Bill of Rights over many years. In the Vincent Lingiari Lecture delivered in 2000,² the former Liberal Prime Minister of Australia Malcolm Fraser said:

“Through much of my political life I accepted the view of noted lawyers, that our system of law, derived from Britain and the development of common law best protected the human rights of individuals. I now believe that our own system has so patently failed to protect the “rights” of Aboriginals that we should look once again at the establishment of a Bill of Rights in Australia.

² <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/2408.html>

The circumstances of Australia’s indigenous population provide a powerful argument for such a change. The need for an Australian Bill of Rights would be broadly based to guarantee basic rights to all individuals and minority groups.”

The former Chief Justice of the High Court of Australia, Sir Anthony Mason indicated a similar change of mind some twelve years earlier.³

There are an increasing number of Australians who have and are expressing similar views, as the recent National Human Rights consultation found. However, every attempt to introduce a Bill of Rights in Australia has been a failure at Federal level, largely through lack of leadership and political will. The Australian Human Rights Commission has said in 2010:

“The absence of an entrenched guarantee of equality / non-discrimination in the Constitution is of particular concern due to current laws that discriminate against Indigenous peoples on the basis of race. While there are federal, state and territory discrimination laws, there are inconsistencies between them and their coverage varies and is not comprehensive. There is no other comprehensive human rights protection legislation and access to remedies for human rights breaches is accordingly limited.”⁴

A group of Australian NGO’s in a submission to the UN Universal Periodic Review of Human Rights has listed sixteen separate areas where Australia has failed to meet its human rights obligations in 2010. These include relevantly for present purposes Aboriginal and Torres Strait Island people, Children’s Rights, Housing and Homelessness and Poverty.⁵

The ALP has long had the policy of introducing such a Bill. In 1973, Lionel Murphy introduced a proposed Bill of Rights in the Commonwealth Parliament. It was based on the International Covenant on Civil and Political Rights ('the Covenant'), to which Australia is a signatory. That bill lapsed when the Parliament was dissolved in 1974. In 1983, Gareth Evans again attempted to implement the Covenant, overseeing the drafting of another Bill of Rights. That Bill was given Cabinet approval but was never introduced into Parliament. After the 1984 election, Lionel Bowen replaced Gareth Evans as Attorney-General. A much watered down version was introduced by him to Parliament in 1985 but was eventually abandoned after strong opposition was expressed in the Senate and from certain community groups.

³ The Hon Sir Anthony Mason; A Bill of Rights for Australia; Address to Australian Bar Association Bicentenary Conference 1988

⁴ Australian Human Rights Commission Submission to UN Periodic Review 2011, accessed 7/11/10 at http://www.hreoc.gov.au/upr/AHRC_UPR_guide.pdf

⁵ These are:

1. Constitutional and legislative framework
2. Equality and non discrimination laws
3. Women’s rights
4. People with disability
5. Children’s rights
6. Sexual and gender identity
7. Aboriginal and Torres Strait Islander peoples
8. Refugees and asylum seekers
9. Culturally and linguistically diverse communities
10. Administration of justice
11. Housing and homelessness
12. Poverty
13. Mental health care
14. Counter-terrorism
15. Police
16. Prisoners and prison conditions
17. Extra-territorial obligations

The Australian Democrats introduced their version of such a Bill but in 2000, but it met the same fate as its predecessors. The Rudd Government set up a National Human Rights Consultation chaired by Father Frank Brennan, which reported in September 2009.

It is impossible in the context of this address to do justice to that 450 page report but importantly, it recommended a Human Rights Act for Australia. It is a good and comprehensive report, which made it clear that the concept of human rights legislation was widely supported. I would criticise the report for paying too much regard to the frequently expressed conservative mantra that a Bill of Rights involves handing over powers that should be exercised by the Parliament to “unelected judges”. This mantra conveniently ignores the fact that these same “unelected judges” interpret the Constitution and interpret and often declare what the law is in disputes between citizens and between Governments and citizens. Of course they are unelected and surely no-one mindful of the US model suggests that it should be otherwise. The legislation proposed by the Committee did not give the courts the power to strike down legislation or prevent executive action found to be in breach of human rights and was thus relatively toothless.

However, even the mild form of legislation proposed was too much for the Government, which responded with extreme caution, proposing a Human Rights Framework which includes initiatives focused on human rights education, improved parliamentary scrutiny of human rights, a new National Human Rights Action Plan and an immediate review of anti-discrimination laws. The Framework does not include the enactment of a Human Rights Act, nor does it include many of the other recommendations of the National Consultation Committee.

The only promising sign on the human rights front in Australia has been from the States and Territories, with Victoria and the ACT enacting charters that have been well received and appear to be operating effectively, albeit with insufficient powers conferred on the courts and Tasmania and Western Australia moving in the same direction.

The question that we must answer is why we cannot adopt the same approach federally? One interesting finding of the Brennan Committee was that there was:

“---a lack of understanding among Australians of what human rights are and that support for an improved human rights culture was strong. Many submissions referred to the need for greater human rights education or the development of a human rights ethos in the community.”

While this is undoubtedly correct, it begs the question of why Australia should have such a different approach or a greater degree of ignorance than other western democracies. I think that the reality is that federally, we have suffered a lack of strong political leadership on the issue over the last 25 years.

Decisions seem all too often to have been poll driven or based upon the views of anonymous focus groups and there appears to have been little or no attempt to lead public opinion on social and political issues. Historically, this form of leadership has come from the ALP but its abandonment of the field has not surprisingly left an opening for the Greens, who are now attracting significant percentages of the vote.

A former American president, Harry S Truman, defined leadership as follows:

“Men make history and not the other way around. In periods where there is no leadership, society stands still. Progress occurs when courageous skilful leaders seize the opportunity to change things for the better.”⁶

This is precisely what has not occurred in this country over this and many other issues including the position of our Indigenous people.

Another feature of leadership is persistence and the willingness to take unpopular positions and to pursue them fearlessly, despite the apparent weight and strength of the opposition. This is often a true test of leadership. It is always easy to pander to popular opinion, but quite another thing to change it. Our current crop of leaders has seemed oblivious to this although there is still time for Julia Gillard to do so.

Another test of good leadership is to know when to seize the moment. In this regard Kevin Rudd missed a wonderful opportunity when he failed to capitalise on popular sentiment in favour of Aboriginal and Torres Strait Island people following his very successful 2008 apology. If ever there was a time to seek a constitutional amendment to recognise the rights of Aborigines and Torres Strait Islanders that was it.

I had the honour of being part of the Indigenous group at the 20/20 Summit in Canberra in 2008, which was chaired by the Minister, Jenny Macklin. There was a strongly expressed feeling amongst the group in favour of a constitutional amendment or treaty or both. However no mention of this appeared in the communiqué appeared following the Summit.

I later helped draft a letter on behalf of a group at the Summit who were concerned about this and wrote to the Prime Minister, pointing out the golden opportunity that he had been afforded by that expression of views coupled with the apology. After a lengthy period I received an inconsequential reply from a junior person in the Minister’s office, which I think was indicative of the Government’s lack of interest in progressing this matter. In any event the issue of constitutional amendment died under Rudd’s leadership.

Until this week there has been silence about the possibility of constitutional recognition, apart from a very vague statement from the Minister’s office in mid 2010. On Monday 8 November Prime Minister Gillard announced the appointment of a committee to report on ways of achieving constitutional recognition for Aborigines and Torres Strait Islanders with a view to holding a referendum to achieve this in conjunction with the next federal election. While this is an important initiative it comes too late. I also wonder about the value of appointing yet another committee, particularly given the fate of the Brennan Committee’s report on legislation for a Bill of Rights

⁶ Accessed on 27 September 2009 at <http://home.att.net/~howingtons/dem/truman.html>

I am also not so sure about holding a referendum in conjunction with an election, given the highly politically charged atmosphere in elections are held and the possibility that the Opposition will see additional political advantage in finding some reason to oppose it.

One of my primary concerns and one that seems to me to be the likely outcome is that in order to avoid such a political controversy, any constitutional amendment will be of the Howard inspired type, namely a meaningless amendment of the preamble to the Constitution, which will have no legal force. Already the Opposition has signalled that this is probably as far as it will go. If that remains its position, a referendum to the substance of the Constitution conferring substantive rights upon Aboriginal and Torres Strait island people is unlikely to pass, even if the Government finds the political courage to offer it. For rights to flow to our Indigenous people, it is essential that there be a substantive amendment to the text of the Constitution conferring these rights.

This leads me to the second part of this lecture, namely the Northern Territory Emergency response, popularly described as “the Northern Territory Intervention”. I have so far dwelt on the absence of human rights protection in Australia and there is no more graphic example of the need for it than the events surrounding the intervention.

The Northern Territory Intervention

On 21 June 2007, Prime Minister Howard and Minister for Indigenous Affairs Brough announced an intervention in the Northern Territory, ostensibly to protect Aboriginal children from sexual and other abuse.

At the time the Howard government had been in office for 11 years and had done little or nothing for the Indigenous people of this country or their children, but was facing an election in late 2007 and looked to be in trouble in the opinion polls. He was desperate for another issue such as that presented to him in the 2001 election by a combination of 9/11 and the Tampa asylum seeker issue. He clearly saw a highly dramatic intervention in the Northern Territory, ostensibly to protect Aboriginal children as falling into a similar category.

Howard’s relationship with Indigenous people was always questionable and he had shown little empathy for or understanding of them and had firmly persisted in his refusal to apologise for their past mistreatment. He had abolished their only representative body, ATSIC without replacing it. While there may have been good grounds for the reform of ATSIC, given the aberrations of its leadership, its abolition left Indigenous people deprived of a voice.

His Government’s real commitment to Indigenous people and their rights can be gauged by its opposition to signing the UN Declaration on the Rights of Indigenous Peoples, a stance subsequently reversed by the Rudd Government

Brough was a comparatively new Minister, a Queenslander with an army background and a “can do” approach. I have an abiding memory of him addressing a homelessness conference in Sydney in 2006, where he succeeded in demonstrating his contempt for the Aboriginal

people to such an extent that a large percentage of his audience, including most Aboriginal people present, walked out. Things did not get better from there.

We thus had a dangerous combination, namely a Prime Minister who was desperate to be re-elected and needed to demonstrate his strength and an ambitious Minister who thought that he knew what Aboriginal people needed, like so many before him.

Brough was what is often called a 'hard man' who had little time for the niceties or consultation when he determined upon what he thought was the correct approach. He was appalled by the state of Aboriginal people in the Territory and believed that he had the answers to their problems.

He was also extremely frustrated by the NT Government, led by a very ineffective Claire Martin, and also by the attitude of Aboriginal elders and leaders, other than Noel Pearson, to his proposals.

In considering the motivation for the intervention it should not be forgotten that there were a number of mini interventions driven by Brough between his becoming Minister in early 2006 and the Intervention itself. These were the Alice Springs town camps, 99 year leases of townships coupled with remote area housing and the permit system.

The town camps surrounding Alice Springs were the responsibility of the Territory Government. It had entered into leases of the land which were controlled by an Aboriginal council, Tangentyere. Housing in the camps was in an appalling condition and there were many issues of violence and child neglect. Brough offered \$60M to correct the situation provided that the Territory Government took back control of the leases of the camps from the Council. In April 2007 town camp residents refused to accept Brough's offer According to Paul Toohey, the long term Territory correspondent for the Australian newspaper, Brough regarded this as his greatest disappointment as Minister.⁷ Toohey points out that the NT Government could have compulsorily acquired the lands but was unwilling to do so in the face of this opposition.⁸

As to housing, Brough became concerned that the Commonwealth neither owned nor was legally responsible for remote area housing and considered that housing had been mismanaged by the Community Housing Infrastructure Program. This may well have been right but Brough's solution was not untypically, to crack a nut with a sledge hammer and he sought to adopt a proposal advanced by the Territory Government for 99 year leases of township lands. In return for such leases the Federal Government would build houses. The Land Act was amended in 2006 to enable the 99 year lease proposal to proceed. The significance of this amendment continues to haunt the Aboriginal people of the Northern Territory.

⁷ Toohey Paul; *Last Drinks, The Impact of the Northern Territory Intervention*; Quarterly Essay, Issue 30, 2008, Black Inc. Melbourne

⁸ Ibid Toohey at pp.30-32

The 99 year leases were a disastrous proposition and were seen by many as striking at the very heart of what had been achieved by the land rights movement and the decision in *Mabo*. It was based on classic conservative ideology whereby communities would be turned into normal towns where tenants would have the opportunity to buy their houses at cheap loan rates. This would also enable lands to be leased to businesses more readily and gradually lead to an urbanisation of Aboriginal people and permits would no longer be necessary to enter such towns. Homelands would be starved of funds and gradually vanish leaving the way clear for further mining activity. Unfortunately, the present government still seems to be wedded to this agenda.

The problem that Brough encountered was that nearly all of the traditional owners refused to enter into such leases despite the offer of preferential treatment as to housing. The only success that he had was on the Tiwi islands north of Darwin where the owners signed in return for receiving a much needed boarding school for their children. Brough personally 'negotiated' with the traditional owners by presenting them with leases for them to sign. The lesson for Brough was that Aboriginal elders could not be bulldozed by an ambitious and arrogant Federal Minister he needed another trigger to introduce legislation to achieve his objects.

These events give some indication of the real motivation for the intervention, which was much more about land than children. However a series of events involving some particularly troublesome crimes and issues relation to children played into the government's hands and made the intervention possible.

For some time there had been considerable media attention and criticism of the NT legal system and its handling of criminal offences committed by Aboriginal people, often involving sexual offences against young girls. Concerns had been expressed by the chief prosecutor at Alice Springs, Dr Nanette Rogers about the handling of such matters and the seeming indifference of the NT Government to the problems confronting it in this regard. Brough also had concerns in this area but also saw it as an opportunity to address Aboriginal issues in the NT once and for all.

Under pressure the Martin government in the NT announced an inquiry to be conducted by the recently retired Director of Public prosecutions in the NT, Rex Wild QC and an Aboriginal woman, Pat Anderson, who was well known in the health area.

The announcement of the intervention was made in response to their report, officially titled *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 of 30 April 2007. That report revealed a serious situation in relation to the abuse of Indigenous children in the Northern Territory and clearly called for urgent action by the Northern Territory Government.

The report contained some 97 recommendations to address the issue and runs to 376 pages. It recorded significant and extensive consultation with Indigenous people, including children, and was a far sighted and genuine attempt to address the problems of child abuse.

The Report was made public on 15 June 2007. It emphasised the need for real consultation with, ‘and ownership by the communities of those solutions’. Significantly, the authors said:

“In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, whether these be in remote, regional or urban settings. We have been conscious throughout our enquiries of the need for that consultation and for Aboriginal people to be involved.”⁹

Some six days later came the Federal Government intervention. It came entirely without consultation with the Indigenous people and ignored the substantive recommendations of the Report to which it was purportedly responding.

It is quite obvious that the Report was used as a trigger to further the Government’s Indigenous policies without regard to the interests of the children concerned. I shall examine what those policies were at a subsequent stage of this address and demonstrate that sadly, the current Government has continued them.

Despite considerable public protest, the *Northern Territory National Emergency Response Act 2007* was passed by Parliament without amendment and came into effect on 18 August 2007. It is an Act of some 500 pages in which the word ‘children’ does not appear and Brough as the responsible Minister admitted that he had not read it before it was passed.

Patrick Dodson wrote

“The tragedy of the Howard Government’s eleven-year hold on power is that Indigenous policy has focused on destroying the potential for this nation to respect and nurture the cultural renaissance of traditional Indigenous society. Public policy that celebrates Indigenous culture has been shunned.

We are left with a vague sense that the problems of the present-day crisis have no history and that the way forward is for Indigenous people to abandon their identity and be absorbed into European settler society”.

He continued:

The extinguishing of Indigenous culture by attrition is the political goal of the Howard Government’s Indigenous policy agenda. Our nation is confronted with a searing moral challenge.”¹⁰

I wrote in late 2007:

“The breadth of the legislation is frightening and it significantly overrides the rights of many Indigenous people in ways that would not be tolerated by the ordinary Australian community. It is discriminatory and racist and bundles all Indigenous people together as potential pornographers, child molesters and persons habitually addicted to the excessive consumption of alcohol.”¹¹

Some of the many objectionable aspects of the legislation involved:

⁹ www.nt.gov.au/dcm/inquiry/saac_final_report.pdf

¹⁰ Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia published by *Arena Publications*, is a series of essays edited by Jon Altman and Melinda Hinkson and is the first book to cover the Northern Territory Intervention. These extracts are from a section of an essay written by Pat Dodson published in *Crikey.com* on 13 September 2007

¹¹ Alastair Nicholson; *Australia’s Children: Does the Law Offer Them Sufficient Protection?* 27th Lionel Murphy Memorial Lecture 2007, accessed 4/10/2009 at http://lionelmurphy.anu.edu.au/memorial_lectures.htm

- The suspension of the Racial Discrimination Act.
- The adoption of income protection.
- The removal of social security benefits (inter alia) where a child is considered to be in need of protection, where the parents reside in specified areas of the Northern Territory, or where a child has an unsatisfactory attendance at school.
- Preventing a court from taking into account Indigenous customary law or practices in sentencing offenders.
- The acquisition of aboriginal lands by means of compulsory leases of up to five years duration.
- Restrictions on the use of alcohol and pornography on Aboriginal lands, coupled with heavy penalties for breach and offensive signage at the entrances to those lands.
- The abandonment of the Community Development Employment Program.

It takes only a moment's thought to appreciate the injustice of most of these measures so far as the Indigenous community in the Northern Territory is concerned.

The suspension of the Racial Discrimination Act involved a direct attack on the meagre rights and freedoms of Indigenous people and should never have been countenanced. However, it was the essential plank that enabled the intervention to proceed. Almost all of the measures associated with the Intervention involved direct racial discrimination and breaches of the human rights of the Aboriginal citizens involved.

It is important to make the point that in the presence of a Bill of Rights most of the objectionable aspects of the legislation and much of the legislation underpinning that social policy would be liable to be struck down. It would thus act as a real protection against the unwarranted seizure of power that has been involved.

However by cloaking itself in the guise of conducting a crusade to protect children, the Government was able to brand those who opposed it as being in favour of child abuse. Because it controlled both houses of Parliament it was able to override the protection afforded by the Racial Discrimination Act; something that it could never have done if those rights had been enshrined in the Constitution.

The interference with judicial discretion on sentencing to prevent a sentencing judge taking matters of customary law or practice into account was racist and discriminatory. Such an approach does not apply for example to Jewish or Islamic people or to the people of many nationalities that have come to Australia to live who have come from places where there are different customs and practices. It is unjust for judges to be prevented from taking these matters into account in determining the degree of criminality of the offender and the appropriate punishment. It is nothing more than a Government over-reaction to media publicity about certain sentences that have been imposed by particular judges and magistrates, most of which were corrected on appeal.

The power to restrict payment of social security benefits because a person lives in particular areas of the Northern Territory was clearly aimed at forcing Indigenous people to live in selected town areas that the Government determined, rather than where they determined. This was directed to forced relocation of people to where the Government wanted them to live. In furtherance of this policy the need to attend Centrelink offices in towns meant that people from homelands had to travel to visit those offices and in order to shop with the Basics card they needed to do so at licensed stores which initially were largely in towns. Considerable distances were often travelled in taxis and small planes at great cost to access licensed stores. At the same time homelands were stripped of their services including educational services, CDEP jobs were removed thus removing access to employment in the homelands.

Sadly the present Government has continued with this strategy. Such measures are intolerable in a democratic society and would never be tolerated by the broader Australian community.

Similarly, benefits may be withdrawn in the event of unsatisfactory school attendance. Again this would be unacceptable in the wider community. Further, it involves a complete lack of appreciation of Indigenous culture. The legislation was based upon a nuclear family assumption, which has little or no relevance to many Indigenous communities. It also ignored the fact that through years of neglect of basic services to Indigenous communities, many children would be living in situations where the provision of education services is inadequate and unattractive.

Wholesale compulsory acquisition of land for unstated purposes is another measure that would not be tolerated by the Australian community as a whole if it was applied to them.

All of this was exacerbated by the fact that the Government acted in a precipitate way without consultation with the Indigenous people or with people with child protection expertise.

By treating the Indigenous people in this fashion, it demonstrated a clear lack of respect for them and as such, their co-operation could hardly be expected. The situation was exacerbated by the then Government's and the present Government's inability or failure to give any or any sufficient explanation as to why all of these measures were necessary to protect the children.

I think that as time passes it becomes clear that the intervention was an exercise in social engineering to destroy Aboriginal culture and Aboriginal attachment to their traditional lands and to force Aboriginal people into suburban agglomerations and adopt a white life style.

Professor Raymond Gaita has commented:

“Could this disrespect be shown to any other community in this country? The answer, I believe, has to be no. If that is true, then it betrays neither cynicism nor insufficient love of country to suspect that, to a significant extent, Aborigines and their children are still seen from a racist denigrating perspective. From that perspective, the (sincere) concern for the children is concern for them as children of a denigrated

people, just as it was when the children whom we now call the Stolen Generation were taken from their parents.”¹²

From the point of view of the then Opposition and now Government, one of the most shameful aspects of this affair was its failure to oppose this legislation. One would seriously question the leadership that this stance displayed. I had thought that it took this approach to avoid giving the Government an election issue with the consequence that in Government, its position was compromised, to the point where it felt unable to dismantle this legislation. However subsequent events to which I will turn have led me to believe that this was an unduly charitable view of its motivation.

I now turn to those subsequent events.

The advent of the Rudd Government brought new hope to those who would advance the position of Indigenous people. The Prime Minister delivered an elegant and heartfelt apology for past wrongs, which was well received throughout Australia and the world.

The new Government also indicated that it proposed to now support the UN Declaration on the Rights of Indigenous peoples.

Unaccountably however, progress came to a stop thereafter.

The Intervention was not abandoned, although several of its aspects were alleviated in a cosmetic way. It has proved to be a costly failure in achieving the object of protecting Indigenous children. None of the recommendations of the original report that sparked it have been put into effect. The plight of Aboriginal children remains serious, despite countless reports and other interventions.

A 2010 Board of Inquiry Report in the NT found as follows:

“• rates of teenage births in the Northern Territory are significantly higher than the Australian average• the rates of infants born with low birth weight in the Northern Territory are higher than in the rest of the country.

• infant mortality rates in the Northern Territory, especially for Aboriginal children, are far higher than in the rest of Australia.

• death by injury across all age groups is significantly more common in the Northern Territory compared to the national average.

• children, particularly Aboriginal children in the Northern Territory, are less likely to reach minimum standards in literacy and numeracy in year 5 than their counterparts in the rest of the country.

• there is a significantly higher percentage of Northern Territory children who are considered developmentally vulnerable on one or more domains of the Australian Early Development Index, compared to other Australian states and territories

• alcohol consumption in the Northern Territory has been between 50-100 percent higher than Australia as a whole for nearly 30 years and also appears to be higher than most other nations.

¹² Raymond Gaita, *Comment*; The Monthly, August 2007, The Monthly Pty Ltd, Melbourne

These data highlight not only the absolute level of disadvantage experienced by the Aboriginal population, but the disparity between their life experiences and those of their non-Aboriginal counterparts.”¹³

Tellingly for present purposes the Board also found:

“The poor implementation of the Northern Territory Emergency Response, particularly in its failure to engage constructively with Aboriginal people in the Northern Territory, diminished its effectiveness.”¹⁴

The Racial Discrimination Act

The Rudd Government had, in its election policy proposals promised to re-instate the Racial Discrimination Act, which had been suspended by the Howard Government in relation to those areas where the Intervention operated. Nothing happened in this regard until 2010 and the deeply flawed legislation to re-instate it will not take effect on 31 December 2010. It is flawed because it attempts to preserve many of the racist and discriminatory aspects of the Intervention.

The Government has shown a single minded determination to continue with most of the objectionable aspects of the Intervention, which it now seeks to characterise as ‘special measures’ under the reintroduced Act. Thus the government takes as it gives, seeking to preserve some of the worst aspects of the intervention and the racism that accompanied it, while purportedly reintroducing the very Act that would have prevented these measures being taken.

The 2010 legislation preserving income management continues to provide for an arbitrary subjection of all affected people within particular geographical areas to income management. Although this purports to be a non discriminatory measure, in practice it continues to discriminate against the Aboriginal people, who form the bulk of the welfare recipients in the affected areas.

The remainder of the 2010 legislation covering alcohol and pornography restrictions, compulsory five year leases, licensing of community stores, extended powers to the Australian Crime Commission and the like are sought to be justified as special measures. These do not qualify as special measures as a matter of law.

A special measure as defined under the United Nations Committee on the Elimination of Racial Discrimination CERD have also been defined by Australian courts as containing four elements:

- it must confer a benefit on some or all members of a class;
- the membership of the class must be based on race, colour, descent, or national or ethnic origin;

¹³ Northern Territory Government 2010, *Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory's children*, Summary Report of the Board of Inquiry into the Child Protection System in the Northern Territory 2010, M. Bamblett, H. Bath and R. Roseby, Northern Territory Government, Darwin.

¹⁴ Ibid Chapter 4

- it must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms; and
 - the circumstances must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.
- Furthermore a special measure must not be continued after the objectives for which it was taken have been achieved.

The relevant case law also suggests the necessity of obtaining the wishes of affected Aboriginal people before introducing a special measure.

The United Nations Committee on the Elimination of Racial Discrimination and the Declaration of the Rights of Indigenous people now require that consultation and consent must occur before a special measure can be introduced and it is probable that this is also a requirement of Australian law.

None of the present Government's measures satisfy the requirement for consultation and obtaining the agreement of the Aboriginal people. Therefore the legislation appears to be inconsistent with the RDA.

The Government claims that it has consulted the Aboriginal people as to these measures but this claim does not stand up to examination. The only hard evidence of the Government's so called consultation makes it clear that the so called consultation was not consultation at all.¹⁵

My original involvement with the consultation issue arose from a request that I view videos of so called consultations at four locations in the NT, which are the only full record of any consultations. I was concerned and indeed disgusted with what I saw and the full enormity of this is described in the *Will They Be Heard* report. Not only were the consultations a sham but the overwhelming view of the communities involved was against the continuation of the Intervention measures

The Government presented the people with what was a *fait accompli* and despite the flood of spin from the Minister's office; there is no evidence of a proper consultation or agreement. In fact all the evidence is to the contrary. Apart from the above report and the videos upon which it was based, the Government's own summaries of regional meetings at five separate locations in the NT supports the view as to the flawed nature of the consultations and the fact that the communities did not and do not support the Government measures.

A June 2010 survey of 35 Aboriginal Elders from 24 communities revealed that 97% believe that they have not consented to the current intervention measures in their communities. 88% of them did not believe that they had been genuinely consulted.

Two of these Elders, Rev. Dr Djiniyini Gondarra, and Rosalie Kunoth-Monks, after taking part in a conversation held at Melbourne University Law School on 19 May 2010¹⁶, presented

¹⁵ Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris; *Will They Be Heard*

¹⁶ A Conversation with Elders from the Northern Territory
www.socialpolicyconnections.com.au/Portals/3/docs/forum%20transcription%20jun2010.doc

a report to the UN Committee on the Elimination of Racial Discrimination at Geneva in August 2010.¹⁷

That Committee has since reported in highly critical terms of Australia in relation to this issue:

“The Committee expresses its concern that 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 (arts. 1, 2, and 5).

The Committee urges the State party to fully reinstate the Racial Discrimination Act, including the use of the Act to challenge and provide remedies for racially discriminatory NTER measures. It also urges the State party to guarantee that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee’s general recommendation No. 32 on Special Measures (2009). It encourages the State party to strengthen its efforts to implement the NTER Review Board recommendations, namely that: it continue 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 it reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership; and that Government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act.”

It is fashionable in Australia to ignore and resent international criticism of its behaviour to its Indigenous people, just as it was in South Africa during the Apartheid era. The reality is that this is an international issue and costs Australia dearly and will continue to do so until the situation is corrected. It is a matter of urgent national importance that this be done because if it is not, we can never aspire to true nationhood or be a country that is regarded with respect throughout the world.

The government not only fails to understand this but continues to behave as if these criticisms have no substance. It is currently engaged in policies towards traditional owners of Aboriginal land that are little short of blackmail, requiring leases of 40 years and upwards over Aboriginal land as the price of discharging what should be its own obligation to provide the inhabitants with decent housing. Traditional owners are placed in an impossible position, because if they refuse to comply with the Government’s demands they feel that they are hurting their own people and their children. This is unconscionable behaviour on the part of Government that makes me feel ashamed to be an Australian.

The passage of a referendum paying lip service to our Indigenous people in a preamble to the Constitution will fool nobody into believing that we have changed our approach. What is required is deeds and action; not empty words.

We should no longer tolerate this sort of conduct by our Government and we must act to close the door on the past and create a new era in which we take pride in our Indigenous

¹⁷ Loss of Rights – the Despair of Aboriginal Communities in the Northern Territory accessed at <http://www.childjustice.org/html/index.htm> 9/11/2010

people and their achievements. Theirs is one of the world's oldest cultures and their history extends over thousands of years. This is also ours as part of the history of our great land and we should embrace these people and be proud that they are living proof of a great heritage.

What needs to be done as a matter of urgency is;

- Withdraw the preset flawed legislation purporting to reinstate the Racial Discrimination Act and reintroduce it in an unqualified form;
- Bring the Intervention to an end;
- Cease forcing traditional Aboriginal owners into executing lengthy and unconscionable leases and with their consent, cancelling existing ones that have been forced on them in this way.
- Provide proper housing and education services without tying them to land tenure;
- Return control of Aboriginal lands to Aboriginal people;
- Restore ATSIC or an equivalent body in order to take Aboriginal and Torres Strait Islander people into partnership as part of this nation and give them proper representation;
- Provide proper health and education services to all Australians regardless of race or location;
- End the mistreatment of Aboriginal children and reduce family violence and alcoholism and enlist the Aboriginal people to help achieve these ends;
- Amend the Constitution in a meaningful way in order to recognise the rights of Aboriginal and Torres Strait Islander people;
- Introduce Human rights legislation in order to protect the rights of all Australians, including Aboriginal and Torres Strait Islander people.

How can we achieve these results? There are many ways that this can be achieved.

We must inform ourselves and others of the real situation in the Northern Territory. We must be prepared to tell our elected representatives that this behaviour will no longer be tolerated and we can do this by e-mail, text, letter and telephone to the Prime Minister's office and the offices of our local members.

We can combine with others to achieve change. For example, yesterday I had the honour of attending a meeting in Sydney aimed at creating a dialogue and an alliance to change the attitudes of Australians towards Indigenous people. It is to be hoped that this and like initiatives will help to draw the curtain on or past shameful treatment of our Indigenous people.

There are organisations like Reconciliation Australia that deserve our support. There are groups like 'concerned Australians' and 'Stop the Intervention Now' who are doing great work to bring these abuses to public attention who also deserve support. Above all we must not sit passively and let our fellow Australians continue to be treated as they have been since white settlement in this country.