Underlying legal issues in the NT intervention

By Larissa Y. Behrendt

It was the 'national emergency' that was sitting neglected for over thirty years. In the wake of decades of reports, each with in-depth analysis of the issues and complex blueprints on how to address the immediate and the underlying issues, the Australian Government announced that it was finally going to prioritise the endemic violence in some Aboriginal communities and stated that it was relying on the recently commissioned report by Pat Anderson and Rex Wild, *Little Children are Sacred.*

When originally announced, the federal intervention, unveiled by Aboriginal Affairs Minister Mal Brough on 21 June 2007 included the following measures:

- widespread alcohol restrictions;
- quarantining welfare payments and linking them to school attendance;
- compulsory health checks to identify health problems and signs of abuse;
- forced acquisition of townships through compulsory leases with just compensation;
- increased policing;
- introduction of market based rents and normal tenancy arrangements;
- banning of pornography and auditing publicly funded computers;
- scrapping the permit system; and
- appointing managers to all prescribed communities.

While there has been unanimous concern about the levels of violence and sexual abuse of women and children by Indigenous communities and their leaders, there have been deep divisions about the best way to address the issue. The approach taken in the intervention has highlighted these divisions. It is universally accepted that Aboriginal communities in the Northern Territory have needed the additional resources that have accompanied the intervention, other aspects have been more contentious: Why were welfare payments being tied to school attendance when there are not enough teachers and classrooms in the Northern Territory to cater for all of the Indigenous students? Why was prohibition of alcohol being forced on Aboriginal communities when it has never worked as an intervention strategy except where there is full community support of it? Why were issues related to Indigenous control of their land being tied to the issue of child sexual abuse? Why was the permit system being repealed when even the Northern Territory Police Association warned that this would make it harder to stop drug runners, grog suppliers and paedophiles from entering Aboriginal communities?

The Northern Territory intervention legislation

The supporting legislation for the intervention was introduced into the Australian Parliament on 7 August 2007. It comprised of five major pieces of legislation, including the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007.*

Rex Wild QC and Patricia Anderson, authors of *The Little Children are Sacred,* the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007. Pic. Eve Peter / Newspix

With the Australian Labor Party agreeing to support the legislation, some of the more contentious aspects of the plan did not get the robust debate that they deserved. In particular, there were two legal issues in that legislative package that deserved much greater scrutiny: the subversion of the *Racial Discrimination Act 1975* (Cth) and the subversion of the principle to provide 'just terms compensation' for the compulsory acquisition of land.

The *Northern Territory National Emergency Response Act 2007* (Cth), amongst other things, provides for the creation of five-year leases by the Commonwealth over specified Aboriginal land and prescribes that native title rights and interests are not protected effectively extinguishing those rights during the term of the compulsorily acquired leases. The owner of the land cannot vary the terms or terminate a compulsorily acquired lease. This deprives Aboriginal people of an avenue to terminate the lease if the Commonwealth is in breach of the terms though the Commonwealth has the discretion to terminate the lease. The town camps under either the Special Purpose Leases Act (NT) or the *Crown Lands Act 1992* (NT) have a reduced notice period for lease resumption (from six months to two months), a less favourable provision than other special purpose leases and the safeguards under the *Land Acquisition Act 1989* (Cth) are excluded from the operation of the Act.

The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) empowers the Commonwealth and Queensland (in relation to the Cape York region) to have the power to regulate in whole or part expenditure of income received through social security payments for identified groups of people including, persons who are physically present overnight in a 'relevant Northern Territory area' as described in the *Northern Territory National Emergency Response Act 2007* (Cth) as well as the areas of Finke and Kalkarindji. A majority of the 'persons' in this category will inevitably be Aboriginal because the communities included as relevant Northern Territory areas are Aboriginal communities and townships.

Welfare payments that fall under this provision are wide-ranging and include social security benefits, social security pensions, Abstudy payments, service pensions and income support supplements. The Commonwealth must deduct between 50 and 100 per cent of a person's welfare payments and place it into an Income Management Special Account in the person's name. The Act requires the secretary to take appropriate action to meet a 'priority need' of the person, their partner, their children or any other dependents. 'Priority needs' are defined as various essential items such as food, clothing and health needs, household utilities, child care and education, rent, funerals and automobile costs. These amendments to the *Social Security Act 1991* (Cth) prevent Aboriginal people from having unfettered access to their social security and other Commonwealth payments and benefits in the same way that other Australians can.

The subversion of the Racial Discrimination Act

The *Racial Discrimination Act 1975* (Cth) was implemented to incorporate into domestic law Australia's obligations under the International Convention to Eliminate All Forms of Racial Discrimination. Section 9(1) of the Act prohibits 'racial discrimination':

> It is unlawful for a 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.

Part II of the Act prohibits racial discrimination in, amongst other things, rights to equality before the law, access to places and facilities, land, housing and other accommodation and provision of goods and services.

Section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth) provides:

(1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

(2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975.*

Similarly, s4 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) both excludes the application of Part II of the *Racial Discrimination Act 1975* (Cth) and prescribes activities under the legislation as being 'special measures'.

Prior to the Northern Territory intervention legislation, the *Racial Discrimination Act 1975* had only been repealed on two other occasions: in relation to the *Native Title Act 1993* as part of the Wik amendments in 1998 and in relation to the *Aboriginal and Torres Strait Island Heritage Protection Act 1984* in relation to the Hindmarsh Island bridge area. As a legislative protection against racial discrimination, it can be subject to repeal by the legislature.

The prescription of acts authorised by the legislation as 'special measures' is more contentious. Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination

Indigenous Affairs Minister Mal Brough with a protestor at Mutitjulu in the Northern Territory as he opens a new police station. Pic: Mechielsen Lyndon / Newspix

states:

> 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 to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed to be 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.

Subsection 8(1) of the *Racial Discrimination Act 1975* incorporates the exemption of 'special measures' as understood under international law. These 'special measures' ensure that affirmative action or other types of 'positive discrimination' are not illegal.

The prescription of 'special measures' not only raises the question of whether the Commonwealth is operating outside of the international legal understanding of what is a 'special measure', it also raises the question of the appropriateness of the legislature over-riding the role the judiciary has played in scrutinising and determining whether an activity or condition is a 'special benefit'.

Australian courts have given consideration to what constitutes a 'special measure' and have determined that:

- it must confer a benefit on some or all members of a class;
- membership of the class must be based on race, colour, descent or national or ethnic origin;
- the special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others human rights and freedoms, and
- the special measure must provide protections to the beneficiaries that are necessary in order for them to enjoy and exercise human rights and freedoms equally with others.

In *Gerhardy v Brown* (1985) 159 CLR 70, Justice Brennan held that 'the

Senior elders attend a town meeting in the Aboriginal community of Mutitjulu, near Uluru, in the Northern Territory. Photo: Jason South / Fairfaxphotos

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 advancement (at 126).

Under this well-established legal test, several aspects about the Northern Territory intervention legislation raise questions about whether they would meet the definition of a 'special measure' if the matter had have been left to the court, for example, whether the quarantining of welfare payments in a way that stops Aboriginal people from having unfettered access to their social security payments a measure that confers a benefit.

The subversion of just terms compensation

Several aspects of the Northern Territory intervention legislation provide for the acquisition of property, including the compulsory acquisition of five-year leases and provisions that allow the Commonwealth and the Northern Territory Governments to have continuing ownership of buildings and infrastructure on Aboriginal land that are constructed or upgraded with government funding, which effectively permits Aboriginal communities to be stripped of their assets.

Sections 60 and 134 of the *Northern Territory National Emergency Response Act 2007 (Cth)* excludes the operation of ss.50(2) of the *Northern Territory Self-Government Act 1978* (Cth) which provides for 'just terms compensation' from applying to any acquisition of property that occurs as a result of the provisions of the Act. These provisions also prescribe that if certain acts would result in an acquisition of property to which the 'just terms' power (s51(xxxi)) of the Constitution would apply, the Commonwealth is required to pay a 'reasonable amount of compensation'.

In other words, the provisions do not specifically apply s51(xxxi) to the acquisition, the acquisition does not require 'just terms' and if the acquisition is otherwise than on 'just terms', the Commonwealth is required to pay 'a reasonable amount of compensation'. Section 61 also provides direction as to how a 'reasonable amount of compensation' is to be calculated which includes rent and compensation paid and improvements to the land and infrastructure.

With s50(2) suspended, there is no requirement for 'just terms' compensation arising under the *Northern Territory Self-Government Act 1978* (Cth). However, questions remain about the extent to which s51 (xxxi) applies to the territories. The interpretation of the 'territories power' (s122) in *Teori Tau v Commonwealth* (1969) 119 CLR 564 established a line of authorities that excluded the operation of s51(xxxi) from the Northern Territory. *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513 questioned this with a four to three majority decision that held that the 'just terms' requirement could apply in the Northern Territory. The result is that the application of the Constitutional 'just terms' provision is not definitively determined.

The concern about the provisions is that a distinction seems to be drawn between 'just terms' and 'a reasonable amount of' compensation with the implication that the latter might mean less than the former.

'Just terms' compensation requires an inquiry as to 'whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country': *Grace Bros Pty Ltd v Commonwealth* (1946) CLR 269 (at 290). Justice Brennan in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 stated:

> The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government

> presumably in the interests of the community at large are not required to sacrifice their property for less than it is worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just (at 310-311).

What 'a reasonable amount of compensation' means is less clear. It has already been suggested by the federal minister that compensation might be given in the form of services or infrastructure rather than proper compensation for the Aboriginal landholders. This aspect of the intervention legislation is part of the grounds for a legal challenge lodged against the Northern Territory intervention by the Bawinanga Aboriginal Corporation and Reggie Wurrdjal, a traditional owner in Maningrida.

At what cost?

It is not surprising, given the history of underfunding of essential services and infrastructure in Aboriginal communities around Australia that the aspects of the intervention that have seen additional resources brought into some towns warmly welcomed.

Research undertaken last year by the Centre for Aboriginal Policy Research at the Australian National University showed that, in the Northern Territory, only 47 cents was spent on the education of an Aboriginal child compared to the dollar spent on the education of a non-Aboriginal one. Wadeye has welcomed the promise of additional housing that has been offered as part of the intervention. But while the Australian Government has promised $1.6 billion over four years to support the intervention, the under-funding on Indigenous housing in the Northern Territory alone is estimated to be over $2 billion. All this indicates that, while aspects of the intervention have been a step forward, there is every indication that they will not be enough to deal with the underlying issues that lead to dysfunction and the unravelling of the social fabric in Aboriginal communities.

Much has been made of these small steps to address chronic problems in the Northern Territory but the way in which the intervention has been approached has raised very real questions about its long-term effectiveness. This is partly because the research that shows what works in Indigenous communities when it comes to improving the socio-economic disparity between black and white Australians emphasises the key need to consult and work with Aboriginal and Torres Strait communities affected by policies and programs. The lack of consultation in the way the intervention has been undertaken has been a key concern of those working on the ground because the 'top-down' approach to Indigenous policy has consistently been shown to fail.

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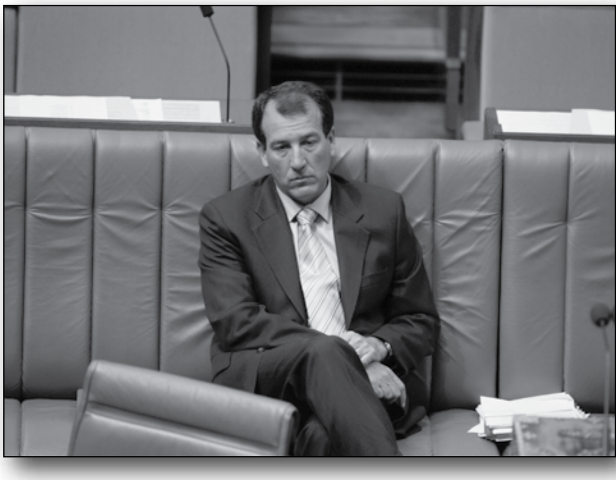

Minister Mal Brough tables the NT Emergency Response Legislation. Photo: Gary Ramage / Newspix

However, when questions were asked about this and other aspects of the intervention, the federal government and their supporters, black and white, dismissed any questions about the nature of the intervention by accusing the sceptics of protecting paedophiles and of not wanting to protect children. The unfortunate effect of this stifling of debate around the very contentious mechanisms employed in the intervention meant that some of the key questions that needed to be asked about the necessity of repealing some of the few legal protections our legal system affords the most vulnerable were not asked.

In its report of March 2005, the Committee on the Elimination of Racial Discrimination noted the lack of entrenched provisions to protect from racial discrimination in the Australian legal system and recommended that Australia work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.[1] The Northern Territory intervention is another example of how fragile that protection is.

Endnotes

1. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia* CERD/AUS/CO/14, March 2005. Committee to Eliminate Racial Discrimination, Sixty-sixth session, 21 February-11 March 2005. http://www.humanrights.gov.au/cerd/report.html.