



TASMANIAN ABORIGINAL CENTRE INC.

ABN 48 212 321 102

HEAD OFFICE
198 ELIZABETH STREET,
G.P.O. BOX 569,
HOBART, TAS. 7001
Phone: (03) 6234 0700
Fax: (03) 6234 0799
Email: hobart@tacinc.com.au

182 CHARLES STREET,
P.O. BOX 531,
LAUNCESTON TAS. 7250
Phone: (03) 6332 3800
Fax: (03) 6332 3899
Email: launceston@tacinc.com.au

53 ALEXANDER STREET,
P.O. BOX 536,
BURNIE TAS. 7320
Phone: (03) 6431 3289
Fax: (03) 6431 8363
Email: burnie@tacinc.com.au

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Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Fax: 02 6277 5829

Email: community.affairs.sen@aph.gov.au

Dear Senate Committee Members,

Re: Stronger Futures in the Northern Territory Bill 2011 & Australia's international human rights obligations

The *Stronger Futures in the Northern Territory Bill 2011* is an extension of the Northern Territory intervention legislation. The Bill further entrenches discrimination against Aborigines. The Bill only applies to Aborigines and serves to legitimise negative stereotypes of Aboriginal people.

The further regulation of Northern Territory Aborigines living in particular areas is unacceptable. Regulation in the Bill covers the possession and consumption of alcohol, strengthening land reforms and applies to town camps and Aboriginal community living areas. The Bill also regulates store owners in places where Aborigines live in the Northern Territory. Regulation on the basis of race and the imposition of such conditions by the Minister on Aborigines are all discriminatory measures and as such are contrary to international law. We fully support the submission of the 7 Aboriginal leaders of the Northern Territory read by Rev Dr Djiniyini Gondarra and Rosalie Kunoth-Monks made to the Senate Committee, (Submission number 40 at <http://www.aph.gov.au>).

Furthermore, it is noteworthy that there is no proposal to incorporate bilingual education and for schools to address poor attendance through the incorporation of Aboriginal cultural education led by elders from surrounding communities. The survival of Aboriginal languages in the Northern

Territory is placed under threat by this extension of the intervention. Once again consultation has been ignored. The local communities have been ignored.

Irrespective of any other points, this Bill should be required to comply with international human rights documents. Whenever there is a consideration of international customary law it is always argued that any such recognition must be consistent with international human rights principles – why should this proposed legislation be any different?

If the Commonwealth passes the *Stronger Futures in the Northern Territory Bill 2011* there is no doubt that international human rights will again be breached. In particular the Convention on the Elimination of Racial Discrimination (CERD), Declaration on the Rights of Indigenous Peoples (DRIP), Convention on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) all introduce an international legal regime which has been ignored in the preparation of the *Stronger Futures in the Northern Territory Bill 2011*. It is farcical that Australia should be a signatory to all of these international instruments and then chose to ignore all the international human rights incorporated in these instruments.

Fundamentally there are human rights abuses which are intolerable entrenched in this Bill. The international law principles breached by the Bill are identified in our following submission for the Senate Committees consideration. It is unacceptable that the Commonwealth Government continues to oppress Aboriginal peoples - 200 years of oppression, dispossession and marginalisation is enough. The Governments proposal as articulated in this Bill will further continue this marginalisation. We urge the Senate to demonstrate some leadership and refuse to pass this Bill on the grounds of the human rights abuses and breaches its passage will deliver.

Breach of CERD and Racial Discrimination Act 1975

Laws designed to specifically apply only to Aborigines are not lawful. To design laws to only apply to Aborigines, without consultation with Aborigines offends the principles outlined in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

CERD provides in Article 1:

“racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race,...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the...economic...or any other field of public life.

Similarly, Article 2 of CERD inter alia provides that there is to be no separate rights for different racial groups. Article 5 further entrenches this right by providing:

...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:...

(e) Economic, social and cultural rights, in particular:...

(iv) The right to public health, medical care, social security and social services

However, the *Stronger Futures in the Northern Territory Bill 2011* creates a legal regime that only applies to Aborigines.

Similarly the Bill offends Article 2 of the Covenant on Economic, Social and Cultural Rights which provides;

State parties undertake to guarantee that the rights enunciated...will be exercised without discrimination of any kind as to race,...property, birth or other status.

Thus the *Stronger Futures in the Northern Territory Bill 2011* breaches CERD as it imposes differential treatment on Aborigines living in certain areas based on their Aboriginality. The object of the Act is said to be to support Aboriginal people. However there is no provision in the proposed Act to obtain Aboriginal consent.

"If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and fundamental freedoms. To that general proposition, there are some exceptions." per Brennan J *Gerhardy v Brown* [1985] HCA 11

The *Racial Discrimination Act 1975* is Australia's domestic application of this international instrument. As such section 9 of the *Racial Discrimination Act 1975* provides that racial discrimination is unlawful. Specifically section 9(1) provides inter alia:

It is unlawful...to do any act involving a distinction,...restriction...based on race,...descent...which has the purpose or effect of...impairing the ...enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the ...economic...or any other field of public life.

Restricting and dictating the way in which a person can spend their money impacts on that person's economic freedom. Knowingly placing such restrictions on town camps and Aborigines living in certain areas, creates a restriction that impairs the economic freedom of Aborigines over and above other Australians. Accordingly international human rights law is breached.

In further support of this position we refer to Article 5 of CERD which confirms racial discrimination is to be eliminated in all its forms and section 9(1) of the *Racial Discrimination Act 1975* which clarifies that an act with the purpose or effect of discriminating is unlawful.

The Government can not avoid international obligations arising from CERD. The Government's scheme is designed to perpetuate a system of separate and unequal treatment on those Aborigines living in town camps and their homelands in the Northern Territory. This is clearly stated in the Bill as intended to affect Aborigines. Trying to justify or dress up these measures as "special measures" will not render these discriminatory actions lawful. As Justice Brennan said in *Gerhardy v Brown* [1985] HCA 11 "*The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted*

material benefit foisted on them." This passage was cited approvingly by McMurdo P in [2010] QCA 37 (1 March 2010). Where is the consent or even involvement of Northern Territory Aboriginal communities in this expansion of the intervention? It follows that the proposed legislation should incorporate a governing provision that requires the written consent of all adult persons intended to be, or by implication are, affected by this law.

The Government is pursuing this course of action with the intent of only affecting Aborigines in certain areas, in the knowledge that Aborigines are over-represented in the lowest socio economic group, and knowing that Aborigines continue to live amongst their own people in clusters often in remote areas of the country. The Government is using this contemporary cultural way of living to discriminate against Aborigines who chose to continue to live amongst their own people. One has to question whether the real intention the Government is pursuing is to force Aborigines from their homelands. As such, the Government will remain in breach of this international instrument and we expect the criticism of the Governments action to continue on the world stage. Such criticism flies in the face of recommendation 66 of the Special Rapporteur, James Anaya's Report on the situation of Human Rights and fundamental freedoms of Indigenous peoples in Australia which acknowledges homeland disadvantage in the following way:

"...special efforts are required to ensure that indigenous peoples living in these areas, including homelands (also called outstations), can enjoy the same social and economic rights as other segments of the Australian population, without having to sacrifice important aspects of their cultures and ways of life."

Anaya goes on to say at para 70 of his report that he had observed:

'...the profound connection that many Aboriginal people in Australia have to their homelands, many of which began to be re-populated in the 1970's when elders took their people back to ancestral lands for larger communities run by missions, and the importance of these lands to the lives and culture of Australia's Aboriginal people. Further, homelands are widely understood to have lower levels of social problems, such as domestic violence and substance abuse, than more populated communities.'

This observation along with others identified in this report highlights the difficulties the Government will face if it proceeds to pass this Bill which will undermine self determination of peoples living on their homelands in town camps.

Breach of self determination

Passage of the Stronger Futures in the Northern Territory Bill 2011 in its present form will not enable the Australian Government to meet even the minimum standards¹ set out in DRIP. This is especially so in relation to self determination. In a nutshell the Northern Territory Intervention removes decision making from Aboriginal people.

¹ Mick Gooda sees DRIP as containing "...minimum standards for the survival, dignity and wellbeing of Indigenous peoples," see Human rights progress slow: Mick Gooda www.nit.com.au September 28, 2011

In *Wurridjal*² Aboriginal communities recognised that their communities were not perfect. However the Government failed to realise that pursuing a policy of undermining self determination, served to further disempower and disengage Aborigines and further alienated them from others in the country. Specifically introducing “special measures” that only apply to Aborigines residing in town camps is contrary to the Commonwealth’s Racial Discrimination Act and Australia’s international obligations arising from CERD.

The Bill in its entirety is discriminatory and to couch the Bill as a “special measure” misrepresents the intention behind the creation of special measures. Imposing assessments on particular licensed premises, imposing land laws on “town camps” and imposing a licensing regime on shops operating in areas the Government has selected requiring “food security” are all measures that are designed to discriminate and highly regulate Aboriginal communities. Aborigines in these towns are more highly regulated than any other people in the country and are subject to draconian laws.

It is noteworthy that the Commonwealth Government has completely failed in drafting the *Stronger Futures in the Northern Territory Bill 2011* to attempt to grapple with the underlying reasons as to why Aborigines are so disadvantaged. There is no proposal on the table to rectify dispossession of Aboriginal peoples from their land and culture. Clearly the proposed Bill undermines the collective right of families and communities to govern their own business. The special measures proposed in the *Stronger Futures in the Northern Territory Bill 2011* fail to respect the self determination as Aboriginal peoples. Indeed Anya in his report recommends at para 72 that there “...is a continued need to develop new initiatives and reform existing ones, in consultation and in real partnership with indigenous peoples, to conform to international standards requiring genuine respect for cultural integrity and self determination...”

This partnership is not reflected in any real and meaningful process of consultation with Aboriginal people. The “special measures” proposed in the Bill fail to address the particular disadvantage of Aborigines and thus must fail the international law test applicable to special measures. This conclusion stands irrespective of the definition of self determination applied. The proposed Northern Territory Bill is not capable of meeting the required international law standards in DRIP, CCPR or ICESCR as they apply to the human rights principle of self determination. Specifically these international instruments provide:

ICCPR provides in Article 1 inter alia:

All peoples have the right to self determination. By virtue of that right they freely ...pursue their economic, social and cultural development

ICESCR: provides in Article 1 that:

All peoples have the right of self-determination. By virtue of that right they...freely pursue their economic, social and cultural development

² *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 Feb 2009) para 379

DRIP has a similar provision.

There is no evidence of genuine consultation having occurred as part of this Bills process either. Aboriginal people have once again been alienated from the debate and solutions are again being imposed on Aboriginal communities contrary to international human rights law. Specifically in *Wurridjal*, Justice Kirby particularly queried how such a result was possible in view of international human rights law³. Internationally such ongoing abuse of the rights of Aborigines to self determination are less likely to fall on deaf ears. In this regard that the Report prepared by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples prepared by James Anaya must be considered. Specifically in relation to self determination Anaya recommended at para 82 that:

“Any government decision that has the effect of limiting or removing indigenous decision-making authority should be reconsidered and evaluated in light of Australia’s human rights obligations.”

This Report by James Anaya was particularly critical of the Northern Territory Intervention on the grounds of the lack of respect for self determination of Aboriginal peoples. The Government through this Bill is now proposing to extend this intervention notwithstanding the international criticism it has attracted. Justice Kirby in *Wurridjal* was also critical of the courts failure to consider the international law applicable saying:

“It is not as if, in this area of the law, the previously expressed understandings of the legal rights Australia’s indigenous peoples were so developed, beneficial and protective that Australian courts have nothing to learn from comparative and international law in this field.”⁴

In our view the Senate would be well advised to consider CERD, DRIP, CCPR and the ICESCR and the Report prepared by the Special Rapporteur James Anaya on the situation of human rights and fundamental freedoms of Indigenous Peoples.

Protection of property rights

International law concerning the protection of property rights is far from new. Given the inclusion of this right in the Universal Declaration of Human Rights in Article 17 in 1948, all the rights identified in this instrument have acquired the status of customary international law.

Indeed *Wurridjal*⁵ demonstrates that there remains a fundamental misunderstanding in Australia as to Aboriginal policy generally and of the concept of equality and the

³ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 Feb 2009) see Kirby J Para 234

⁴ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 Feb 2009) per Kirby J para 272

⁵ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 Feb 2009)

requirements of international human rights as they relate to Aborigines.⁶ As Strelein, Dodson & Wier⁷ identify "...governments must exercise their power to reserve, dedicate or otherwise dispose of land in a manner consistent with the RDA." They go on to say that as a "...a minimum the same protection, such as constitutional guarantees of just terms for compulsory acquisition of property that apply to non-indigenous interests must also apply in Indigenous titles."

To suspend the Racial Discrimination Act for the purpose of discriminating against Aborigines is clearly in breach of CERD. Will the Senate endorse the Government's efforts to further breach international customary law?

A further issue arises as to whether Aborigines can simply ever be compensated adequately for the loss of their lands. It is to be noted that section 116 of the Bill contemplates compensation for acquisition of property. Thus Ward's case⁸ requires some consideration. 'As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that: "*the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.*" '

Once title has been returned it should be secure from further interference regardless of whether the land holding authority is traditional, statutory or common law.

Justice Michael Kirby grasped this point in *Wurridjal*⁹. He believed Aboriginals were given constitutional protection that would invalidate the loss of control. Kirby J looked at the cultural and spiritual basis of Aboriginal interests in land and noted that that was the essence of the Mabo decision. How could money or rents fairly compensate these interests, Justice Kirby pondered, and referring to international law developments¹⁰ believed the majority had got lost among the trees and could not see the woods.

Justice Kirby, highlighting the different values between Aboriginal and European society, noted '*The owners of shares in the Bank of New South Wales, when that bank and others were purportedly nationalised by federal legislation, rarely if ever loved the share scrip as such. A few might have had sentimental or employment attachments to the bank, dating as many of the affected banks did back to colonial days. However, the only real virtue of the shares for shareholders was the [money]. For such value the promise in the legislation to pay a "reasonable amount" and monetary "compensation" might well satisfy the "just terms" requirement.*'¹¹

⁶ Strelein, Dodson & Weir identified this misunderstanding in respect of the amendments to the NTA, but this misunderstanding equally applies to the Northern Territory Intervention] where the Commonwealth Government had no qualms about suspending the RDA to allow Government sanctioned discrimination to occur.

⁷ Lisa Srelein, Michael Dodson and Jessica Weir "Understanding Non-Discrimination: Native Title Law and Policy in a Human Rights Context", *Balayi: Culture, Law and Colonialism* Volume 3, 2001 at p113at p125

⁸ *Western Australia v Ward* [2002] HCA 28 per Gleeson CJ, Gaudron, Gummow and Hayne JJ para 14

⁹ *op cit* [305-8]

¹⁰ *ibid* [269]

¹¹ *ibid* [304]

Accepting previous authority expressed by Dixon J in *Nelungaloo*¹² that just terms is concerned with fairness, Justice Kirby found that the lack of fairness could mean the constitutional guarantee of just terms was not satisfied in the intervention case. A lack of consultation and participation¹³ protected Aboriginal land owners from the type of legislation under consideration. Keifel J¹⁴ took a similar broad approach noting,

'The plaintiffs' case in this respect did not depend only upon the notion that special value attaching to rights associated with sacred sites was incapable of assessment and therefore could not be the subject of compensation in money. It was claimed to be a consequence of this that the Minister was obliged to consider whether the acquisition of these lands was for the benefit of Aboriginal people having such rights. Such a consideration might oblige a conclusion to the contrary. So understood, the issue is not whether just terms can be provided, but whether the Minister should decide to acquire the land at all'.

The High Court majority did not pick up the distinction between the values that different societies put on 'property', 'land' and money as Justice Kirby did, prompting this jibe, *'the majority rejects the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race. Far from being "gratuitous", this reasoning is essential and, in truth, self-evident'*¹⁵.

International Covenant on Civil and Political Rights

The proposed legislation is paternalistic, identifying ways limited personal financial resources must be applied. Aborigines living in designated areas are being denied the right to freely determine their economic circumstances. Such paternalistic measures damage the ability of Aborigines as a peoples to exercise any self determination over their own limited resources and serves to further disempower. We also note that the Government has further perpetuated disempowerment through acquiring Aboriginal land on the pretence the Government can "better manage" Aboriginal lands. Self determination is the tool which must be applied to improve socio economic outcomes for our people in the long run.

Further Article 2 of ICCPR is breached. Article 2 of the ICCPR provides:

Each State Party ...undertakes to respect and to ensure to all individuals...,without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This international instrument mandates that those members of the Australian community who are most venerable in a socio-economic sense, can not be singled out, in any scheme scheme on account of their racial status for distinct treatment, such as is proposed in the present legislative reform.

International Covenant on Economic, Social and Cultural Rights

Article 2 of the Covenant provides;

¹² [1947] HCA 58

¹³ Wurrildjal op cit [308]

¹⁴ ibid [469]

¹⁵ ibid [215]

State parties undertake to guarantee that the rights enunciated...will be exercised without discrimination of any kind as to race,...property, birth or other status.

And Article 4 provides:

...the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Identifying those members of the community with a particular socio-economic status, and imposing further restrictions on how entire communities manage their money, in an evidential vacuum, where the Government has not outlined and or conducted any evidence based evaluation of the necessity of such a measure, breaches this standard imposed by international law.

In particular we note Article 9 recognises:

...the right of everyone to social security, including social insurance.

Aborigines must not be discriminated against either directly or indirectly in terms of access to and the spending of their incomes. Nor should social security payments be used as a weapon to secure compliance with a value system that belongs to another culture. Forced assimilation must not be tolerated.

United Nations Declaration on the Rights of Indigenous Peoples

The following DRIP Articles are also pertinent:

Article 17 of provides that:

Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international ...law

Article 18 provides that:

Indigenous peoples have the right to participate in decision making in matters which would affect their rights...

And Article 19

States shall consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

And Article 23 lends further support to this objective of consultation by providing:

...In particular indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 21 of DRIP has similarly been ignored insofar as that provides:

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, ...social security

There is no improvement proposed. Introducing further restrictions on limited funds to further regulate Aborigines hardly satisfies the declaration. A more forward thinking objective would be to apply more funds to services and other community based organisations designed to assist those most disadvantaged members of society in Australia.

Further displacement and alienation of peoples from their communities

The consequence of these reforms will no doubt be the further fragmentation of Aborigines from their communities in the Northern Territory. If certain regions and towns are designated as those where these laws apply, it is foreseeable that Aborigines will move from these areas to avoid the application of these laws. We query whether this is in fact the Government's real motivation, to displace and further dispossess Aboriginal peoples by further removing them from their communities and in the case of remote communities, their existing lands. This effect must have been anticipated by the Government in light of the reaction in the Northern Territory to compulsory health checks. According to the Report of the NTER Review Board (2008), quoting the Australian Indigenous Doctors' Association, Submission No 187 to NTER Review, 22 August 2008, women and children under 16 left communities in fear of the general health checks they understood were to be imposed.

In this regard the Government needs to be reminded that encouraging the social and cultural dislocation of families and individuals from their cultural group breaches Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. This Article provides that:

The States parties ...recognize the right of everyone: (a) To take part in cultural life;

Further, Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture...

And

States shall provide effective mechanisms for prevention of, and redress for:...Any action which has the aim or effect of disposing them of their lands, territories or resources;...Any form of forced assimilation or integration.

Some members of communities will no doubt move away from their communities to avoid the application of this draconian law if it passes. This will result in an aggravation of the underlying issues further disadvantaging Aborigines as they become further alienated from ancestral lands and their people and culture.

Conclusion

The proposed legislation breaches a number of international treaties. Specifically, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and

Cultural Rights (ICESCR), and the United Nations Declaration on the Rights of Indigenous Peoples (DRIP). This extension of the Northern Territory Intervention must not proceed on the basis that it fails to comply with international human rights obligations.

Yours faithfully

Michael Mansell
Legal Director