CHAPTER FIVE

THE INTERVENTION, STRONGER FUTURES AND RACIAL DISCRIMINATION: PLACING THE AUSTRALIAN GOVERNMENT UNDER SCRUTINY

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Introduction

The Northern Territory Emergency Response (NTER/Intervention), instigated in 2007 by Australia's Federal Government, has led to prolonged human rights abuses for Australia's First Peoples living in the Northern Territory (NT). This is consistent with "a long history of oppressive and domineering Indigenous policy in this country […] where the recognition of Indigenous rights" has often been "considered unnecessary" (Dodson and Cronin 2011, 189). Indigenous peoples have frequently been denied three types of rights in Australia: citizenship rights, Indigenous rights such as self-determination and human rights. Although the Intervention infringes all three, the focal point of this section will be human rights denied in the context of the Intervention, specifically, the right to protection from racial discrimination.

The Intervention's catalyst was the *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred* report outlining abuse of Indigenous children in some remote Indigenous communities (Wild and Anderson 2007). A range of rapidly drafted rights removing legislation ensued—so discriminatory that the government took the extreme step of suspending the *Racial Discrimination Act 1975* (Cth) (RDA) via: the *Northern Territory*

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National Emergency Response Act 2007 (Cth) (NTNER Act) s 132(2), the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(3) and 6(3), and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2). The RDA refers to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)[2] in numerous sections and reproduces ICERD in its Schedule. The Australian Government claimed removal of rights protection was necessary to make practical progress in targeted communities. Yet, as Pat Anderson, co-author of *Little Children Are Sacred* states, "[a]n approach to addressing Aboriginal disadvantage that is based on respect for our established rights is necessary because in the long term it is the only one that, practically speaking, will work" (Anderson 2015, 39).

Introducing the Intervention legislation involved (then) Minister Malcolm Brough representing Indigenous communities as anarchic places where welfare and drug dependent Indigenous adults refused to responsibly parent their offspring whilst living large on "free money" due to "the scourge of passive welfare" (Commonwealth of Australia 2007, 2, 6). The government claimed their Intervention would enhance the safety of Indigenous women and children whilst stabilising and normalising Indigenous communities (ibid., 2–13). The Intervention legislation profoundly affected the lives of Indigenous peoples living in prescribed communities in the NT over the next five years. However, Indigenous peoples affected by the Intervention were not consulted about it prior to its launch, nor did they have any role in designing laws and policies which were to fundamentally alter their lives.

The Intervention introduced sweeping reforms across numerous Indigenous policy areas, including: compulsory five year leases, signage prohibiting alcohol and pornography in Indigenous communities, criminalising possession and supply of alcohol in Indigenous communities, compulsory health checks for children, compulsory income management, and prohibiting consideration of Indigenous customary law during sentencing (Hinkson 2007, 3–4; Bielefeld 2010b, 2–23; Altman 2013, 18, 141–45). This article will consider the relationship between some of these measures and the ICERD, with case studies on two problematic measures

[2] Opened for signature December 21, 1965, 660 UNTS 195 (entered into force January 4, 1969).

that continue under the Intervention's successor framework of Stronger Futures: income management and criminalising possession of alcohol.

The Intervention and ICERD

However well-intentioned its originators claimed to be, the Intervention resulted in undesirable consequences for those subject to it, including increased rates of suicide and self-harm, unemployment, dependence on welfare income, criminalisation and health problems for children (Altman 2013, 138–42; Anthony 2013, 196–97). The Intervention involved a dominant discourse expressing concern for children amidst hyperbolic stereotyping of Indigenous men as paedophiles preying upon the vulnerable, remote Indigenous communities as dysfunctional, and Indigenous cultural and parental practices as improper. These rationalisations underpinned the government's choice to characterise the Intervention as essential, likening it to a life-saving medical procedure. Brough claimed:

> Without an across-the-board intervention we would only be applying a bandaid yet again to the critical situation facing Aboriginal children in the Northern Territory, when what is needed is emergency surgery. The interventions proposed will work together to break the back of violence and dysfunction and allow us to build sustainable, healthy approaches in the long term (Commonwealth of Australia 2007, 12).

Medicinal metaphors have a lengthy history of being used to naturalise oppressive ideology. For example, the Nazis used the concept of "racial hygiene" to target those that they characterised as "social misfits" (Longerich 2010, 46). This characterisation covered many, including homosexuals, Romany people, those with disabilities, people of colour, political dissidents and "those receiving welfare support" (ibid., 46–51; Bielefeld 2010a, 52, 121). Medicinal metaphors have also featured prominently in political rhetoric rationalising onerous conditions for those in need of government income support in the United States (Schram 2000, 84). Using medicinal metaphors is a powerful rhetorical device to portray punitive policies as part of a necessary public health campaign and thereby facilitate social control (Foucault 2004, 39, 181, 244–45, 252).

The Intervention has deeply hurt those affected by it without providing any healing benefits (Northern Territory Elders 2015, 139–40). Nevertheless, representation of the Intervention as medicinal rationalised the racial ordering reproduced by the Intervention. Whilst botched surgery generally leaves patients with the option of suing their doctors for reparation, recipients of the Intervention's "emergency surgery" were left with no

effective domestic remedies due to the suspension of the RDA. This led to attempts to find redress through international human rights mechanisms. The Intervention was opposed by the majority of Northern Territory Elders; their dramatic exclusion from the realm of rights resulted in a request to the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD). Their "Request for Urgent Action" under ICERD outlined multiple breaches of Australia's human rights obligations orchestrated through the Intervention (Shaw et al. 2009).

The Request submitted that the Intervention legislation breached numerous provisions of ICERD. For instance, Article 5(e)(iv) imposes on state parties an obligation to eliminate discrimination in relation to the right to social security—which was infringed by imposing compulsory income management on all Indigenous welfare recipients in prescribed areas as a race based measure. Article 5(d)(i) stipulates state parties are to assure "the right to freedom of movement"—which was curtailed through compulsory income management restricting Indigenous people from travelling to undertake cultural obligations. This also relates to Article 5(e)(vi), "the right to equal participation in cultural activities". The Request stated income management affected "participation in ceremony and 'sorry business'";[3] and that the government's aim of using income management to alter Indigenous cultural practices of sharing resources violated Article 5(e)(vi) (ibid., 10). It was submitted that Article 5(e)(vi) was infringed by prohibiting consideration of customary law in sentencing matters, and that Article 5(d)(v), "[t]he right to own property alone as well as in association with others", was contravened via compulsory five-year leases of Indigenous lands. The Intervention legislation was said to violate Article 6 obliging state parties to ensure "effective protection and remedies […] against any acts of racial discrimination". The Request maintained that Article 7, requiring states "to adopt […] effective measures" to combat "prejudices which lead to racial discrimination", was breached by stigmatising rhetoric rationalising the Intervention, use of the military to implement the Intervention, and signage which "had the effect of shaming Aboriginal people as alcoholics and paedophiles" (ibid., 11). CERD responded with an early warning letter to the Australian Government

[3] "Sorry business" is used by Indigenous people "to refer to the death of a family or community member and the mourning process. Sorry Business includes attending funerals and taking part in mourning activities with community. This can take an extended period of time, a week or more, and may also involve travelling long distances" (North Queensland Land Council 2016).

stating that the Intervention was incompatible with ICERD and urging compliance (CERD 2009a).

Despite their suspension of the RDA under the Intervention legislation, the Federal Government claimed that the Intervention introduced "special measures" for Indigenous people (Commonwealth of Australia 2007, 22). These claims were not compelling. Article 1(4) of ICERD stipulates:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial […] groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided […] that such measures do not […] 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 (ICERD).

After Australia submitted their long overdue report on Australia's obligations under ICERD, CERD expressed concern that the Intervention legislation continued "to discriminate on the basis of race as well as the use of so-called 'special measures' by the State party" and conveyed regret over "restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies" (CERD 2010, 4). CERD counselled Australia to fully reinstate the RDA and to "provide remedies for racially discriminatory NTER measures" (ibid.). The Committee urged Australia "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)" (ibid.). CERD stressed the importance of resetting "the relationship with Aboriginal people based on genuine consultation, engagement and partnership" with respect for the human rights of Indigenous communities (ibid.).

Unfortunately, Australia's response to CERD's report was partial rather than robust. As concerns income management, although the government moved to reinstate the RDA in a formal sense via the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (Reinstatement Act), they did so in such a manner that geographical targeting still facilitated racially discriminatory outcomes (Bielefeld 2012, 540). Compulsory income management still overwhelmingly affected Indigenous welfare recipients after the introduction of new income management (NIM). Following the Reinstatement Act, over 90 per cent of NT welfare recipients subject to NIM identified as Indigenous (Bray et al. 2012, 6).

The Federal Government's claims that the Intervention has been for the good of Indigenous people are widely disputed (Altman 2013; Harris 2012; Watson 2009). Patrick Dodson and Darryl Cronin refer to the Intervention as "a discriminatory and structurally violent intervention which dehumanises people" (Dodson and Cronin 2011, 194). Far from providing the positive outcomes to which the Australian Government aspired, the Intervention has resulted in regressive repercussions for Australia's First Peoples (Northern Territory Elders 2015, 139–42; Altman 2013). However, as Irene Watson observes, ongoing inequality between Indigenous and non-Indigenous people "provides fertile ground" for further interventions (Watson 2009, 45). Hence, when the Intervention legislation expired in 2012, the Stronger Futures framework immediately took its place. Despite the fact that the government portrays Stronger Futures as a new and improved framework, at a grassroots level the Stronger Futures laws are "generally perceived as being an extension of the NTER legislation and the term 'Intervention' [is] used for both" (Harris 2012, 29; Rollback the Intervention, 2015). This perception arises from the reality that many key Intervention measures continue under Stronger Futures, albeit in different legislative instruments, which is an issue of ongoing concern (Altman 2013; Nicholson et al. 2012, 5–11). Whilst acknowledging the close relationship between the two, in the next section the Intervention is not used synonymously with Stronger Futures, in order to reflect the current legislative framework operating in the Northern Territory.

Stronger Futures and ICERD

As was the case with the Intervention, the Australian Government claims that Stronger Futures contains "practical measures" in order to continue their "approach to Closing the Gap between Indigenous and non-Indigenous people" (Australian Government 2011, 2). Perhaps mindful of the criticism incurred over failure to consult Indigenous communities targeted by the Intervention, the government engaged in consultation for its successor policy approach. Although the government claims such consultations were thorough (Commonwealth of Australia 2011, 13541) this is disputed. Manderson suggests the government's efforts regarding consultation

> would be very impressive indeed if there were any evidence that they made, or were intended to make, the slightest bit of difference to Government policy or legislation. There is none. So hasty was the process that any influence on policy seems improbable (Manderson 2012, 8–9).

Instead he suggests the purpose of the consultations was to create a "paper trail" that would "satisfy an audience elsewhere" (ibid., 10) like the High Court of Australia or UN bodies such as CERD.

Consultation concerning Stronger Futures is widely considered to be inadequate (Northern Territory Elders 2015, 139–42; Harris 2012, 13–20; Nicholson et al. 2012, 5–11; Australian Human Rights Commission 2011, 27–28). In some communities policy documents were distributed to Indigenous people only moments before consultations took place, leaving inadequate time to allow for an informed discussion and genuine consultation to occur (Harris 2012, 15). Stronger Futures policy documents were only in English—which made participation difficult for those whose first language is not English, who do not speak English, or who have "hearing impairments" (ibid., 19).

The consultation process squares poorly with CERD's General Recommendation (GR) 23, which stipulates under 4(d) that "no decisions directly relating to" the "rights and interests" of Indigenous peoples are to be "taken without their informed consent" (CERD 1997, 1). The consultation also failed to meet the criteria for a legitimate process by which to introduce "special measures" for the purposes of ICERD. GR 32 provides that states "should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities" (CERD 2009b, 6). Yet there is no evidence that the government involved affected Indigenous communities in the design of Stronger Futures. Indigenous communities were presented with a predetermined policy document outlining the government's agenda, which emerged as legislation a short while afterwards (Northern Territory Elders 2015, 140).

The government claims that Stronger Futures is based upon "partnership" between the Federal and NT Governments and Indigenous communities (Commonwealth of Australia 2011, 13539). However, the distance between rhetoric and reality in the government's narrative is clearly a chasm. As the Intervention transitioned into Stronger Futures, set in place for another decade pursuant to s 118 of the *Stronger Futures in the Northern Territory Act 2012* (Cth) (SFNT Act), many people remained concerned about the ongoing consequences of the intensive regulatory framework imposed by government. Although s 4 of the SFNT Act states its object "is to support Aboriginal people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy", Stronger Futures leaves key aspects of the Intervention in place and continues to be criticised by NT Elders. After the consultations these Elders called for an apology from the Australian Government

for "the illegal removal" of the RDA under the Intervention, and stated that they "will not support an extension of the Intervention, or an Intervention under other names" (Northern Territory Elders 2015, 140–41). Their counter narrative to official declarations of benevolent intentions is that the Intervention and Stronger Futures are an attack on the dignity of Australia's First Peoples.

Section 4A of the SFNT Act provides that it "does not affect the operation of the *Racial Discrimination Act 1975*". This reinstates the RDA in a formal sense, yet for Indigenous peoples living under Stronger Futures "the situation remains the same with only a few cosmetic touches" (Scott 2015, 2). Intervention measures that continue under Stronger Futures include income management, criminalisation of possession and supply of alcohol, linking welfare payments to school enrolment and attendance, and prohibitions on consideration of customary law in sentencing matters. Many of the concerns expressed by CERD remain current under Stronger Futures (CERD 2010, 4). Whilst the Intervention's compulsory five-year leases of Indigenous lands drew to a close in 2012, these leases normalised a coercive approach to the provision of essential services for those living on Indigenous lands, with dwindling service delivery in many areas, making it difficult for Indigenous people to live on their land and in their communities (Rollback the Intervention 2015; Altman 2013, 63). These realities reveal that many human rights contained in the ICERD and elaborated upon by CERD remain unrealised for those living under Stronger Futures laws and policies.

Rights discourse is positioned prominently under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (HRPS Act). In accordance with s 7 of this enactment, "Bills, Acts and legislative instruments" are to be examined by the Parliamentary Joint Committee on Human Rights (PJCHR), who report to the House of Representatives and Senate about whether these instruments are compatible with Australia's human rights obligations. Note that a finding of incompatibility does not render legislation invalid. The HRPS Act therefore provides a weak regulatory system for ensuring human rights compliance. However, it can highlight injustices perpetrated by Parliament against politically disempowered citizens, stimulating public discussion about the social injustice created by the denial of human rights.

A choice was made to enact the Stronger Futures laws before the PJCHR was due to commence its monitoring role. Nevertheless, the PJCHR decided to review certain aspects of Stronger Futures on request of the National Congress of Australia's First Peoples (PJCHR 2013, 1, 3), an Indigenous organisation that is independent from the government with 190

Indigenous organisational members from every Australian state and territory. The PJCHR delivered a report on this issue in June 2013. During their scrutiny of Stronger Futures laws the PJCHR noted in accordance with GR 32 that "differential treatment will not constitute discrimination if it can be shown to be justifiable […] based on objective and reasonable grounds and is a proportionate measure in pursuit of a legitimate objective" (ibid., 18). Even if benevolent aims to improve the circumstances of Indigenous people outlined by the government are said to be legitimate, a point of contention with Stronger Futures is the lack of proportionality of these measures (ibid., 75). The criterion of "reasonable grounds", which correlates with what GR 32 refers to as "reasonable justification for differential treatment", also presents problems for the Australian Government (CERD 2009b, 3). There is a paucity of compelling evidence to suggest that Stronger Futures measures are reasonably justified. The requirement of reasonableness suggests that evidence of ineffectiveness of these measures in achieving the government's stated aims should have an impact upon policy. However, the government has ignored such evidence in the context of income management. There is also no evidence to suggest that the criminalising alcohol measures are effective (Minter Ellison 2015, 5). Recent data suggests that alcohol related harm in the NT with Indigenous victims has increased rather than decreased since the Intervention commenced in 2007 (Bray et al. 2014, 231). If these alcohol criminalisation laws were effective, should there not be a decrease in alcohol related harm for Indigenous people? The article will now briefly address the income management and alcohol criminalisation measures.

Income Management

There has long been critique over the racially discriminatory nature of income management. Discrimination in the 2007 income management scheme was blatant (Anthony 2009, 34–39; Bielefeld 2012, 534–38), yet there are ongoing concerns about racial discrimination under NIM. With the development of NIM categories in 2010, continued under Schedule 1 of the *Social Security Legislation Amendment Act 2012* (Cth), Indigenous welfare recipients are still disproportionately subject to income management. As of 1 January 2016, 78 per cent of 26,347 welfare recipients subject to income management nationwide identified as Indigenous; the NT has the highest percentage of Indigenous welfare recipients subject to income management in any Australian jurisdiction—87 per cent (Department of Social Services 2016, 2–3).

The government indicates that many NT Indigenous welfare recipients are eager to choose the "voluntary" income management category under NIM. In 2015, Tudge advocated income management by stating that "when given the opportunity […] to come off the BasicsCard fully 60 per cent choose to stay on it because they realise that it's beneficial for them" (Tudge 2015, 13:28–55). However, grassroots feedback reveals that it can be very difficult for people to exit income management—including so-called "voluntary" income management (Gibson 2010; Campbell 2015, 23:42–57). Evidence suggests that the number of Indigenous welfare recipients on voluntary income management cannot be simplistically conflated with consent to, or approval of, the scheme. Numerous Indigenous welfare recipients on voluntary income management have not understood that they have an exit option. Those working with financial and legal services in the NT report that there has been "a great deal of confusion […] about differences between Voluntary Income Management and the compulsory measures" and "some of the people they worked with who were on the voluntary measure think they are not allowed to come off it at all" (Bray et al. 2014, 238). Many of these people have been subject to income management since the Intervention first commenced (ibid.).

The figure for voluntary income management across the NT is 20.1 per cent (ibid., xx). Close to 80 per cent of those on income management in the NT are subject to compulsory forms of income management as "disengaged youth", "long-term" or "vulnerable" welfare recipients, or under child protection income management (ibid.). Elsewhere, the author has outlined problems with NIM categories which disproportionately catch Indigenous welfare recipients and shall not rehearse those same arguments here (Bielefeld 2014, 701–23; 2012, 540–50). It is also well documented that Indigenous welfare recipients face a range of barriers in obtaining exemptions from compulsory income management making their exit from the scheme difficult (Bray et al. 2014, 112; Commonwealth Ombudsman 2012, 1, 30).

There is arguably a lack of "reasonable justification" for income management—the latest and most comprehensive NT Income Management Evaluation Report revealed there was no "substantive evidence" that income management was achieving the government's key policy objectives or changing the behaviour of welfare recipients subject to it (Bray et al. 2014, xxi). Bray and others stressed:

- There was no evidence of changes in spending patterns, including food and alcohol sales […]

- There was no evidence of any overall improvement in financial well-being, including reductions in financial harassment or improved financial management skills [… and]
- More general measures of wellbeing at the community level show no evidence of improvement, including for children (ibid.).

Bray and others noted that considerable numbers of welfare recipients on NIM "felt that income management is unfair, embarrassing and discriminatory" (ibid.). That the scheme is still perceived to be racially discriminatory is evident in feedback given by a NT non-Indigenous welfare recipient who questioned why he was "put on a black fella card" (ibid., 198). This perception is unsurprising. Despite the fact that income management now also applies to some non-Indigenous people the government has disproportionately targeted Indigenous people and Indigenous communities for income management trials.[4]

Income management has led to an increase in the price of goods and services for some NT welfare recipients, and prevented others from accessing retailers and service providers of their choice who were not authorised by the Federal Government to accept income managed funds (ibid., 136–37). Many of those subject to this control have found this scheme to be burdensome in terms of caring for themselves and their families. A vivid illustration of such hardship is reflected in the statement made by Yingiya Guyula from remote Arnhem Land. Guyula recounted in 2011 that the closest government approved retailer to the Mapuru homeland accepting income managed funds involved a $560 return flight (Guyula 2015, 61). This presented a Sisyphean[5] challenge for those

[4] Emphasis of this problematic disproportionality does not mean that income management applied to all welfare recipients would be a better approach. Andrew Forrest advocated in 2014 that all welfare recipients should be allocated 100 per cent cashless welfare on a "Healthy Welfare Card" (Forrest 2014, 103–108), which deploys more medicinal language to rationalise paternalistic intervention. Such an approach would still involve substantial interference with personal autonomy and perpetuate negative stereotypes about the budgetary capacity of welfare recipients. It would also shrink the market of goods and services available to those existing on meagre government income support payments by eliminating cash only outlets such as market stalls, garage sales, coin-operated laundromats and parking meters, and online stores requiring payment by either a credit card or cash transfer.

[5] Homer recounts that in the underworld Sisyphus was allocated the unenviable task of repeatedly rolling a large boulder towards the top of a hill only to see it roll back to the bottom of the hill before he could push it over the pinnacle and obtain

surviving on scanty sums provided through welfare. Centrelink was unwilling to approve Mapuru homeland's national award winning co-op store, which sold healthy groceries, as an authorised retailer for the purposes of income management. Guyula stated that income management was not appropriate for his people in "Arnhem Land homelands where there is no gambling, no alcohol and no child abuse" and that this scheme "has had a devastating and debilitating impact on remote communities in Arnhem Land" (ibid., 61, 63).

Although recent evaluation of income management reveals that many problems persist (Bray et al. 2014, 136–38, 198–99), both major political parties continue to be ideologically devoted to income management with its intrusive control over common consumer purchases. For numerous NT Indigenous welfare recipients this has been combined with forced work-for-the-dole requirements, resulting in coerced labour as a precondition to access income managed funds (Gurindji 2015, 103–05). This is disturbingly reminiscent of Indigenous peoples being forced to work for rations during Australia's earlier colonial period. This practice of requiring Indigenous welfare recipients to labour for social security payments appears to violate Article 5(e)(i) of the ICERD, which stipulates that there is to be "just and favourable conditions of work" and "just and favourable remuneration" for work. The income managed payments for which Indigenous welfare recipients have laboured are paid well below award rates.

GR 32 stipulates that it is discriminatory to engage in "unequal treatment of persons whose situations are objectively the same" (CERD 2009b, 3). Income management treats NT income managed welfare recipients differently to welfare recipients in other trial areas, due to the larger number of NIM categories applied in the NT. In addition, any income managed welfare recipient is being treated unequally to other welfare recipients in non-trial areas who are still able to access their entire welfare payment in cash. Incidentally, many NT welfare recipients do not have the behavioural problems identified by government as those sought to be addressed by income management. As Bray and others state:

> A central rationale for income management is to *reduce the amount of welfare funds available to be spent on alcohol, gambling, tobacco products and pornography* […]. The majority of survey participants reported that none of these issues were a problem for their family (Bray et al. 2012, 185).

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rest (Homer 2008, 570). Sisyphus was trapped in an endless cycle of trying to achieve the impossible.

The PJCHR raised concerns about ongoing racial discrimination with income management, stating:

> [E]ven though the income management regime is formulated without explicit reference to the race […] of the potential participants, the history of the measure and the fact that it appears to apply overwhelmingly to Indigenous Australians suggest that it should be characterised as a measure that has the purpose or effect of limiting the rights of person[s] of a particular race […] within the meaning of article 1 of the ICERD. Accordingly, it must be closely scrutinised and the onus is on the government to demonstrate clearly that it pursues a legitimate objective and is based on objective and reasonable criteria and is a proportionate measure to achieve the legitimate objective (PJCHR 2013, 60).

However, the PJCHR concluded the government had not proven that NIM was "a reasonable and proportionate measure and therefore not discriminatory" nor that it constituted "a justifiable limitation on the rights to social security and the right to privacy and family" (ibid., 61–62). Even now, three years after the PJCHR report and after many years of "trials", the government still has not demonstrated that NIM satisfies these criteria.

Alcohol Measures

Intervention laws prohibiting alcohol in alcohol restricted areas were reintroduced under Stronger Futures. However, the maximum penalty for possession of alcohol has been greatly increased. Section 12(2) of the NTNER Act set a penalty of 10 penalty units for a first offence and 20 penalty units for a second offence. By contrast, the maximum penalty for possession of alcohol under s 8 of the SFNT Act, which inserts a range of provisions into the NT Liquor Act, is 100 penalty units or imprisonment for six months. According to s 5 of the SFNT Act, a penalty unit "has the same meaning as s 4AA of the *Crimes Act 1914* (Cth)", which as of January 2016 sets a penalty unit at $180. Thus the penalty for breach of s 8 could be one hundred times $180, an astounding $18,000 for possession of alcohol in an alcohol prohibited area. There are also stiff penalties for supply of alcohol in alcohol prohibited areas contained in s 8 of the SFNT Act. Where "the quantity of ethyl alcohol" supplied exceeds "1,350 ml the maximum penalty for the offence is 680 penalty units or imprisonment for 18 months". Thus the maximum financial penalty for breach of this provision is $122,400.

Whilst there are some Indigenous communities in the NT where alcohol related harm is a serious problem and strategies to address this are desirable (Standing Committee on Indigenous Affairs 2015, ix–x), the

imposition of hefty financial penalties for possession or supply of alcohol that Indigenous defendants have no prospect of paying is arguably tantamount to a jail sentence. From there, deaths in custody are a high risk (Royal Commission into Aboriginal Deaths in Custody 1991). Such fines are therefore a risky strategy for attempting to redress alcohol related harm and have the capacity to contribute to excessive Indigenous incarceration rates. By June 2015 "Aboriginal and Torres Strait Islanders comprised 84%" of NT prisoners, the largest percentage in any Australian jurisdiction (Australian Bureau of Statistics 2015).

These criminalisation measures were greeted unfavourably in Stronger Futures consultations (Harris 2012, 41–45). For example, Raelene Silverton from Ntaria stated: "[w]e need treatment and a rehabilitation centre for dealing with alcohol and substance abuse—not imprisonment" (quoted in ibid., 43). Nevertheless, the government characterises these laws as "special measures" under the RDA (SFNT Act s 7). This claim has been contested by the PJCHR, who concluded that such laws cannot legitimately be perceived as "special measures" under international law:

> The committee notes the view of the Special Rapporteur on Indigenous Peoples that a measure which criminalises conduct by some members of the group to be benefited, in order to promote the overall benefit of the group, is not appropriately classified as a "special measure". The committee shares this view, which it considers reflects the current position in international law (PJCHR 2013, 28).

The view of the PJCHR is consistent with GR 32, which notes that special measures are subject to two limitations: firstly, that the measures "should not lead to the maintenance of separate rights for different racial groups"; and secondly, that the measures "shall not be continued after the objectives for which they have been taken have been achieved" (CERD 2009b, 7). As concerns the latter, CERD states special measures are to be "carefully tailored to meet the particular needs of the groups or individuals concerned" (ibid.). It is difficult to fathom how the government thinks incarceration would meet the needs of Indigenous people whose only crime was possession/consumption of alcohol; after all, this is a provision applied to moderate as well as problematic drinkers. The Federal Government's claims regarding "special measures" reveal well how the language of human rights can be "usurped by those against whom they were supposed to be a defence" (Douzinas 2007, 13).

If Stronger Futures alcohol criminalisation measures are not legitimately special measures then these extreme penalties tally poorly with Article 5(a) of ICERD, by which Australia pledged "to eliminate racial

discrimination in all its forms and to guarantee the right of everyone […] to equality before the law" including "equal treatment before the tribunals and all other organs administering justice". The alcohol penalties imposed under Stronger Futures are grossly disproportionate to penalties for possession of alcohol in alcohol restricted areas in places populated predominately by non-Indigenous people where there are also social problems associated with excessive alcohol consumption. For instance, the Standing Committee on Social Issues reported the following about alcohol restricted areas in New South Wales:

> Once seized […] alcohol can be disposed of by immediately tipping it out or in accordance with directions given by the Commissioner of Police or council. A fine of $20 can be issued to persons caught drinking in an alcohol free area. If a person does not co-operate with a police officer […] they can be charged with obstruction, an offence which carries a maximum penalty of $2,200 (Standing Committee on Social Issues 2013, 88).

In their 2013 report the PJCHR considered *Maloney v The Queen*, where Australia's High Court recently dispensed with contemporary international human rights jurisprudence about what constitutes "special measures" for the purposes of domestic law.[6] The High Court only gave credence to material available in 1975, the year the RDA was enacted—GR 32 and GR 23 were not given any weight. Consequently, alcohol laws operating in the Indigenous community of Palm Island similar to s 8 of the SFNT Act were upheld as "special measures" under s 8 of the RDA, rather than infringing s 9 of the RDA which renders racial discrimination unlawful. The High Court concurred with the Federal Parliament's view about "special measures". This highlights the veracity of Irene Watson's comment that for Indigenous peoples "a rights discourse contained by the coloniser is meaningless" (Watson 2015, 92). It can facilitate ongoing colonialism camouflaged as kindness.

The Australian Government's insistence that such laws and policies are "special measures" and therefore not "racial discrimination" are regrettably reminiscent of Humpty Dumpty in Lewis Carroll's novel *Through the Looking Glass* (1871). At the point in her journey where Alice encounters Humpty Dumpy they have the following exchange:

> "When *I* use a word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

[6] [2013] HCA 28, [24], [61], [134], [234]–[235].

> "The question is", said Alice, "whether you *can* make words mean so many different things."
> "The question is", said Humpty Dumpty, "which is to be master – that's all."
> (Carroll 2012 [1871], 180)

The Humpty Dumpty logic deployed by the Australian Government resonates with well-worn critiques of human rights language (McCann 2014, 249). The Australian Government, due to its state sovereignty constructed and protected under international law (Watson 2015, 18), clearly sees itself as master of meaning regarding human rights in its domestic domain, regardless of views expressed by CERD, the PJCHR or others. How then are the human rights of Australia's First Peoples to be protected and enforced? This remains an ongoing challenge nine years after the Intervention commenced.

Concluding Comments

Whilst the PJCHR report indicated numerous human rights compliance problems with Stronger Futures, the impact of their report has been negligible. On receipt of the report, instead of revising law and policy to comply with human rights as they are understood internationally, the Federal Government chose to continue the same approach. A ritual of human rights scrutiny that does not lead to Australia's compliance with human rights obligations offers cold comfort to those whose rights are denied. As Larissa Behrendt states, "[e]quality needs to be measured not by the mere existence of a rights framework, but by assessing the end results of that framework" (Behrendt 2001, 860).

The authoritarian regulatory systems put in place by Stronger Futures are not proving more successful than the Intervention. Minister for Indigenous Affairs Nigel Scullion has admitted that "Stronger Futures in the Northern Territory is strong on inputs, but poor on results" (Scullion 2014). Indigenous hospitalisation rates are reportedly high, school attendance is low and unemployment higher than ever (Productivity Commission 2015, 2, 9; Scullion 2014). Incarceration of Indigenous people in the NT has also increased. That these results deviate dramatically from the government's stated intention regarding Stronger Futures is incontrovertible. Unfortunately, however, policy failure is being viewed by the government as a justification for extended discriminatory measures (Bielefeld and Altman 2015, 206).

The government has attempted to discursively erase the violence of the Intervention via a benign rebadging of many of its key attributes under

Stronger Futures and attempts to cloak ongoing human rights abuses by deploying Humpty Dumpty logic. Yet, Northern Territory Elders call upon "the international community to hold Australia to account" for denying the human rights of Australia's First Peoples (Northern Territory Elders 2015, 142). Human rights compatibility problems, evaluations and reviews of the Intervention and Stronger Futures reveal that a different policy approach is required, one that is grounded in genuinely respectful and culturally appropriate treatment.

The Federal Government claims that Stronger Futures laws comply with Australia's international human rights obligations (PJCHR 2013, 10). However, NT Elders have long been outspoken about human rights abuses ingrained in the Intervention and Stronger Futures legislation. Their voices provide a compelling counter narrative to the government's dominant discourse about the Intervention and Stronger Futures as mechanisms to protect and assist Indigenous peoples. Rosalie Kunoth-Monks maintains that the Intervention has inflicted "tremendous trauma" upon First Peoples (Kunoth-Monks 2015, 14). Nine years later the "emergency surgery" continues with no imminent prospect of suturing the wounds inflicted through the Intervention. Australia chose to use medicinal language to frame their coercive state violence, a political misinformation mechanism by which the government evidently sought to safeguard its approach. However, Indigenous peoples' views about the destruction wrought by unilaterally designed authoritarian colonialist interventions are reflected in the statement that "[y]ou can't be the Doctor if you are the disease" (Marie Battiste quoted in Stanton 2009, 5; Kji Keptin Alex Denny quoted in Battiste 2013, 139).

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