



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF LAW

SEAN BRENNAN

SENIOR LECTURER

DIRECTOR, INDIGENOUS LEGAL  
ISSUES PROJECT

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National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Members of the Secretariat

### **Submission on Indigenous Legal Issues**

I send you the attached submission for consideration by the Consultation Committee, chaired by Father Frank Brennan AO, and constituted also by Mary Kostakidis, Mick Palmer AO APM and Tammy Williams.

I make this submission in my capacity as a member of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. I am solely responsible for its contents.

I acknowledge the main submission to the Committee from my colleague, Mr Edward Santow, Director of the Centre's Charter of Human Rights Project. This submission offers supplementary arguments made in the specific context of Indigenous legal issues.

SYDNEY 2052 AUSTRALIA  
Email: [s.brennan@unsw.edu.au](mailto:s.brennan@unsw.edu.au)  
Telephone: +61 (2) 9385 2334  
Facsimile: +61 (2) 9385 1175  
Web: [www.law.unsw.edu.au/staff](http://www.law.unsw.edu.au/staff)

The submission develops an argument according to a set of sub-headings. The answers to the three questions posed by the terms of reference for the Consultation Committee are found at the conclusion of the submission. The focus of the submission is on the merits of a national Human Rights Act, as a preferable alternative to existing human rights protections, particularly from the standpoint of Indigenous legal issues.

### **1. Why is it relevant to contemplate a change of statutory framework for Indigenous affairs?**

The simplest answer to this question comes from one of the most influential non-politicians in the ranks of Australian government, Treasury Secretary Ken Henry: 'it has to be admitted that decades of policy action have failed'.<sup>1</sup> By any number of socio-economic indicators – life expectancy, educational attainment, incidence of chronic and acute disease, income levels, quality of housing, employment, skills, incarceration, substance abuse – Aboriginal Australians fare very poorly when compared with non-Indigenous Australians.<sup>2</sup>

In the past two decades Indigenous affairs policy has passed through a number of paradigms, including social justice, reconciliation, practical reconciliation and emergency response. None can claim great success, results have been mixed at best and many regard them all as failures.

From the vantage point of 2009, three key criticisms can be made of government action in Indigenous affairs in this past 20 years. In addition to the grim statistical outcomes referred to above, they provide additional reasons why Australia should contemplate a change of statutory framework for Indigenous affairs.

#### ***Because there is too much government unilateralism***

A strange disconnect continues to prevail in Indigenous affairs policy: between what is known about effective government action and how things are actually done. For much of Australia's history post-1788 government policy in Indigenous affairs was simply, unreflectively 'top-down'. But in the past generation there has been a creeping recognition that one reason for persistent government failure in this area is the absence of community 'buy-in' for policy measures. Measures which harness local knowledge and strong community ownership through participation in design, decision-

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<sup>1</sup> Ken Henry, 'Managing Prosperity', Address to the 2006 Economic and Social Outlook Conferences, Melbourne, 2 November 2006 <[www.treasury.gov.au/documents/1183/PDF/Managing\\_Prospersity.pdf](http://www.treasury.gov.au/documents/1183/PDF/Managing_Prospersity.pdf)>, p 5.

<sup>2</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007); Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008* (2008).

making and implementation have the best chance of working. This understanding, by now, has percolated upwards to the most hard-headed economic rationalist bodies in the Canberra bureaucracy. The Chairman of the Productivity Commission says that his organisation's 'analysis of the "things that work"' identified many of the success stories have had in common in several factors which include:

- 'cooperative approaches between Indigenous people and government (and the private sector);
- community involvement in program design and decision-making — a "bottom-up" rather than "top-down" approach'.<sup>3</sup>

Yet money and good local ideas continue to be wasted as governments go on practising 'we know what's best for you' policies. The introduction of 'tenure reform' in 2006 designed to kick-start economic development and all-important improvements to housing on Aboriginal land is one example of how opportunities for negotiated reform were by-passed in favour of government unilateralism.<sup>4</sup> The Northern Territory Emergency Response (NTER), or Intervention, commencing in late 2007 paid too little heed to local initiatives, sweeping up every town camp and remote community dweller in a 'one-size-fits-all' solution devised in Canberra and often implemented by fly-in 'business managers' without local networks or experience:

Support for the positive potential of NTER measures has been dampened and delayed by the manner in which they were imposed. The Intervention diminished its own effectiveness through its failure to engage constructively with the Aboriginal people it was intended to help.<sup>5</sup>

Even the best policy idea can fall foul of community distrust. And people are unlikely to trust governments (of all stripes) that ignore pleas for help and reform for years and then suddenly rush in with unilateral solutions.

### ***Because there is too much policy discontinuity***

Indigenous communities have been buffeted and destabilised by policy discontinuity. In the last years of the Keating Government people and organisations engaged in good faith in a nationwide consultation process designed to produce a social justice package. This was to be implemented as the third element in the Commonwealth's response to the *Mabo* decision, particularly for those Indigenous people – the majority – not expected to benefit from the recognition of native title. The whole exercise was

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<sup>3</sup> Gary Banks, 'Overcoming Indigenous Disadvantage in Australia', Address to the Second OECD World Forum on "Statistics, Knowledge and Policy", Measuring and Fostering the Progress of Societies, Istanbul, Turkey, 27-30 June 2007 <[www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0009/64584/cs20070629.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0009/64584/cs20070629.pdf)>, p 27.

<sup>4</sup> Sean Brennan, 'Economic Development and Land Council Power: Modernising the Land Rights Act or Same Old Same Old?' (2006) 10 *Australian Indigenous Law Reporter* 1, 17-19.

shelved without implementation and with two subsequent changes of government has never been seriously looked at again.

In the year 2000 the Howard Government received the Final Report of the Council for Aboriginal Reconciliation. Recommendations from that decade-long process of community engagement were left unaddressed for 21 months as the momentum behind reconciliation ebbed away and then many were simply ignored or rejected by government.<sup>6</sup> Policies of 'practical reconciliation' crowded out other considerations until Prime Minister Howard, on the verge of electoral defeat in October 2007, conceded mistakes and foreshadowed a 'new settlement' at the 'intersection between rights and responsibilities; between the symbolic and the practical'.<sup>7</sup>

In between, serial shifts occurred without careful evaluation and sustained follow-through. The COAG trials were conducted in eight communities to experiment with revised approaches to service delivery. 'Although progress in these was reportedly slow, in mid 2004 the Australian Government announced a set of "new arrangements" in Indigenous affairs, which appeared to draw from this approach and were to apply nationally'.<sup>8</sup> Shared responsibility agreements and regional partnership agreements were promoted as primary tools for achieving government objectives, but have faded into the background within a couple of years. An independent review was announced by the Commonwealth in 2002 into the national and regional voice for Indigenous Australians inside the institutions of government, the Aboriginal and Torres Strait Islander Commission (ATSIC). Submissions were duly made in good faith by individuals and organisations across the country. The review's findings were pre-empted by major administrative changes in 2003 and the conclusions were ignored when the organisation was abolished in 2004.

The Northern Territory Emergency Response, as the name implies, involves some extraordinary departures from existing policies and practices for Aboriginal communities in the Northern Territory. Whatever the merits of each individual departure,<sup>9</sup> collectively they represent another wave of interrupted policies, services,

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<sup>5</sup> Peter Yu, Marcia Ella Duncan and Bill Gray, *Report of the NTER Review Board* (2008), pp 9-10.

<sup>6</sup> Senate Legal and Constitutional References Committee, *Reconciliation: Off Track* (2003).

<sup>7</sup> The Hon John Howard MP, 'The Right Time: Constitutional Recognition for Indigenous Australians', Address to the Sydney Institute, Sydney, 11 October 2007 <[www.abc.net.au/news/opinion/speeches/files/20071011\\_howard.pdf](http://www.abc.net.au/news/opinion/speeches/files/20071011_howard.pdf)>, p 13.

<sup>8</sup> Janet Hunt, 'Between a rock and a hard place: self-determination, mainstreaming and Indigenous community governance' in Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (2008), p 29.

<sup>9</sup> For substantive analysis of some key Intervention measures, see Sean Brennan, Submission to the Northern Territory Emergency Response Review Board on NT Intervention Measures, 22 August 2008 <[www.gtcentre.unsw.edu.au/news/docs/Submission\\_NTER\\_Review\\_Board.pdf](http://www.gtcentre.unsw.edu.au/news/docs/Submission_NTER_Review_Board.pdf)>.

priorities, principles and funding arrangements. The continuation of the NTER under the Rudd Government appears to have become a year-by-year proposition.

In short, Indigenous affairs policy has been hostage, far too much, to shifts in the political wind and a destabilising willingness to visit serial and often discontinuous policy change upon some of the most vulnerable members of the Australian community.

***Because government takes action which would likely not be visited upon non-Indigenous people***

Discrimination was for a long time the hallmark of Australian law and policy affecting Indigenous peoples. The removal of overtly discriminatory laws and policies through the mid-late 20<sup>th</sup> Century and the introduction of anti-discrimination legislation at a state and federal level has significantly transformed government behaviour.<sup>10</sup>

It remains the case, however, that governments will inflict policies on Indigenous peoples with coercive or adverse impacts where it is difficult or perhaps impossible to imagine the same thing happening to non-Indigenous Australians.

A High Court case from 2008 dealing with native title in the Northern Territory provides one illustration.<sup>11</sup> After amendments were made to the *Native Title Act 1993* (Cth) and complementary Territory legislation, the Northern Territory Government issued dozens of compulsory acquisition notices over parcels of township land, many of them designed to deliver the land into the hands of private interests for the pursuit of private profit. The Principal Legal Officer for the Northern Land Council told ABC Radio:

In the Northern Territory the expanded 1998 power to compulsorily acquire private property for any purpose whatsoever, in particular to give that property to a private person to make a private profit, has only ever been exercised in relation to Native Title, property owned by Aboriginal people.<sup>12</sup>

Purely 'private-to-private transfers' relying on the coercive expropriation powers of government are unconstitutional in the United States and generally regarded as contrary to common law traditions.<sup>13</sup> But the High Court rejected a legal challenge to

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<sup>10</sup> Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (4<sup>th</sup> ed, 2009), chapters 1 and 9.

<sup>11</sup> *Griffiths v Minister for Lands, Planning and Environment* (2008)

<sup>12</sup> ABC Radio National, 'Land Appropriation in the NT', *The Law Report*, 20 May 2008 <[www.abc.net.au/rn/lawreport/stories/2008/2247140.htm#transcript](http://www.abc.net.au/rn/lawreport/stories/2008/2247140.htm#transcript)>

<sup>13</sup> Kevin Gray, 'There's No Place Like Home!' (2007) 11 *Journal of South Pacific Law* 73 and Michael Taggart, 'Expropriation, Public Purpose and the Constitution' in Christopher Forsyth and Ivan Hare (eds),

one of these compulsory acquisition notices, in the township of Timber Creek. Parliament had given its authority for them to occur. In practical terms it was hard to imagine a Territory government risking such a controversial approach to freehold property in the suburbs of Darwin, where elections can be decided by a few thousand votes. On the other hand, the facts behind the *Griffiths* litigation show that the strongest-form parcels of native title land are vulnerable:

For Aboriginal people, unalienated land is amongst the precious remaining stock of recoverable country, not taken after more than two hundred years. Justice Kirby called it 'the classic circumstance in which Australian law gives recognition to an established Aboriginal native title'.<sup>14</sup>

But the Territory experience shows that politically it is precisely this category of land that is vulnerable to being picked off and delivered into the hands of private operators, particularly in towns where not even the right to negotiate applies. As the lawyer for the Aboriginal parties, Stephen Gageler SC, told the High Court, it may be 'that the Territory Government goes around acquiring freehold land for the purpose of allowing someone else to run a goat farm on it. It may happen, but we are not aware of it'.<sup>15</sup>

Another example is the ill-prepared application of 'income management' to the social security payments of Aboriginal people across Northern Territory communities. In the context of a measure that treated Aboriginal people in a sweeping and indiscriminate fashion, regardless of their personal and family circumstances, their achievements and their community contribution, it was extraordinary that so little attention was paid to implementation issues before launching the policy.

The BasicsCard, the debit card necessary to make the system work properly, became available from Centrelink in September 2008, more than 12 months after the commencement of the income management laws:

This is a basic technical component of the scheme that the government should have straightened out before it launched the system. Instead Aboriginal people were forced to make do with second-best solutions that were inflexible, inefficient and disruptive. Stored value cards generated a whole set of new problems in the lives of many Aboriginal people suddenly subjected to income management. They could only be redeemed at a small number of stores. It was not clear that they could be augmented with cash, nor that an unused balance could be spent on later occasions. New cards had to be constantly obtained in order that basic necessities could be bought. Small business

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*The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998), 91-112

<sup>14</sup> [2008] HCA 20 at [62].

<sup>15</sup> Sean Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179.

operators lost custom to large stores or in remote areas faced enormous record-keeping and other demands as they were compelled to make the government's policy work. Centrelink staff were diverted into unnecessary and repetitious tasks and community organisations were likewise saddled with a major new problem-solving workload... A government mindful of its responsibilities to the human beings affected by its policies would not take such a high-handed approach to the introduction of a major change to the social security system.<sup>16</sup>

The Intervention also included the imposition of compulsory five year leases to the Commonwealth over Aboriginal townships, on terms heavily skewed towards the Commonwealth and the Minister:

The terms and conditions of a lease can be set and later varied at the Minister's discretion. The previous Minister issued additional terms and conditions by way of a Determination the day after Parliament passed the legislation in August 2007. These confirmed the breadth and unilateral nature of the Commonwealth's interest by defining the 'permitted use' of the land as follows: 'to use, and permit the use of, the Land *for any use the Commonwealth considers* is consistent with the fulfilment of the object of the [NT Emergency Response] Act' (emphasis added). The Commonwealth is under no statutory obligation to pay rent for a five year lease and an amount was not budgeted for in 2007.<sup>17</sup> Amendments effective from 1 July 2008 facilitate the negotiation of rent or other payments to traditional owners but do not remove the discretionary basis for payments to be made.<sup>18</sup> While traditional owners cannot terminate or vary a five year lease, the Commonwealth lessee may add or remove land from the lease area, terminate the lease and sublease, license, part with possession of or otherwise deal with its interest (short of a transfer of the lease). A sublease or other dealing by the Commonwealth dispenses with the normal requirement for traditional owner consent under s 19(8) of the Land Rights Act (s 52(7)).

Part 4 leases exemplify the unilateralism of the Intervention, by-passing existing mechanisms for negotiating the presence of Commonwealth officials and agents on township land in pursuit of improved community life. They also reflect a high-handed

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<sup>16</sup> Sean Brennan, Submission to the Northern Territory Emergency Response Review Board on NT Intervention Measures, 22 August 2008 <[www.gtcentre.unsw.edu.au/news/docs/Submission\\_NTERTER\\_Review\\_Board.pdf](http://www.gtcentre.unsw.edu.au/news/docs/Submission_NTERTER_Review_Board.pdf)>, p 17.

<sup>17</sup> Senate Legal and Constitutional Affairs Estimates Committee, *Answers to Questions on Notice received from Department of Families, Community Services and Indigenous Affairs (FaCSIA)*, 2007, Question no 4 <[www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/nt\\_emergency/additional\\_info/facsia\\_answers\\_qon.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/additional_info/facsia_answers_qon.pdf)>. The Commonwealth maintained the position that rent was a discretionary matter in its submissions to the High Court in *Wurridjal v Commonwealth* (2009) 252 ALR 232 and judges either disagreed amongst themselves on the issue or did not commit themselves in their reasons for judgment (cf Crennan J at 344 and Kiefel J at 347-348).

<sup>18</sup> *Indigenous Affairs Legislation Amendment Act 2008*, Schedule 2, item 10.

governmental attitude to Aboriginal freehold property rights, unlikely to be replicated where non-Aboriginal property rights are at stake.<sup>19</sup>

On the issue of compensation too, the Commonwealth subordinated property rights to social policy priorities in a way that is unlikely to occur to non-Indigenous freehold interests:

A non-Aboriginal freeholder subjected to the same kind of temporary expropriation of control over their land, in pursuit of government policy objectives, would have an unambiguous and upfront *statutory* entitlement to compensation. Importantly, that entitlement does not depend on establishing they have suffered what the Commonwealth Constitution regards as an 'acquisition of property'. For an ordinary freeholder, the Constitution stands in the background as an irreducible minimum, acting as both a safety net and potential source of top-up compensation.

The normal compensation regime available under the *Lands Acquisition Act 1989* (Cth), however, is expressly overridden by the Intervention legislation. Aboriginal traditional owners have to do much more than demonstrate that their property has been acquired by compulsory process (which would require no more than pointing to section 31 of the NTNER Act and its commencement date in the Government Gazette). They must show they qualify for just terms compensation under the constitutional definition of an acquisition of property.<sup>20</sup>

## **2. Would a statutory human rights framework make a difference?**

The practical question, then, is whether any of these and other recurrent defects in government approaches to Indigenous affairs are likely to change with the adoption of a national Human Rights Act. The answer in this submission is a qualified yes. It is reasonable to expect that government approaches to Indigenous affairs law and policy would alter, due to the changed expectations of how governments will act and justify their actions. But experience shows that, in this field in particular, statutory rights protection would be no ultimate impediment to a government intent on infringement.

The changed expectations would operate at two levels: in the Australian political community considered as a whole and as a question of law. With a regime of comprehensive human rights protection embedded in our political system, it is reasonable to assume that the political pressures on government to justify or avoid potential rights-infringing action will increase substantially. Because politicians

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<sup>19</sup> Sean Brennan, Submission to the Northern Territory Emergency Response Review Board on NT Intervention Measures, 22 August 2008  
<[www.gtcentre.unsw.edu.au/news/docs/Submission\\_NTNER\\_Review\\_Board.pdf](http://www.gtcentre.unsw.edu.au/news/docs/Submission_NTNER_Review_Board.pdf)>, pp 22-23.

<sup>20</sup> *Ibid*, pp 23-24.

generally avoid unnecessary political skirmishes, a national Human Rights Act should change their behaviour in the direction of more rights-sensitive law and policy.

These expectations will be reinforced by legally-required practices that will be familiar to the Consultation Committee from many other submissions. In brief, the pressure for a 'culture of justification', as it has been called, will be applied at three points in particular:

- pre-legislative
- legislative
- implementation.

At each of these points governments will need to test and publicly justify their proposals against benchmarks based on respect for fairness and human dignity.

Essentially a national Human Rights Act would require that politicians and public servants:

- define their objectives clearly in terms of the public interests being addressed
- clarify the calculus of potentially conflicting individual and group rights
- construct measures in a way that achieve a proportionality between the means adopted and the ends being pursued.

This does not guarantee a solution to the criticisms commonly levelled at Indigenous affairs policy, including those listed above. But it is reasonable to expect that it may have a moderating and beneficial influence.

In terms of **policy discontinuity** the effect is likely to be indirect at best. Political considerations, including partisan political ones, will continue to have a very powerful influence on law and policy in Indigenous affairs. The injection of an explicit human rights framework should, however, curb the degree to which Indigenous affairs policy is captive to purely political forces. Subjecting new measures each time to the same set of well-developed benchmarks and considerations should achieve some level of greater policy consistency.

In terms of **unilateralism**, some human rights instruments do draw attention to political participation by those affected by new government measures. More generally, a national Human Rights Act would require governments to direct their attention beyond their own policy and political considerations. In contemplating the impact on individuals of proposed measures and being required to make public statements about that impact in a politically credible way, governments should be drawn towards

greater interaction with the Indigenous people affected by the measure – not least, to adequately inform themselves on these issues.

In terms of **inequality**, a human rights framework is explicit. Departures from formal equality can only be justified by reference to substantive equality and/or special measures. Embedding a Human Rights Act in our national system of government should reduce the likelihood that measures will be visited upon Indigenous people that would not be implemented were non-Indigenous people to find themselves in the same circumstances.

A simple example, already mentioned, will illustrate the point. The Commonwealth compelled, by force of law, a five year lease granting exclusive possession and quiet enjoyment to itself over Aboriginal land in townships across the Northern Territory as part of the Intervention. The terms of the lease were unilaterally defined by the Commonwealth in a way favourable to itself, the existing statutory rights of freeholders to compensation for expropriation of property rights were denied to Aboriginal freeholders and the Commonwealth (though it evidently regarded the issue of rent as discretionary)<sup>21</sup> in my view employed weasel words during the parliamentary debate over the Bill.<sup>22</sup> At the very least such significant departures from equal treatment would need to be justified and it is unlikely the government could have obscured its intentions as to rent.

However the likelihood that a national Human Rights Act would make a difference to law, policy and government practice in Indigenous affairs should not be overstated. That is for the very good reason that a strong principle of non-discrimination, drawn from international law, has been embedded in Australian domestic law since 1975. Experience with the *Racial Discrimination Act 1975* (Cth) (RDA) suggests the need for realism about the limitations of purely statutory mechanisms and a cautious, perhaps skeptical, optimism about what they might achieve.

For Indigenous people the presence of the RDA in Australian law has counted, on some critical occasions. It must be said that some of the most critical instances involved the overriding operation of the RDA on *State* law, through section 109 of the Constitution. A national Human Rights Act that does not bind the States would not even have that effect. At the Commonwealth level the RDA has been a central consideration in some of the debates had over Indigenous rights in Australia. For the example it exerted a strong political influence during the debates over introduction of the *Native Title Act*

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<sup>21</sup> See n 16.

<sup>22</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2008 at pp 13-14 (The Hon Mal Brough MP, Minister for Families, Community Services and Indigenous Affairs): 'It must be emphasised that the underlying ownership by traditional owners will be preserved, and compensation when required by the Constitution will be paid. This includes provision for the payment of rent.'

1993 and the amendment of the Act, in the period 1996-98. The political calculus for the government was materially altered by the fact that any new measure would be assessed against the benchmark of non-discrimination embedded in the RDA.

However, both the native title context and the Intervention demonstrate the vulnerability of statutory human rights protections to amendment by a later Act of the same Parliament passing through both houses, when a government has nominated passage of such rights-infringing legislation as a non-negotiable political necessity. The RDA is less explicit in terms of procedural requirements at the pre- and post-legislative stages than most proposals for a national Human Rights Act. But in constitutional terms all these features of a Human Rights Act could be swept aside in a climate of 'national emergency', in exactly the same way as the RDA was in 2007 by the Intervention. If the government was prepared to be explicit enough, then not only could the substantive content of the new law over-ride human rights considerations, but the procedural elements of a Human Rights Act such as publication of compatibility statements and so on could be repealed as well. Whether that would actually occur depends on the degree to which governments feel constrained by a new 'rights culture' in Australian politics, something which remains unknown for the moment.

The other point about a Human Rights Act is that it should not be assumed that Indigenous-specific measures of a confronting kind would not occur in a post-Human Rights Act era. One of the weaknesses in the case made by many critics of the Intervention was an assumption that re-establishing a non-discrimination framework or indeed the legal adoption of a more comprehensive human rights framework would prevent the introduction of dramatic policy changes such as those seen in the Intervention. Part of this depended on a misconception about the inbuilt capacity in the Intervention legislation to extend income management nationally, across Indigenous and non-Indigenous Australia.<sup>23</sup> Part of it also arguably stemmed from an unwillingness to acknowledge the degree to which rights analysis requires a consideration of *all* the human rights at stake in a given situation, as well as the capacity for public policy considerations to justify reasonable restrictions on those rights.

Arguably one difference that a Human Rights Act would make to the overall improvement of Australian governance and political debate is to introduce a greater degree of rigour to the debates we need to have in Indigenous affairs. The status quo in many Indigenous communities is not acceptable. Human rights, as well as many others considerations, demand government action. But such is the level of crisis that Indigenous-specific measures of a confronting kind also need to be debated in a way that gives comprehensive not selective attention to the rights issues involved – that

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<sup>23</sup> For example, see section 123UE of the *Social Security Administration Act 1999*.

takes into account the position of social security recipients *and* children and women threatened by violence in the home. A statutory framework that builds human rights justifications into the policy process from the earliest stage will assist in ensuring *all* those rights are given proper consideration, that means and ends are made explicit, that the targeting and proportionality of individual measures is given careful attention and that implementation pays due regard to the intrusions that may be involved on people's daily lives.

Framed by reference to a comprehensive checklist of human rights amongst other considerations, collectively we have a better chance as a society of reaching a reasoned assessment of proposals to break the cycle of disadvantage afflicting Indigenous communities. Human rights considerations are also likely to give Indigenous voices a better chance of being heard at all stages of the decision-making process.

### **3. Why a human rights framework rather than some other kind of framework?**

A fair question to ask is why privilege human rights over some other framework when considering law and policy in Indigenous affairs.

There are three brief responses to that question.

First, rights have weight and definable content that makes them legally and politically meaningful:

Human rights are *rights*; they are not merely aspirations, or assertions of the good...The idea of rights implies entitlement on the part of the holder in some order under some applicable norm; the idea of human rights implies entitlement in a moral order under a moral law, to be translated into and confirmed as legal entitlement in the legal order of a political society. When a society recognises that a person has a right, it affirms, legitimates and justifies that entitlement, and incorporates and establishes it in the society's system of values, giving it important weight in competition with other societal values.

Human rights imply the obligation of society to satisfy those claims. The state must develop institutions and procedures, must plan, must mobilize resources as necessary to meet those claims.<sup>24</sup>

In this respect human rights offer a more robust, comprehensive and durable set of considerations against which to assess new measures in law and policy. By comparison, notions such as 'social justice', 'practical reconciliation', 'emergency response' and

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<sup>24</sup> Louis Henkin, *The Age of Rights* (1990), p 3.

‘social inclusion’ and so on operate at a level of political rhetoric and conceptual openness that makes them less suitable as reliable benchmarks. Or they lack political durability of the kind demonstrated globally by the rights framework since the end of World War Two.

Secondly the rights framework has an inbuilt capacity to perform two vitally important public policy tasks. One is to accommodate tensions *between rights*, so that the complexities of individual and group welfare are not lost to the debate. Secondly the human rights framework recognises the need to temper rights by consideration of legitimate and potentially conflicting public policy concerns not necessarily driven by notions of human rights.

The third reason is that outside Australia, many countries have become accustomed to conducting complex policy debates within a human rights framework, whether statutorily imposed or constitutionally entrenched. We have things we can learn from the sophisticated experience of other societies overseas.

#### **4. Are there any risks in adopting a human rights framework?**

One risk is that a statutory Human Rights Act would be too weak, for the reasons discussed above. This submission is premised on acceptance of the political reality that a comprehensive rights framework entrenched in the Australian Constitution is not a viable political option in the near-term in Australia. It is also premised on the view that it is in any case wiser and more appropriate to explore what differences it makes to Australian political culture to have a national statutory human rights framework. As long as expectations of a national Human Rights Act are realistic, this risk of weakness and disappointment is manageable. The specific case for constitutional action in respect of racial discrimination is discussed below.

One risk on this front does concern me, having paid close attention over 15 years to legislative and policy processes in Indigenous affairs. Government rhetoric can easily (and often deliberately) elide issues, obscure intentions and disguise important detail. The capacity for a statutory Human Rights Act and the ‘dialogue model’ to produce a qualitative improvement in public debate and a greater ‘culture of justification’ in government depends to a very great extent on how meaningful the words are that are used by government. Close attention will have to be paid at the point of designing a Human Rights Act and on an ongoing basis to deter governments from resorting to superficial rights analysis and justifications for infringement that rely on untested or untestable assertions. A close review of overseas and domestic experience should help in building this level of substance into the system and minimising the risk of gaining a superficial human rights culture without the substance.

It is also important that advocates of a national rights framework accept that it does involve a paradigm shift – otherwise why would they advocate its introduction. In that respect it is legitimate to ask whether Australians risk losing something in moving to a new paradigm.

In Indigenous affairs this requires acceptance of two important propositions. The first is that a rights culture is not incompatible with a ‘responsibility’ culture. A post-Human Rights Act Australia will still need to embrace a genuine notion of shared responsibility for the fate of Indigenous peoples and communities across government, community, business, family and individual levels (Indigenous and non-Indigenous).

The second is that embracing a national human rights framework cannot obscure the need for potentially strong Indigenous-specific government measures. As noted above the risk of losing this focus is very low, because the rights framework on paper and as practised overseas has enough sophistication to accommodate both competing rights and considerations of public policy driven by considerations other than human rights. In the end, particularly with a statutory rather than constitutionally entrenched charter, the adoption of such a framework in Australia is, in many cases, simply likely to require government action to be justified against internationally-accepted standards of fairness and human dignity.

##### **5. Is more needed to achieve adequate human rights protection in areas relating to Indigenous peoples?**

The Commonwealth will need to continue discussions with Indigenous groups and others over how to give domestic effect to Australia’s commitments under the United Nations Declaration on the Rights of Indigenous Peoples, for which it recently expressed its support.

The focus of this part of the submission, however, is on the specific issue of prohibiting racial discrimination and the need for more than a national Human Rights Act in this area.

In general this submission is premised on the use of a statutory model – a national Human Rights Act. There is a persuasive argument that a period of statutory human rights protection will allow Australians to assess their comfort level with a rights paradigm, before deciding whether to shift to constitutional entrenchment.

There is, however, a material difference on the issue of racial discrimination. The RDA is more than 30 years old. On the one hand it has been shown to be a legal standard

that can make a concrete difference to outcomes for Indigenous peoples. To take one example, but for the RDA the Queensland Government would have successfully killed off the *Mabo* litigation before it was properly off the ground.<sup>25</sup> And yet on the other hand it has also shown itself to be capable of being rolled back or waved aside: the native title legislation of 1993 and of 1998, and key elements of the Intervention legislation being examples.

The basic principle of racial discrimination should be forbidden in our constitution. But In the era of the Intervention it needs to be acknowledged, as noted earlier, that this is not a simple issue. The truth is that Australia needs also either the races power or a power to make laws regarding Indigenous peoples for the federal government to make progress in many areas of reform. Once these two constitutional provisions co-exist we cannot wish away a whole complex set of issues, ones which we see embodied, for example, by the Intervention and its surrounding controversy.

Indigenous Australia is different and suffers some stark problems of crisis proportions. Governments will use the races power to make Indigenous-specific laws and possibly in some situations, justifiably so. We should not assume all Aboriginal people will have one view on the merits of such measures. They will not. Some may say they are beneficial and others may not. When governments take Indigenous-specific action, freedom from racial discrimination is not the only relevant right at stake in the human rights calculus. The rights of women and children, for example, to education, to bodily integrity and so on, may also be involved.

Proper, sophisticated human rights analysis entails consideration of competing rights and considerations. That must also be the case when it comes to drafting our constitutional law. No doubt it will be. The consequence is that a prohibition on racial discrimination in the Constitution will not necessarily eliminate a lot of the conflict and controversy that surrounds an issue like the Intervention. But, by creating a strong legal demand for justification around the use of a race-specific law, apart from applying an important standard to the content of the law itself, we could expect that it would deter scandalously abbreviated parliamentary processes,<sup>26</sup> or inadequate policy development, or shoddy implementation that lacks basic respect for human dignity.

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<sup>25</sup> *Queensland Coast Islands Declaratory Act 1985* (Qld) and *Mabo v Queensland* (1988) 166 CLR 186.

<sup>26</sup> Such as we saw at the time of the Intervention when one of the most sweeping, complex and intrusive examples of Commonwealth social policy was introduced with absurdly brief provision for committee scrutiny and report, which essentially made a mockery of parliamentary processes.

## Conclusion

Decisive government action on a broad front to combat crisis-level issues in Indigenous child and community safety, public health, housing, education levels, welfare dependency and substance abuse can proceed if Australia has a national Human Rights Act.

In fact a rights framework demands that governments act in these areas, and others as well.

Bringing a human rights framework to bear on government action such as the Northern Territory Intervention should not be mistaken for opposition to a broad-front governmental intervention in Aboriginal communities.

A national Human Rights Act would, however, have an impact on such an intervention. It should improve its quality and chances of success. Showing fairness and respect in developing and implementing law and policy affecting people in their daily lives will encourage buy-in. Careful calibration of means and ends will target resources, reduce opposition and enhance the legitimacy of government action.

These practical considerations reinforce the desirability, as a matter of principle, that government power be exercised most carefully, when it intrudes into people's daily lives.

The answer to the three questions posed to the Consultation Committee by its terms of reference are:

*1. The rights incorporated in a statutory Human Rights Act should include at the very least those referred to in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Consultations with Indigenous groups should continue about the ways in which the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples can be incorporated as a matter of course in the development of law and policy affecting Indigenous Australians.*

*2. These rights are not adequately protected by the existing Constitution and the operation of an essentially Westminster-style system of representative and responsible government. The system of rigid party discipline, in particular, falsified the theory of responsible government to such a substantial degree from the early 20<sup>th</sup> Century that structural repair is needed to fill the gap in terms of accountability and human rights protection. Whatever view is taken about the merits of the individual measures in the NTER, the prolonged neglect of those issues by government and then the sudden rush*

*to legislate in enormous detail, in express defiance of the principle of non-discrimination and with no realistic possibility of community scrutiny through the committee process, demonstrates deep structural flaws in the present level of human rights protection under the Australian Constitution and our version of the Westminster system.*

*3. Australia should adopt a national Human Rights Act on the dialogue model employed in the UK and New Zealand, adapted as necessary to Australian institutions and conditions. The existence of a power in the Constitution to make laws relevant to Indigenous peoples should be tempered by a constitutional prohibition on racial discrimination.*

By adopting a national Human Rights Act, two important changes are likely to occur when the Commonwealth government takes action or drafts legislation.

The first is that greater weight will be given to fairness and respect for the people affected.

The second is that objectives will be more clearly defined and the means for achieving them will be chosen with more care.

These two developments would improve existing human rights protection. They would also lift the quality of government decision-making.

The case commonly made against a national Human Rights Act rests on an assumption that human rights are adequately protected by the common law and the good sense of our elected politicians. Or, at least, that these methods of protection are preferable to a national Human Rights Act. There is a fundamental logical flaw in this argument from the 'Bill of Rights skeptics'. If the people's representatives in the Commonwealth Parliament passed a Human Rights Act, they would be exercising the very responsibility for human rights protection which the skeptics say rightfully belongs with our elected politicians. It would be precisely the kind of deliberative response to contemporary community need which the champions of the existing Westminster system value so highly. The conceptual ground on which the skeptics stand disappears from under their feet.

To date, trusting the common law and the good sense of our politicians has not worked sufficiently well in terms of achieving satisfactory rights protection for Indigenous people. It is reasonable to expect that a national Human Rights Act would make a modest but appreciable difference for the better in the lives of Indigenous people. Our politicians should be encouraged to embrace this measure.

It would strengthen not weaken or obstruct good public policy in Indigenous affairs.

Yours sincerely

Sean Brennan