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James Cook University

**Special Measures and Racial Discrimination:
A Study of the Cape York Welfare Reform**

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Statement on the Contribution of Others

Nature of Assistance	Contribution	Co-Contributors
Intellectual Support	Editorial Assistance	Professor Chris Cunneen Dr Lorette de Plevitz Dr Nikki Savvides

Abstract

In 2008, income management of recipients' social security payments was implemented as part of the Cape York Welfare Reform package (CYWR), a program supported by both the Queensland and federal governments. The income management scheme rests on the *Family Responsibilities Commission Act 2008* (Qld) (*FRC Act*) and Commonwealth social security legislation. The CYWR applies to five communities in northern Queensland predominantly populated by Aboriginal peoples (Aurukun, Hope Vale, Mossman Gorge, Coen and Doomadgee). These communities have long colonial histories which have involved the implementation of paternalistic laws, policies and practices all aimed at controlling Aboriginal peoples, including attempts at forced assimilation. The CYWR commenced as a four year trial and is now permanent.

The stated objectives of the reform are to assist people in the CYWR communities in becoming 'socially responsible' for the wellbeing of themselves, their families and other people in their communities, and by providing support for local authority. This thesis argues that these objectives are a continuation of the paternalism inherent in previous laws, policies and practices, and questions their connection to income management, particularly as government evaluations have found that income management has not had any immediate positive impact on people's compliance with what are deemed by the government to be their social responsibilities.

Section 8 *Racial Discrimination Act 1975* (Cth) exempts from racial discrimination any special measures taken for the sole purpose of securing adequate advancement of certain racial groups requiring protection in order to achieve equal enjoyment or exercise of human rights and fundamental freedoms. Income management has been deemed a special measure by the Commonwealth legislature, and by both Queensland and Commonwealth governments; however, it differs from previous special measures (excluding alcohol restrictions) because it restricts Aboriginal peoples' human rights.

The thesis argues that, if challenged, the High Court is likely to decide that income management is a special measure. To date, the High Court has applied a formal and literal statutory interpretative approach to special measures cases, despite the broad words used in the *Racial Discrimination Act 1975* (Cth) and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* on which the Act is based. Analysis of these cases shows that the court takes a restrictive view of the relevance and importance of international law and international committee recommendations with regard to racial discrimination. Further, on the basis that the decision to implement special measures is political, the court defers to the legislature by limiting itself to assessing whether the decision was reasonable.

The thesis finds that the approach of deeming measures which restrict rights, to be special measures, appears to be unique to Australia. The United States of America, Canada and South Africa have legislation and processes that enable the court to assess measures which may restrict the rights of minority peoples. Australia lacks similar legislative or process safeguards, thus enabling restrictive measures affecting Aboriginal peoples' rights to be found lawful.

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Acronyms and Abbreviations

AAA Act – Aurukun Associates Agreement Act 1975 (Qld)

ADA Act – Anti-Discrimination Act 1991 (Qld)

AIA – Acts Interpretation Act 1901 (Cth)

AIDA – Australian Indigenous Doctors Association

AMP – Alcohol Management Plan

Andrews – Andrews v Law Society of British Columbia [1989] 1 SCR 143

Applicant A – Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225

APRSO Act – The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld)

ATSIC – Aboriginal and Torres Strait Islander Commission

Bligh – Bligh v Queensland [1996] HREOC 28

Bropho – Bropho v Western Australia [2007] FCA 519; [2008] FCAFC 100

CERD – Committee on the Elimination of Racial Discrimination

CDEP – Community Development Employment Project

CEO – Chief Executive Officer

CIC – CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

CJG – Community Justice Group

Congress – National Congress of Australia's First Peoples

CROC – Convention on the Rights of the Child

CYI – Cape York Institute for Policy and Leadership

CYJS – Cape York Justice Study

CYP – Cape York Partnership

CYWR – Cape York Welfare Reform Communities

DAIA – Department of Aboriginal and Islander Advancement

DHS – Commonwealth Department of Human Services

FIM – Family Income Management Program

FLA – Family Law Act 1975 (Cth)

FRC – Family Responsibilities Commission

FRC Act – Families Responsibilities Commission Act 2008 (Qld)

FRC Bill – Family Responsibilities Commission Bill 2008 (Qld)

Gerhardy – Gerhardy v Brown (1985) 159 CLR 168

Harksen test – Harksen v Lane NO and Others 1998 (1) SA 300 (Constitutional Court)

HREOC – Human Rights and Equal Opportunity Commission

IAC – Indigenous Advisory Council

IBA – Indigenous Business Australia

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of all forms of Racial Discrimination

ICESCR – International Covenant on Civil, Economic and Social Rights

JP – Justice of the Peace

Maloney – Maloney v The Queen (2013) 252 CLR 168

NT – Northern Territory

NTER Act – Northern Territory Emergency Response Act 2007 (Cth)

NTI – Northern Territory intervention

Oakes – R v Oakes [1986] 1 SCR 103

PEPUDA – Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa)

Plessy – Plessy v Ferguson, 163 US 537 (1896)

Project Blue Sky – Project Blue Sky v ABA (1998) 194 CLR 355

Queensland Discriminatory Laws Act – Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)

Queensland Discriminatory Laws Bill - Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill 1974 (Cth)

RCIADIC – Royal Commission into Aboriginal Deaths in Custody

RDA – Racial Discrimination Act 1975 (Cth)

SEAM – School Enrolment and Attendance Measure

SFNT Act – Stronger Futures in the Northern Territory Act 2012 (Cth)

SFNT(CTP) Act – Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth)

SS(A) Act – Social Security (Administration) Act 1999 (Cth)

SSLA Act – Social Security Legislation Amendment Act 2012 (Cth)

SSOLA Act – Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)

SSOLA Bill – Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDRIP – United Nations Declaration on the Rights of Indigenous People

US – United States of America

Vienna Convention – Vienna Convention on the Law of Treaties (1969)

1965 Act – Aborigines' and Torres Strait Islanders' Act of 1965 (Qld)

1971 Act – Aborigines Act 1971 (Qld)

1972 Regulation – Aborigines Regulation of 1972 (Qld)

CHAPTER 1: INCOME MANAGEMENT AS A SPECIAL MEASURE IN THE CAPE YORK WELFARE REFORM

I INTRODUCTION

This thesis is concerned with special measures in Australian human rights law. The measure which is the focus of the thesis is income management under the Cape York Welfare Reform (CYWR). Under this income management regime, receiving a social security payment to spend as a person wishes is conditional on their compliance with certain 'social responsibilities'.¹ This thesis argues that measures of this nature – including income management – which target Aboriginal peoples and restricts their rights and fundamental freedoms – are discriminatory, and therefore unable to be characterised as a special measure, or justified on any other basis.

I use the term 'Aboriginal peoples' or 'Aboriginal and Torres Strait Islander peoples' when talking about distinct groups of people, based on their different cultures, languages or communities. The term 'Aboriginal people' is used when there are commonalities, for example, in the context of the effect of particular legislation, and when discussing the effects of this legislation on individuals or particular, bounded groups of individuals.

Generally, present legislation restricting rights – such as income management and alcohol restrictions – do not apply to Torres Strait Islander communities, with the exception of alcohol restrictions in the Northern Peninsula Area of Cape York. However, it is acknowledged that some Torres Strait Islander peoples live in the CYWR communities.

Aboriginal people have been managed through legislation, policy and practice since the arrival of white colonists from 1788. Initially, some colonists inflicted violence on Aboriginal people in an attempt to eradicate them.² Such violence had profoundly destructive consequences for Aboriginal peoples, with many killed at the hands of colonists, or as a result of legislation and policy that

¹ *Family Responsibilities Commission Act 2008* (Qld) s 4.

² Patricia Grimshaw, Marilyn Lake, Ann McGrath, Marian Quartly, *Creating a Nation* (Penguin Press, 1996) 131-142.

supported their annihilation. Those Aboriginal people who survived were segregated on the basis that they were inferior to white colonists: childlike, and incapable of interacting on the same social level as non-Aboriginal people, and therefore requiring protection from Europeans, disease and alcohol.³ Many Aboriginal families and individuals were removed from communities and forced to settle on government reserves or church missions.⁴ Following this, policies to assimilate were imposed upon Aboriginal peoples living in these reserves and missions.⁵ Arguably, governments persist with assimilationist approaches today, especially in regard to health, education, employment and home ownership.⁶

The assumed inferiority of Aboriginal peoples reflected the prejudices of colonists, who vilified Aboriginal peoples not only due to their skin colour, but due to their cultural practices. Social Darwinism portrayed races as distinct, with some seen not to have progressed through all stages of development. The notion that Aboriginal people need paternalistic care and control by members of the 'superior' culture⁷ has justified the management of their affairs, including whether and who they could marry, where they could live, their access to alcohol, and the control of their finances.⁸ In order to protect Aboriginal children from what was seen as dysfunctional family life, many children were taken from their families and segregated in dormitories within Aboriginal reserves. Aboriginal people – both adults and children – were forced into tough physical work for little or no money. Protectors controlled Aboriginal workers' wages

³ See, eg, Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *UNSW Law Journal* 529; Heather McRae, Garth Nettheim, Laura Beacroft, Luke McNamara, *Indigenous Legal Issues* (LBC Information Services Press, 2nd ed, 1997) 43.

⁴ Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney, 1997.

⁵ See, eg, Bain Attwood, Winifred Burrage, Alan Burrage and Elsie Stokie, *A Life Together, A Life Apart* (Melbourne University Press, 1994) 5-6; Andrew Markus, 'Under the Act' in Bill Gammage and Peter Spearitt (eds), *Australians 1938* (Fairfax, Syme and Weldon, 1987) 48-53; Australian Human Rights and Equal Opportunity Commission, above n 4.

⁶ Lester J Thompson and Richard Hill, 'Ideology in Public Policy: An Examination of Aggressive Paternalism and Enculturation in Indigenous Assistance Programs', (2007) 2(2) *The International Journal of Interdisciplinary Social Sciences* 421, 427.

⁷ Bielefeld, 'Compulsory Income Management and Indigenous Australians', above n 3, 528-529.

⁸ Henry Reynolds, 'Racial Thought in Early Colonial Australia', *Australian Journal of Politics and History* (1974) 20(1), 45-53.

because they were not trusted to spend them ‘appropriately’. Protectors decided whether or not a person required their money, controlled how much money they could access, and even decided whether the money would be given to its owner upon request.⁹ The government was concerned that they would waste it on unnecessary items. At the same time, Aboriginal workers were exploited both by laws and policies limiting their access to their wages,¹⁰ as well as being affected when employers underpaid them, or in some cases did not pay them at all.¹¹ Protectors often managed Aboriginal people’s money in a way that left the person and their family far more impoverished than if Aboriginal peoples managed their own money.¹² In greatly reducing Aboriginal peoples’ autonomy, this treatment forced them to become dependent on the state.¹³

Effects from long-term discriminatory treatment of Aboriginal people continue today. These destructive practices were acknowledged in 2008 by the then Prime Minister of Australia – Kevin Rudd – in a National Apology to Aboriginal and Torres Strait Islander peoples.¹⁴ However, at the same time, similar legislation in the form of the income management of social security payments was in force, having been implemented in 2007¹⁵ in the Northern Territory (NT).

Income management involves a proportion of a person’s social security payment being quarantined in a separate bank account so that it can only be used to pay particular bills, purchase particular items, or buy from particular businesses. The person can spend the remaining proportion of their social security payment as they wish. These income management regimes are aimed at changing cultural practices, so that Aboriginal people cannot share or request money from each other. They are also premised on a stereotype of Aboriginal

⁹ Bielefeld, ‘Compulsory Income Management and Indigenous Australians’, above n 3, 531-532.

¹⁰ Ibid 529.

¹¹ Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) 56-60.

¹² Ibid 87.

¹³ Bielefeld, ‘Compulsory Income Management and Indigenous Australians’, above n 3, 534.

¹⁴ Kevin Rudd, Prime Minister, Government of Australia, ‘Apology to Australia’s Indigenous Peoples’, 13 February 2008 <<http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>>.

¹⁵ J Rob Bray, Matthew Gray, Kelly Hand and Ilan Katz, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre University of New South Wales Press, 2012) 6.

people as substance abusers who might spend all their money on alcohol or illicit substances, and income management is directed at stopping the purchase of these items. Income management is also intended to prevent gambling, which is similarly seen as a vice of Aboriginal people. The primary aim of the measure is therefore to redirect funds away from such activities, towards paying for things required, for example, by their children, and basic necessities including food, rent and bills.¹⁶

In the late 2000s, social security payment management arose in response to continued negative stereotypes attributed to Aboriginal people. The most widely known income management regime in Australia is the Northern Territory intervention (NTI) (now called Stronger Futures). Development of the Cape York Welfare Reform (CYWR) commenced in the early 2000s and was implemented soon after the NTI. Because of the application of the NTI and CYWR to communities populated predominantly by Aboriginal people, the Commonwealth government initially suspended Part II *Racial Discrimination Act 1975* (Cth) (*RDA*),¹⁷ which prohibits legislation directed at racial groups that causes them to enjoy human rights to a lesser extent than other cultural groups. Income management was described in the legislation as a ‘special measure’.¹⁸ The suspension of Part II removed any opportunity for individuals to challenge income management under the *RDA* and for a court to decide on the legislation’s validity. In response to lobbying and criticism, Part II *RDA* was later reinstated when the NTI was broadened to include non-Aboriginal communities, despite Aboriginal peoples continuing to be the primary target.¹⁹

¹⁶ See, eg, Cape York Institute for Policy and Leadership, May 2007, *From Hand Out to Hand Up: Cape York Welfare Reform Project*, Aurukun, Coen, Hope Vale, Mossman Gorge, Design Recommendations (Queensland Cape York Institute for Policy and Leadership Press, 2007) 20; Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 5.

¹⁷ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4-5.

¹⁸ *Ibid* s 4.

¹⁹ Commonwealth, Parliamentary Debates, House of Representatives, 25 November 2009, 12783-84 (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs); *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010* (Cth) cl 3; Luke Buckmaster, Diane Spooner and Kirsty Magarey, ‘Income Management and the Racial Discrimination Act’ (Parliamentary Library, Background Note 2011-12, 28 May 2012) 1-2

The legislation and branding was changed to ‘Stronger Futures’;²⁰ however, it is still referred to as the NTI.²¹

Special measures in the area of human rights law usually include policy, legislation or programs implemented to assist a racial or ethnic group to enjoy human rights to the same extent as other racial and cultural groups. These human rights include access to education, property, employment, social security, safety and wellbeing. Special measures enable a disadvantaged group to be treated differently where the treatment occurs, in order to remedy the disadvantage, but can only last until that disadvantage is overcome.

II NEW PATERNALISM – THE CONTEXT OF INCOME MANAGEMENT

Legislation enabling government control of Aboriginal peoples’ money has traditionally been paternalistic, based on a presumption that Aboriginal people cannot manage their own money responsibly, and that they therefore require assistance. Paternalism can be explained generally as the government acting as a kind of ‘parent’, which knows what is best for particular people, and which is able to overrule or make decisions because it deems those people to be incapable of knowing what is best for themselves. Paternalism consists of three elements. Firstly, it interferes in a person’s choice or ability to choose. Secondly, it has the objective of furthering the person’s welfare. Thirdly, it can

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagementRDA.

²⁰ *Stronger Futures in the Northern Territory Act 2012* (Cth).

²¹ See, eg, Nicholas Biddle, ‘Northern Territory Intervention Extended ... But is it Working?’ *The Conversation* (online), 3 July 2012, <<https://theconversation.com/northern-territory-intervention-extended-but-is-it-working-8005>>; Calla Wahlquist, ‘Northern Territory Intervention Should be Disbanded, says Indigenous Advocacy Group’, *The Guardian* (online), 9 February 2016 <<http://www.theguardian.com/australia-news/2016/feb/09/northern-territory-intervention-should-be-disbanded-says-indigenous-advocacy-group>>; Helen Davidson, ‘Nova Peris says Government Language Around Indigenous People is Patronising’, *The Guardian* (online), 2 August 2015 <<http://www.theguardian.com/australia-news/2015/aug/02/nova-peris-says-government-language-around-indigenous-people-is-patronising>>; Santilla Chingaipe, ‘NT Intervention Fails on Key Reforms: Report’, Special Broadcasting Service (SBS), 9 February 2016 <<http://www.sbs.com.au/news/article/2016/02/09/nt-intervention-fails-key-reforms-report>>.

be made without the person's consent.²² Governments engage in paternalistic behaviour regularly, such as requiring people to wear seat belts in cars and helmets on motorbikes and bicycles, for parents to send children to school, and deciding which drugs people can legally consume.²³ Special measures developed by the State and implemented or imposed upon people without their consent, purportedly to benefit them, are by their very nature paternalistic. This is in contrast to measures developed either by or in partnership with those to whom they are to apply.

While government paternalism is acceptable when it is based on substantiated research,²⁴ paternalistic legislation, practice and policy has applied specifically to Aboriginal people without supportive evidence, and may therefore in fact cause unintended detriment.²⁵ These programs are partly aimed at forcing Aboriginal people to westernise to 'improve' their lives. In places like Cape York, where despair and dysfunction are said by some²⁶ to now be the norm, radical policies such as income management of social security payments are specifically designed to change culture by promoting individual responsibility.²⁷

The connection between income management and its objectives is unclear and therefore its likelihood of achieving these outcomes is doubtful. However, its objectives indicate the intent behind it to:

- reduce immediate hardship and deprivation by directing welfare payments to the priority needs of recipients, their partners, children and any other dependants;
- help affected welfare payment recipients to budget so that they can meet their priority needs;

²² Matthew Thomas, Luke Buckmaster, 'Paternalism in Social Policy – When is it Justifiable?' (*Parliamentary Library Research Paper* No. 8, 2010-11, 15 December 2010) 2 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp08#_Toc280187798>.

²³ Ibid 1.

²⁴ Ibid.

²⁵ Jon Altman and Melinda Hinkson, 'Very Risky Business: The Quest to Normalise Remote-Living Aboriginal People' in Greg Marston, Jeremy Moss and John Quiggin (eds), *Risk, Welfare and Work* (University of Melbourne Press, 2010) 190.

²⁶ Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson and Associates Press, 2000).

²⁷ Altman and Hinkson, above n 25.

- reduce the amount of discretionary income available for alcohol, gambling, tobacco and pornography;
- reduce the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments; and
- encourage socially responsible behaviour, particularly concerning the care and education of children.²⁸

Income management assumes that people are not managing their money due to behavioural or cultural issues. The objectives of the measure fail to address the inadequacy of social security payments to provide for families, especially in remote communities where food and travel are expensive. The Commonwealth and Queensland governments adopted an approach which has been termed 'new paternalism'.²⁹ This is a step well beyond the provision of the safety net of social security payments to be spent by a recipient as required. It assumes a strong connection between disadvantage and supposedly deficient social values and norms.³⁰ This 'new paternalism' is premised on the assumption that Aboriginal people are unable to exercise personal responsibility and self-discipline, and thus require surveillance of their spending and a reduction in their spending choices, to ensure correct decisions are made.³¹ Choices regarding spending are reduced through limitations placed on items that can be bought and places where people can shop, controlled through a BasicsCard. A BasicsCard is similar to a bank keycard and is linked to a person's social security account, which is income managed. The items that can be purchased on a BasicsCard are restricted to those considered by the Commonwealth government as 'priority needs'. These priority needs include bills, rent, groceries, clothes, health and hygiene items, and costs associated with child care, education and the organisation of funerals. They also include transport and the acquisition, operation or repair of a vehicle, necessary only if in

²⁸ *Social Security (Administration) Act 1999* (Cth) s 123TB; Department of Social Services, Government of Australia, *Guide to Social Security Law, 11.1.1.30 Objectives of Income Management* <<http://guides.dss.gov.au/guide-social-security-law/11/1/1/30>>.

²⁹ Luke Buckmaster, Carol Ey and Michael Klapdor, 'Income Management: An Overview' (Parliamentary Library, Background Note, 2012-12, 21 June 2012) 17-18 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagementOverview#_ftnref61>.

³⁰ *Ibid* 18.

³¹ Lawrence M. Mead (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Brookings Institution Press, 1997).

connection with any of the above.³² BasicsCards are only accepted at certain stores and cannot be used in transactions at markets or to purchase items over the internet. Income managed money cannot be withdrawn and if not used on priority needs, it remains in a person's income managed account.

Bielefeld explains that the concept of new paternalism originated in the United States, its influence gradually spreading across western nations.³³ It is derived from a deficit approach, portraying the poor as having defective reasoning or character and less inclination than the rest of the community to comply with social norms.³⁴ New paternalism imposes certain obligations on social security recipients. In the case of the CYWR, social security recipients must comply with certain obligations, termed 'social responsibilities', or be referred to a statutory body called the Family Responsibilities Commission (FRC). These social responsibilities and the FRC are discussed further below. By creating and focusing on fulfilling obligations under this 'new paternalism', the importance of the social security recipients' rights and needs are reduced.³⁵

Recommendations to manage Aboriginal peoples' spending are based on an assumption of deficit. Deficit discourse assumes that Aboriginal people have deficient social norms, and are a problem that requires fixing.³⁶ While this view is common amongst non-Aboriginal people, it is also held by some Aboriginal people.³⁷

Interest in income management commenced in Australia in 2003 when Lionel Quartermaine – Acting Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC) – suggested a smart card be issued that could be used at certain shops to buy food and clothes and to provide for children's

³² *Social Security (Administration) Act 1999* (Cth) s 123TH.

³³ Shelley Bielefeld, Submission to the Australian Law Reform Commission, *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*, Submission 62, 9 March 2015, 4
<<http://www.alrc.gov.au/inquiries/freedoms/submissions>>.

³⁴ *Ibid.*

³⁵ *Ibid.* 2.

³⁶ Cressida Fforde, Lawrence Bamblett, Ray Lovett, Scott Gorringe and Bill Fogarty 'Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia' (2013) 149 *Media International Australia, Incorporating Culture and Policy*, 162.

³⁷ See, eg, Pearson, above n 26, Marcia Langton, 'Trapped in the Aboriginal Reality Show' (2008) *Griffith Review* 19, 145–162.

education.³⁸ The smart card suggestion was not accepted by all ATSI Commissioned. ³⁹ At the time, Aboriginal lawyer Noel Pearson – later instrumental in designing the CYWR – publicly supported Quartermaine’s objective of ensuring that Aboriginal peoples’ money should benefit children by restricting how and where it can be spent.⁴⁰ At the time, then Minister for Indigenous Affairs, Amanda Vanstone, described Quartermaine’s suggestion as complex, requiring substantial legislative backing, and stating that she would be surprised if it gained parliament’s approval.⁴¹

In 2005, the Commonwealth government abolished ATSI and changed its policy mantra from ‘self-determination’ to ‘mutual obligation’, ‘shared responsibility’, ‘mainstreaming’ and ‘normalisation’.⁴² In the same year, the Cape York Institute for Policy and Leadership (CYI) approached the Commonwealth government with their proposal to develop a new approach to ‘welfare’. The CYI is funded by the Queensland and Commonwealth governments. It describes itself as having ‘an overarching Think Tank function which is responsible for idea articulation [and] external liaison’.⁴³ Its main focuses are economic and social policy reforms, as well as supporting the development of Cape York leaders.⁴⁴ Noel Pearson,⁴⁵ previously a CYI

³⁸ Australian Broadcasting Corporation, ‘Proposal for ‘Smart Card’ Payment for Welfare Recipients’, *The World Today*, 27 October 2013 (Jo Mazzocchi) <<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/worldtoday/content/2003/s976028.html>>.

³⁹ Australian Broadcasting Corporation News, ‘*Smart Card a Dumb Idea, ATSI Western Commissioner says*’, (29 October 2003) <<http://www.abc.net.au/news/2003-10-29/smart-card-a-dumb-idea-atsic-western-commissioner/1500938>>.

⁴⁰ Australian Broadcasting Corporation, ‘Pearson Supports Welfare ‘Smart Card’’, *AM*, 30 October 2003 (Linda Mottram and Hamish Fitzsimmons) <<http://www.abc.net.au/am/content/2003/s978230.htm>>.

⁴¹ Australian Broadcasting Corporation, ‘ATSI Smartcard Unlikely Solution: Vanstone’, *The World Today*, 1 November 2003 (Peta Donald), <<http://www.abc.net.au/am/content/2003/s980067.htm>>.

⁴² Jon Altman, ‘Neo-Paternalism: Reflections on the Northern Territory Intervention’ (2008) Summer *ANU Reporter* 32.

⁴³ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up*, above n 16.

⁴⁴ *Ibid* 1.

⁴⁵ Noel Pearson is from Hope Vale and has been an advocate for change in Cape York communities. He has been involved in setting up a number of Cape York organisations including the Cape York Land Council in 1990, Cape York Partnership (CYP) in 2000, the Cape York Institute for Policy and Leadership (CYI) in 2004, Balkanu Development Corporation in 1997 and Apunipima Cape York Health Council in 1994. He has been a Director of the CYI since 2004 and is the Executive Chairman of CYP. He is also a Director on the Family Responsibilities Board, the relevant board for the Family Responsibilities Commission.

Director,⁴⁶ is the Founder and now Director of Strategy for Cape York Partnership (CYP) since the Institute was included in the CYP.⁴⁷

Funding of \$3 million was provided by the Commonwealth government to the CYI to design a new approach to welfare. By the end of 2007, the CYI had produced a two volume report, 'From Hand Out to Hand Up',⁴⁸ which proposed the Cape York Welfare Reform (CYWR). The CYWR was premised on deficient social norms being a large contributor to social problems in Cape York. One policy proposed by the report was that social security should be conditional.⁴⁹ In the broader context, around the same time as the CYWR was being developed, the 'Ampe Akelyernemane Meke Mekarle' (Little Children are Sacred) report⁵⁰ on child sexual abuse in the Northern Territory was completed. On 27 June 2007 the Commonwealth government, ignoring many of the report's recommendations, swiftly implemented the NTI, which included a wide range of controls on Aboriginal peoples.⁵¹

Generally, it is assumed by designers of special measures that rights enjoyed in western cultures are relevant and acceptable to Aboriginal and Torres Strait Islander peoples. This is despite obvious cultural differences. For instance, the relationships that Aboriginal and Torres Strait Islander peoples have with their land, their family structures, their community centeredness, and their cultural norms and values, are very different to facets of western culture.⁵² Based on a view of western culture as superior and Aboriginal and Torres Strait Islander cultures as deficient, the new paternalism which restricts the rights of Aboriginal peoples is the antithesis of an approach where the cultural values of these peoples are acknowledged and promoted as strengthening rights and

⁴⁶ Griffith Review, 'Noel Pearson' <<https://griffithreview.com/contributors/noel-pearson/>>.

⁴⁷ Cape York Partnership, 'Board Members' <<http://capeyorkpartnership.org.au/agents-of-change/board-members/>>.

⁴⁸ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up*, above n 16.

⁴⁹ Ibid 21.

⁵⁰ Northern Territory Government, Rex Wild QC and Patricia Anderson, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007 <http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf>.

⁵¹ Cosima Hay McRae, 'Suspending the Racial Discrimination Act, 1975 (Cth): Domestic and International Dimensions' (2013) 13 *Journal of Indigenous Policy* 63-64.

⁵² Commonwealth Race Discrimination Commissioner, Commonwealth of Australia, *Alcohol Report* (1995) 29.

equality of individuals and communities.⁵³ Analysis of the income management measure's effect on Aboriginal peoples' human rights is critical to assessing whether income management should be a special measure, or whether it is racially discriminatory.

III RESEARCH QUESTIONS

This thesis examines Australian court cases where special measures are challenged. This is to assist in predicting an Australian court's approach to a challenge to the CYWR income management measure. The thesis analyses the court's approach in such matters in a broad context by comparing it to that of other countries. In so doing, the thesis addresses the following questions:

Primary Research Question

A Should the Cape York Welfare Reform (CYWR) income management measure be characterised by a court as a special measure? While Commonwealth and Queensland governments characterise income management as a special measure, the relevant legislation, international conventions, judicial reasoning and expert commentary require analysis to assess the validity of this characterisation.

Secondary Research Questions

B What human rights are promoted and restricted by the income management measure of the CYWR? In implementing income management, the CYI and governments' stated focus has been to protect the rights of the vulnerable, including the rights of children to benefit from social security payments. In order to assess whether income management is a special measure, other rights which are restricted by the CYWR require identification and comparison with the rights promoted by income management.

⁵³ Australian Human Rights Commission, *Social Justice and Aboriginal and Torres Strait Islander Peoples' Access to Services Conference Paper* (2010) <<https://www.humanrights.gov.au/news/speeches/social-justice-and-aboriginal-and-torres-strait-islander-peoples-access-services-2010>>.

- C What is the legal/judicial approach in regard to determining a special measure? Judicial processes are crucial in predicting whether income management will be held a special measure if challenged. Past cases assist in understanding judicial approaches, in constructing legal arguments, and in some cases to provide precedents.
- D Can a special measure be racially discriminatory against some or all of those it is aimed at? Treating people differently because of their race can be said to be discriminatory, however this would capture all special measures. Discrimination is referred to here as treatment that restricts peoples' rights, rather than treatment which promotes rights. This is significant because it is arguable that income management restricts a number of rights of those to whom it is directed.
- E Is income management likely to be held to be racially discriminatory by an Australian court? An analysis of past legal cases and judicial reasoning must be undertaken in order to understand the court's approach. An investigation into the judicial analysis of legislation which restricts rights based on race is crucial to understanding the court's interpretation of racial discrimination.
- F Does, or should, the court assess whether the measure is capable of achieving the stated goal? The division of the legislature and court's roles requires review to answer this question. The question is important to income management, given the history of past measures related to control of Aboriginal people's money.
- G If an Australian court was asked to determine if the income management component of the CYWR was a special measure, would the answer be different to that of a court from the United States of America, Canada or South Africa, and, if so, why? I examine approaches from other jurisdictions in Chapter 5, providing different perspectives on measures restricting rights and racial discrimination. Different countries have varying histories of racial discrimination. This provides an opportunity to compare and improve Australia's approach to racial discrimination and special measures.

H What is the role of the concepts of deficit discourse and paternalism in understanding special measures? These concepts provide a framework to analyse legislation, policy and judicial reasoning. The application of these concepts is required to understand the thinking behind the CYWR income management measure. This is crucial in arguing against the present approach and for an approach which acknowledges and draws on Aboriginal culture as unique and as a strength so that ownership of processes and measures affecting Aboriginal people can belong to them.

IV THE METHODOLOGY – A DOCTRINAL APPROACH

The doctrinal methodology is applied in this thesis. This is a form of methodology based on applying legal norms to seek particular answers and statements of law that can apply to a number of factual situations.⁵⁴ The context of this thesis is the Australian legal system and whether, if legally challenged, income management of predominately Aboriginal communities would be held by the High Court to be a special measure and therefore permissible under the *Racial Discrimination Act 1975* (Cth). The doctrinal methodology enables me to apply legal rules to best predict judicial decision making if income management were legally challenged. The doctrinal approach includes locating relevant law (international conventions, legislation and case law), interpreting and applying the law and analysing the law and its outcome. It includes a predictive approach based on the doctrine of precedent, where principles from court decisions are extracted and applied to cases where similar principles are arguably applicable. While the law is continuously developing, my analysis and application of law is limited to that in operation as at 6 May 2016.

Hutchinson and Duncan state that ‘doctrinal research is the research into the law and legal concepts.’⁵⁵ Doctrinal legal research requires a legal education and is therefore aided by ‘privileged voices’, as opposed to subjects from all

⁵⁴ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing what we do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83, 116-117.

⁵⁵ *Ibid* 85.

socio-economic classes.⁵⁶ In researching and writing this thesis these privileged voices include those of the many commentators and judiciary I reference, as well as my own. None of us have the lived experience of the matters about which I write. This observation is important for this thesis as it highlights the fact that the relevant legislation has a specific cultural focus which only targets a particular section of the Australian population: that is, Aboriginal peoples on social security payments. Parliament, courts and other judicial decision-making bodies, while experienced in law, are still required to grasp the social and cultural conditions of Aboriginal peoples in the CYWR communities, even though they will never experience them firsthand.

Legal concepts and all types of principles from judicial cases, legislation, rules and norms are included as doctrine. Doctrine is also defined by each of these factors combined and the way in which they work alongside each other based on practices of interpretation. Doctrines may vary in form from abstract, to decisions which are binding on lower courts (*ratio decidendi*) or non-binding (*obiter dicta*).⁵⁷ Legal rules are doctrinal because they are applied consistently and develop slowly over time through the doctrine of precedent, under which a court is obliged to follow principles from previous court decisions from courts of equal or higher jurisdiction when deciding on similar sets of facts.⁵⁸ These statutory interpretation rules, derived from the common law, the *Acts Interpretation Act 1901* (Cth) and the *Vienna Convention on the Law of Treaties* (1969), are examined in Chapter 6. Their application to the *RDA*, *FRC Act*, social security legislation and the *International Convention on the Elimination of All Forms of Racial Discrimination*⁵⁹ (*ICERD*) by Australian judges is examined, and the limitations of the literal and formal interpretative approach adopted by judges discussed and compared to other interpretative approaches.

The problem-based doctrinal research methodology is often used by legal practitioners and students. It is a practical approach aimed at solving a specific legal problem. The steps normally followed to resolve a problem include:

⁵⁶ Ibid 117.

⁵⁷ Ibid 111, 114.

⁵⁸ Ibid 84-85.

⁵⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

establishing the facts; identifying the legal issues; analysing the issues to identify the relevant law; reading background documents (e.g., legal dictionaries, textbooks, papers on law and policy reform, looseleaf services, commentary and journals); examining primary materials (e.g., legislation, delegated legislation, second reading speeches, explanatory memorandum and case law); and synthesising the factual issues in light of the law to arrive at a tentative conclusion.⁶⁰ This approach is also used by judges. However, judges are bound by rules of precedent and must therefore address how particular cases apply or are distinguished. Judges must also consider the broader application and use of their decision and reasoning beyond that of the case being decided. Academics using the doctrinal research methodology rely on the same investigative approach; however, they are not restricted by the need to arrive at a concrete answer.⁶¹

The doctrinal method is a two-part process. Firstly, sources of the law are located, and secondly, they are interpreted and analysed. Hutchinson and Duncan state that the first step involves an attempt to find an 'objective reality'.⁶² This is defined as an authoritative statement in legislation or case law. However, the authors highlight that many legal practitioners – including critical legal scholars – argue that the law is often uncertain, and that, therefore, objective reality in law is a fallacy.⁶³ Hutchinson and Duncan suggest that because legislation is law passed by parliament and written, it is a positive statement of the law,⁶⁴ where the legal outcome is contingent on the next step of interpreting and analysing the law within a specific context based on the views, expertise and methods of the interpreter or analyst.⁶⁵ Hutchinson and Duncan also view synthesising the law and applying it to facts and contexts as a highly subjective process where the outcome is 'totally dependent' on the experience of the individual.⁶⁶ This highlights the importance of a multitude of

⁶⁰ Hutchinson and Duncan, above n 54, 106.

⁶¹ *Ibid* 107.

⁶² *Ibid* 110.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 116.

other perspectives and approaches in relation to doctrinal research, but by the same token it points to its limitations.⁶⁷

Having been legally trained, I apply western legal rules to predict the likely outcome of the court deciding whether the CYWR income management measure is a special measure. My analysis of the law and its application by judges is subjective: heavily influenced by my legal training, life experience, gender and cultural background.

Porsanger has identified that western academic research empowers non-indigenous peoples, and when targeted at indigenous research subjects, it is usually directed at “indigenous problems” or answering questions about indigenous peoples.⁶⁸ Laws and the rules that operate when applying these laws are derived from western culture, and only serve to exacerbate the impact of colonisation. The continued promotion of western culture fails to acknowledge and value Aboriginal and Torres Strait Islander cultures and the different worldviews of Aboriginal and Torres Strait Islander peoples.⁶⁹

In this thesis I rely on doctrinal research to enable me to predict the likely outcome if the court was to decide whether the income management measure of the CYWR is a special measure. In applying legal rules, I critique judicial decision making approaches, including the lack of acknowledgement of the cultural colonising context of institutions such as courts and legal regimes and their ongoing oppression of Aboriginal and Torres Strait Islander peoples. This includes the court’s rejection of its requirement and responsibility to assess the racially discriminatory nature of legislation which targets Aboriginal peoples.

However, in applying a doctrinal methodology, I acknowledge the importance of indigenous methodologies when researching Aboriginal and Torres Strait Islander peoples or matters pertaining to them. I respect the ongoing critique

⁶⁷ Ibid 115.

⁶⁸ Jelena Porsanger, ‘An Essay About Indigenous Methodology’ (2004) 15 *Nordlit* 15, Tromsø University, 108.

⁶⁹ Chris Cunneen and Simone Rowe, ‘Changing Narratives: Colonised Peoples, Criminology and Social Work’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy*, 53-54, 56.

of western research methodologies by indigenous⁷⁰ and non-indigenous scholars.⁷¹ Indigenous methodologies understand that indigenous subjects are affected by the broad historical, political and social context of peoples' lives. Important to indigenous methodologies are an understanding of colonisation and its continuation through western structures and institutions, an understanding of indigenous ethics which govern how and whether research should occur and the potential for empowerment and self-determination to be outcomes of the research process. Through the lens of indigenous ethics, research must be beneficial for Aboriginal and Torres Strait Islander peoples; ie, it must improve their lives. This may be through empowerment and self-determination, or by influencing change in external areas such as laws and policies. When applying indigenous methodologies, the researcher must recognise their own belief system and social, cultural position and perspective as well as understanding the impacts of colonisation on indigenous peoples.⁷² Throughout this thesis I have attempted to apply these principles when critiquing the disproportionate and discriminatory impact of the law on Aboriginal and Torres Strait Islander peoples, including the application of legal rules.

A The Research in the Context of the Doctrinal Research Methodology

I have chosen to examine the application of the CYWR income management measure in detail.⁷³ I selected the CYWR income management measure in order to focus the research on a specific measure to assess whether it is, or should be, deemed a special measure. The CYWR includes both voluntary and

⁷⁰ Karen Martin, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search, (2003) 27(76) *Journal of Australian Studies*; Karen Martin, *Please Knock Before You Enter* (Post Pressed, 2008); Aileen Moreton-Robinson and Maggie Walter, 'Indigenous Methodologies in Social Research', *Social Research Methods: An Australian Perspective* (Oxford University Press, 2nd Edition, 2009); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012); Jelena Porsanger, 'An Essay About Indigenous Methodology' (2004) 15 *Nordlit* 15, Tromsø University.

⁷¹ Chris Cunneen and Simone Rowe, 'Changing Narratives: Colonised Peoples, Criminology and Social Work' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy*; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Annandale, Hawkins Press, 2008).

⁷² Jelena Porsanger, 'An Essay About Indigenous Methodology' (2004) 15 *Nordlit* 15, Tromsø University, 112-113, 116-117.

⁷³ *Family Responsibilities Commission Act 2008* (Qld) s 69(1)(iv).

imposed income management. However, the focus of this research is on imposed income management. Income management under the CYWR is unique because the Family Responsibilities Commission (FRC) becomes the decision-maker once a person is required to attend the FRC, because it has been alleged that they have not met particular social responsibilities.

While judicial cases on broad areas pertaining to special measures are examined in the thesis, focussing upon income management enables me to use these cases as precedents. This assists me to predict the likely outcome of a domestic court deciding a challenge to income management and to answer the research questions. This approach is possible due to the rules and norms that apply to legislative interpretation and precedents derived from case law. Though this reflects a legal approach to resolving legal problems, I will also critique judicial reasoning. Critique is also a legal approach and is useful in the formation of new legal arguments, to distinguish facts and to assist in identifying new or different forms of evidence to enable the court to depart from precedent.

This thesis applies reform-oriented research to evaluate the existing rules and the ideologies from which they are derived. An issue that arises with a discipline strongly focused upon rules and law is that it often fails to fully consider important external factors, including imbalances in power and the position, circumstances and backgrounds (e.g., cultural, racial and socio-economic) of the people to whom the law is being applied. The reform-oriented approach is integral to the analysis undertaken within this thesis, given that cultural differences exist between those applying the rules,⁷⁴ the general community, and those affected by the application of the rules. Throughout the thesis I also canvass alternatives to rules that have been deemed inadequate.⁷⁵

To provide context to the analysis, the CYWR communities are described in Chapter 3. Their differing demographics, and events in their histories, including an analysis of the historical legislation and policy pertaining to management of property (including money) by the Queensland government, are examined.

⁷⁴ This includes governments in developing policy and legislation as well as courts in deciding cases.

⁷⁵ Hutchinson and Duncan, above n 54, 101.

V SPECIAL MEASURES ARE SUPPOSED TO IMPROVE ABORIGINAL PEOPLES' ENJOYMENT OF RIGHTS

In Australia, inequality stems from a history of racist policies and legislation, which have resulted in dispossessing and disempowering Aboriginal people and breaking down cultural mechanisms of support and kinship.⁷⁶ The requirement for special measures is an acknowledgement that more than simply prohibiting racial discrimination is required to address the effects of racism and achieve substantive equality.⁷⁷ In 1966, Australia signed *ICERD*, and ratified it in 1975. From 30 October 1975, the Australian government was obligated to prohibit racial discrimination⁷⁸ and implement special measures as detailed in Arts 1(4) and 2(2) *ICERD*. Article 1(4) *ICERD* provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary 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, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.

Article 2(2) *ICERD* provides:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights

⁷⁶ See, eg, Rudd, above n 14; Michaela Widdowson-Kidd, 'The Howard Government's Special Measures for Indigenous Australians' (2008) '1(2)' *Queensland Law Student Review* 117, 121.

⁷⁷ William Jonas and Margaret Donaldson, 'The Legitimacy of Special Measures' in Sam Garkawe, Loretta Kelly and Warwick Fisher (eds), *Indigenous Human Rights* (Federation Press, 2001).

⁷⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2(1).

for different racial groups after the objectives for which they were taken have been achieved.

Special measures could provide an opportunity for Aboriginal people to determine and implement measures best suited to their needs, culture and interests. Special measures are required if Aboriginal people are to enjoy substantive equality.⁷⁹ If Aboriginal people are to accept these special measures, it is important that they are included in deciding whether measures that restrict their rights are appropriate.

Until recently in Australia, special measures have been accepted by those who benefit from them as non-contentious, because of the terms of their application and their function as positive measures or 'affirmative action' to promote human rights denied through historic racism and disadvantage. However, in recent times, measures such as Alcohol Management Plans (AMPs) and income management have been deemed special measures by courts or governments.⁸⁰ These measures restrict human rights on the basis that they are said to protect or promote vulnerable community members' human rights.⁸¹ Aboriginal people, including those deemed vulnerable, are usually not included in decisions to design or implement these measures, despite the measures being for their benefit.

In this thesis, legislation, human rights instruments and Australian case law pertaining to special measures, particularly those that restrict rights, are examined and critiqued to provide a detailed explanation of special measures in Australia. Further analysis applies the principles extracted from the aforementioned critique to the CYWR income management measure.

The CYWR income management measure is a germane example to examine because it is a controversial contemporary measure, enacted despite its

⁷⁹ Jonas and Donaldson, above n 77.

⁸⁰ *Maloney v The Queen* (2013) 252 CLR 168.

⁸¹ See, eg, *Family Responsibilities Commission Act 2008* (Qld) s 4(2)(b)(ii); Noel Pearson, Apunipima Cape York Health Council, Cape York Partnership (Qld) and Alcohol and Drugs Working Group, *Cape York Peninsula Drug Abuse Strategy* (Cape York Partnership Press, 2002) 7-8, 13; Department of Human Services, Government of Australia, 'Income Management' <<http://www.humanservices.gov.au/customer/services/centrelink/income-management>>.

seeming incompatibility with anti-racial discrimination legislation.⁸² However, it is similar to previous Queensland government paternalistic policy, practice and legislation. The aspects which make the contemporary version contentious include a) its punitive control; b) its imposition upon those to whom it directly applies; c) that it departs significantly from historical views of special measures in Australia, and from international case law; and d) that it ignores important but non-binding international instruments on human rights, including those promoting indigenous peoples rights.⁸³ However, despite all of these factors, income management seems a natural progression in special measures in Australia following on from AMPs.

The income management measure of the CYWR is of relevance to a critique of special measures because of a) the stated reasoning supporting it as an approach for the betterment of lives of children and other vulnerable community members; b) its significance as a likely special measure (as purported by the Queensland and Commonwealth governments); c) the alleged support of community members; d) its development and implementation driven by an Aboriginal organisation; and e) its high cost comparative to the population and size of the communities. The nature of developing judicial cases on special measures lends support to the likelihood of it being deemed a special measure.

The CYWR has gathered relatively little attention compared to the NTI. It has even been positively distinguished from the NTI because it targets only particular members of Aboriginal communities.⁸⁴ It has also been portrayed as

⁸² See, eg, *Racial Discrimination Act 1975* (Cth), *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) and *Anti-Discrimination Act 1991* (Qld).

⁸³ See, eg, *International Covenant on Civil and Political Rights*, opened for signing 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *International Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸⁴ See, eg, Peter Billings, 'The Family Responsibilities Commission: Facilitating Socially Responsible Standards of Behaviour in Cape York?' (2010) 7(16) *Indigenous Law Bulletin* 1-6; Australian Council of Social Services, *Compulsory Income Management: A Flawed Answer to a Complex Problem*. Policy analysis, (September 2014) 4-5

having been negotiated with these communities.⁸⁵ However, CYWR income management restricts between 60% and 90% of a person's social security payment,⁸⁶ compared to 50% under the NTI,⁸⁷ and the FRC and its processes are unlike any other statutory body.

VI DEFICIT DISCOURSE

As previously mentioned, deficit discourse has been integral to the discriminatory assumption that Aboriginal and Torres Strait Islander peoples are inferior. As such, Aboriginal and Torres Strait Islander peoples have become the most disadvantaged peoples in Australia on all social indicators, including education, employment, health, infant mortality, standard of living and incidences of family violence.⁸⁸ Aboriginal and Torres Strait Islander peoples are also over-represented in the child protection and criminal justice systems.⁸⁹ Another outcome of their disadvantage is a lower life expectancy compared to non-Aboriginal and Torres Strait Islander peoples: 10.6 years lower for male and 9.5 years lower for female Aboriginal and Torres Strait Islander peoples.⁹⁰

Various efforts have been made to draw attention to the disadvantage suffered by Aboriginal and Torres Strait Islander peoples, including the bi-yearly Productivity Commission's *Overcoming Indigenous Disadvantage* reports, the first of which was released in 2003;⁹¹ the Royal Commission into Aboriginal

http://acoss.org.au/images/uploads/Income_management_policy_analysis_September_2014.pdf.

⁸⁵ See, eg, Billings, above n 84, 4-5; Australian Council of Social Services, above n 84, 1, 6.

⁸⁶ Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013, as repealed by *Social Services and Other Legislation Amendment Act 2014* (Cth).

⁸⁷ Don Arthur, 'Income Management: A Quick Guide', (Research Paper Series, Parliamentary Library, Parliament of Australia, 2015-16)

http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3952862/upload_binary/3952862.pdf;fileType=application/pdf.

⁸⁸ Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2014* (2014) 14-21.

⁸⁹ Human Rights Law Centre, '*National Human Rights Action Plan: Aboriginal and Torres Strait Islander Peoples*' <<http://www.humanrightSACTIONPLAN.org.au/nhrap/focus-area/aboriginal-and-torres-strait-islander-peoples>>.

⁹⁰ Steering Committee for the Review of Government Service Provision, above n 88, 14, Human Rights Law Centre, above n 89.

⁹¹ Productivity Commission, Parliament of Australia, *Overcoming Indigenous Disadvantage* (2014) <<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage>>.

Deaths in Custody, National Report, released in 2001;⁹² the Cape York Justice Study of 2001;⁹³ and the Aboriginal and Torres Strait Islander Women's Task Force on Violence report, released in 2000.⁹⁴ However, despite all the recommendations offered and discussion generated by these reports, the numbers of disadvantaged Aboriginal and Torres Strait Islander peoples have continued to rise.

These disadvantages stem, as previously discussed, from a history of racist policies and legislation that have resulted in the dispossession and disempowerment of Aboriginal and Torres Strait Islander people and the breaking down of their cultural mechanisms.⁹⁵ Language which presents Aboriginal peoples as deficient and inferior, lacking the capability to determine their own future, and stereotyping Aboriginal peoples as substance abusers, susceptible to engaging in or suffering from domestic violence, has been used to justify harsh measures such as income management. This assumption of inferiority is never identified as an issue by parliament or the court; rather, the issue focused upon is the 'cause' of the disadvantage.⁹⁶

The concept of 'deficit discourse' is central to the argument of this thesis. Deficit discourse is described as:

... expressed in a mode of language that consistently frames Aboriginal identity in a narrative of deficiency. It is interwoven with notions of 'authenticity', which in turn adhere to models of identity still embedded within the race paradigm, suffering from all of its constraints but perniciously benefiting from all of its tenacity. Recent work shows that deficit discourse surrounding Aboriginality is intricately entwined within and across different sites of representation, policy and expression, and is active both within and outside Indigenous Australia.⁹⁷

⁹² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

⁹³ Tony Fitzgerald and Queensland Department of the Premier and Cabinet, *Cape York Justice Study* (2001) 2 (Brisbane: Department of the Premier and Cabinet Press).

⁹⁴ Queensland Aboriginal and Torres Strait Islander Task Force on Violence and Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development, 2000).

⁹⁵ Rudd, above n 14.

⁹⁶ Fforde, above n 36, 167.

⁹⁷ Ibid 162.

'Closing the Gap' is an example of deficit discourse which presents Aboriginal people as being susceptible to illness, leading to high mortality rates within their communities, rather than identifying and addressing inadequate and inappropriate service provision and resourcing.⁹⁸ Deficit discourse supports particular forms of policy, programs, practices and legislation directed at control and manipulation of culture, which are based on philosophical foundations that have continued since colonisation. The likely ramifications from this are discrimination, and failure to achieve policy goals or support the aspirations of Aboriginal and Torres Strait Islander peoples.⁹⁹ This is because Aboriginal and Torres Strait Islander peoples are either not consulted, or superficial consultation has occurred after policies are developed and poised for implementation. Additionally, these policies do not address the structural reform required to address disadvantage experienced due to colonialism.¹⁰⁰

This thesis sets out to identify how the court rationalises restrictive measures as special measures and whether this characterisation could include income management. It also seeks to determine whether there is a way in which racist restrictive measures which have a disproportionate effect on Aboriginal peoples can be prohibited, and only those measures purely beneficial to Aboriginal peoples can be implemented as special measures.

VII SPECIAL MEASURES, THE *INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* AND THE *RACIAL DISCRIMINATION ACT 1975 (CTH)*

On 30 September 1975, the Australian government ratified the *International Convention on the Elimination of all forms of Racial Discrimination 1966 (ICERD)*. This action obligated the Australian government to prohibit racial discrimination¹⁰¹ and to implement special measures aimed at achieving

⁹⁸ Ibid 167.

⁹⁹ Ibid 169.

¹⁰⁰ Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78, 90.

¹⁰¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2(1).

substantive equality by eliminating disadvantage.¹⁰² These measures take their meaning directly from Art 1(4) *ICERD*. Articles 1(4) and 2(2) *ICERD* require State Parties (such as the Australian government) to implement special measures to ensure adequate development and protection of particular racial or ethnic groups or individuals belonging to those groups. *ICERD* also requires the Australian government to facilitate compliance by its State and Territory governments.

Special measures enable a group experiencing particular human rights to a lesser extent than others to be treated differently than those others. However, this different treatment can only occur to promote enjoyment of those human rights enjoyed to a lesser extent. In Australia, the issue is that the goal of the measure is usually defined by government, and not by its intended beneficiaries. A special measure promoting the dominant culture may be implemented by government and imposed upon the disadvantaged group with the expectation that the disadvantaged group wants or should want the same outcomes as the dominant group. The measure may also be aimed not only at disadvantage, but at eliminating cultural difference.¹⁰³ This aim cannot be derived from the wording of Arts 1(4) and 2(2) *ICERD*; however, the articles use broad terms, enabling interpretation and implementation by government using its own ideologies.

Three judges in *Gerhardy v Brown*¹⁰⁴ (*Gerhardy*) noted that Arts 1(4) and 2(2) *ICERD* should be read together.¹⁰⁵ Justice Wilson referred to the *travaux préparatoires* (preparatory works to *ICERD*) which stated that Art 1(4) needs to be read in light of Art 2(2).¹⁰⁶ Justice Brennan in *Gerhardy* viewed Arts 1(4) and 2(2) as complementary, saying that their terms should be interpreted consistently.¹⁰⁷ Justice Deane stated that the two provisions ‘must be read together’¹⁰⁸ as a practical measure to assist in interpreting Art 1(4). He said

¹⁰² Ibid art 2(2).

¹⁰³ See, eg, Jennifer Nielsen, ‘Whiteness and Anti-Discrimination Law: It’s in the Design’ (2008) 4(2) *Australian Critical Race and Whiteness Studies Association*, e-journal, 3-5 <<http://www.acrawsa.org.au/files/ejournalfiles/52NielsenInthedesignFINAL.pdf>>.

¹⁰⁴ (1985) 159 CLR 70.

¹⁰⁵ Ibid [9] (Wilson J), [32] (Brennan J), [9] (Deane J).

¹⁰⁶ Ibid [9] (Wilson J).

¹⁰⁷ Ibid [32] (Brennan J).

¹⁰⁸ Ibid [9] (Deane J).

that the requirement of States Parties by Art 2(2) to take special measures to achieve equality 'when the circumstance so warrant'¹⁰⁹, provides some clarity to some of the vague concepts of Art 1(4).¹¹⁰ In *Maloney v The Queen*¹¹¹ (*Maloney*), French CJ,¹¹² Hayne J,¹¹³ Crennan J,¹¹⁴ and Gageler J¹¹⁵ also utilised Art 2(2) to interpret Art 1(4).

The *RDA* was enacted to incorporate Australia's international obligations under *ICERD* into domestic law. Special measures, while not defined explicitly in the *RDA*, are integrated into s 8 *RDA* through reference to Art 1(4) *ICERD*.¹¹⁶ It is notable that it is rare in Australia for international human rights instruments to be converted into binding law.¹¹⁷ Section 8 *RDA* provides that special measures are an exception to the general prohibition against racial discrimination in Part II *RDA*. However, it is clear that laws enabling other people to manage the property of Aboriginal and Torres Strait Islander peoples without their consent and laws preventing or restricting Aboriginal and Torres Strait Islander peoples terminating management of their property by another person cannot be special measures.¹¹⁸ Provisions of this nature are invalidated by s 10(1) *RDA*. Section 10(3) *RDA* and s 5 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Qld) specifically address legislation and policies enabling the government to manage Queensland Aboriginal and Torres Strait Islander peoples' property and money. Legislation of this nature is discussed in Chapter 3, and it is argued in Chapter 7 that income management constitutes the management of Aboriginal people's property (their social security payment) without their consent.

Examples of special measures include special education assistance, initiatives in relation to employment programs, or specified employment positions. Due to their usually beneficial nature, special measures are not often challenged by

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Maloney v The Queen* (2013) 252 CLR 168.

¹¹² *Ibid* [13] (French CJ).

¹¹³ *Ibid* [88], [91] (Hayne J).

¹¹⁴ *Ibid* [118], [132], [134] (Crennan J).

¹¹⁵ *Ibid* [289], [299], [347], [357] (Gageler J).

¹¹⁶ The *ICERD* is integrated into the *RDA* through its attachment as a schedule to the *RDA* through s 3(1) *Racial Discrimination Act 1975* (Cth).

¹¹⁷ Widdowson-Kidd, above n 76, 119.

¹¹⁸ *Racial Discrimination Act 1975* (Cth) ss 8(1), 10(3).

those within the group or the individuals to whom they apply. However, legal disputes arise because people who are not the beneficiaries of special measures at times feel aggrieved by not having access to benefits of measures.¹¹⁹ These special measures are vastly different to measures which restrict rights and punish Aboriginal people in order to promote human rights, as was held to be the case in *Maloney*.

James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples from 2008-2014, acknowledged that special measures are required in Australia to address the disadvantages experienced by Aboriginal peoples, and in particular, the challenges unique to Aboriginal women and children. It was Anaya's view that:

it would be quite extraordinary to find consistent with the objective of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members.¹²⁰

Anaya expressed his understanding of a special measure as pertaining to 'preferential treatment of disadvantaged groups', rather than through impairment of the enjoyment of human rights.¹²¹

Anaya refers to Art 2(1) *ICERD*, which provides that 'States are obligated to avoid and prevent discriminatory treatment on the basis of race that impairs the enjoyment of human rights.'¹²² Article 2(1) *ICERD* states:

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to

¹¹⁹ See, eg, *Bruch v Cth of Australia* [2002] FMCA 29; *Gerhardy v Brown* (1985) 159 CLR 70.

¹²⁰ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, The Situation of Indigenous Peoples in Australia*, A/HRC/15/37Add.4, appendix B (1 June 2010), 31, [21] <http://unsr.jamesanaya.org/docs/countries/2010_report_australia_en.pdf>.

¹²¹ *Ibid*.

¹²² *Ibid* 30 [18].

ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

Anaya emphasises this requirement to eliminate racial discrimination by stating that '[t]he proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis.'¹²³

VIII IMPORTANT CONCEPTS

Special measures are aimed at achieving equality, and are at times said to be an important part of this process as they assist in achieving the equal enjoyment of human rights and fundamental freedoms, despite differences in a person's background, including race. Because of past and present discrimination, people from different backgrounds do not enjoy rights to the same extent; therefore, special measures are required to address this different level of enjoyment by acting to promote enjoyment of particular rights. For example, Abstudy (financial education assistance), free tutoring and scholarships have been implemented to increase educational qualifications of Aboriginal peoples.

¹²³ Ibid.

However it is important to understand the differing interpretations of equality used in this thesis, such as formal and substantive equality, and the limitations of simply prohibiting discrimination.

A Formal Equality

A formal equality approach treats everyone the same, even if they are different. However, the effect of the identical treatment does not result in equal enjoyment of human rights and fundamental freedoms. For example, a job advertisement may include the need for a university degree even though the job itself does not require tertiary education. This requirement acts as a barrier to exclude most Aboriginal people from applying, making it more likely for a non-Aboriginal person to get the job. Formal equality assumes that where inequality exists, treating all people the same will remove the inequality. It fails to acknowledge structural inequality, ignores social, cultural and economic differences, and favours dominant groups.¹²⁴ Formal equality focuses upon individuals being discriminated against, ignoring the effect of systemic discrimination on certain groups.¹²⁵

Discrimination in international law relates to the different treatment of a person or group based on an attribute – such as race – that has the purpose or effect of nullifying or reducing enjoyment of human rights and fundamental freedoms on an equal footing in political, economic, social, cultural, or any other area of

¹²⁴ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne 1990) 9-23; Margaret Thornton, 'Women and Discrimination Law' in Patricia Eastal (ed), *Women and the Law in Australia* (Butterworths, Sydney 2010) 132; Loretta de Plevitz, *The Failure of Australian Legislation on Indirect Discrimination to Detect the Systemic Racism which Prevents Aboriginal People from Fully Participating in the Workforce* (PhD Thesis, Queensland University of Technology, 2000) 14 and 81; Marie McGregor, *The Application of Affirmative Action in Employment Law with Specific Reference to the Beneficiaries: A Comparative Study* (PhD Thesis, The University of South Africa, 2009) 48 <<http://uir.unisa.ac.za/handle/10500/2531>>.

¹²⁵ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne 1990) 9-23; Margaret Thornton, 'Women and Discrimination Law' in Patricia Eastal (ed), *Women and the Law in Australia* (Butterworths, Sydney 2010) 132; Loretta de Plevitz, *The Failure of Australian Legislation on Indirect Discrimination to Detect the Systemic Racism which Prevents Aboriginal People from Fully Participating in the Workforce* (PhD Thesis, Queensland University of Technology, 2000) 14 and 81; Marie McGregor, *The Application of Affirmative Action in Employment Law with Specific Reference to the Beneficiaries: A Comparative Study* (PhD Thesis, The University of South Africa, 2009) 48 <<http://uir.unisa.ac.za/handle/10500/2531>>.

life.¹²⁶ Only addressing discrimination on an individual basis ignores dominant values which either suppress or disregard social, cultural and economic difference, or imposes those cultural norms on others. This results in the dominant group viewing their values, beliefs, or conduct as universal, not as representative of their particular social, cultural and economic characteristics. Fredman states that this devalues other groups' identity, negating difference and providing pressure to conform to dominant values.¹²⁷

By not accounting for existing inequalities, formal equality can exacerbate inequality by ignoring the fact that institutions structurally favour the dominant group, who are therefore advantaged, and thus excluding minorities.¹²⁸ Formal equality labels actions which target groups or individuals based on race as unlawful, whether they are intended to assist or disadvantage them.¹²⁹

B Substantive Equality

Substantive equality acknowledges difference and the importance of treating those who are different differently and those who are alike alike. This raises a number of questions about what differences should be considered relevant, what treatment is appropriate and how difference should be accommodated.¹³⁰

In order not to continue an assimilationist approach, the practical effects of policies and legislation require examination to understand their differential impact on different racial groups.¹³¹ If there is a different impact it demonstrates that different racial groups are not equally placed. An analysis of the law or policy is likely to show their hidden bias. Identifying differences in the impact of law or policy between racial groups should show that differential treatment is required.¹³² Substantive equality accepts that differential treatment may be

¹²⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1.

¹²⁷ Sandra Fredman, 'Equality: A New Generation?' (2001) 30(2) *Industrial Law Journal* 154-155.

¹²⁸ McGregor, above n 124, 48.

¹²⁹ *Ibid* 48-49.

¹³⁰ Klaartje Wentholt, 'Formal and Substantive Equal Treatment: The Limitations and the Potential of the Legal Concept of Equality' in Titia Loenen and Peter R Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (Martinus Nijhoff Press, 1999) 58.

¹³¹ Loretta de Plevitz, *The Failure of Australian Legislation on Indirect Discrimination to Detect the Systemic Racism which Prevents Aboriginal People from Fully Participating in the Workforce* (PhD Thesis, Queensland University of Technology, 2000).

¹³² Wentholt, above n 130, 59.

necessary to achieve equality. For example, special measures required to reduce high rates of unemployed Aboriginal people by dedicating a certain number of jobs for them only, is not discriminatory under this approach. Substantive equality approaches understand that special measures are required to achieve equality for certain groups and therefore differ from a formal approach where special measures are permitted only as derogation from the principle of equality.¹³³ The formal approach identifies any differential treatment based on race – even to promote rights of a minority – as discriminatory.

C *Discrimination and Non-Discrimination as Limited Concepts – The Need for Special Measures*

While non-discrimination, treating people equally and without distinction based on race or other protected attributes, or the prohibition of unfair discrimination may stop obvious discrimination, generally they fail to address systemic discrimination and the consequences of historical discrimination and oppression. Something more is required to achieve equality.¹³⁴ Special measures aim to correct inequality, providing access to enjoy those rights enjoyed by many in the dominant group.¹³⁵ McKean states that:

Some commentators have taken too narrow a view of the meaning of equality in that they seem to believe that equality means merely the prevention of discrimination, and that positive protection therefore gives more than equal rights to minorities.¹³⁶

McGregor states that substantive equality includes participation by, and inclusion of, all groups. It requires difference to be valued and groups to be treated differently. Therefore, a measure which favours a relatively disadvantaged group at the cost of the dominant group is considered non-discriminatory because the measure will achieve a more equal society.¹³⁷ Under a formal equality approach, special measures are considered

¹³³ Ibid.

¹³⁴ McGregor, above n 124, 51.

¹³⁵ Ibid.

¹³⁶ Warwick McKean, *Equality and Discrimination under International Law* (Oxford University Press, 1985), 51.

¹³⁷ McGregor, above n 124, 51.

discriminatory, requiring assessment and exclusion from being prohibited for being discriminatory.¹³⁸

Due to historical or systemic discrimination, special measures are often implemented to address existing inequalities, which will persist if action is not taken.¹³⁹ McGregor disputes special measures being labelled discriminatory.¹⁴⁰ She argues that discrimination describes arbitrary, unjust or illegitimate distinctions, rather than corrective and directed special measures.¹⁴¹ Tahmindjis similarly rejects the notion of 'reverse discrimination', saying that this ignores the historical context in which opposing groups – such as different racial groups – have emerged.¹⁴² Tahmindjis states that special measures 'require as a starting point not a disembodied equality but the assumption that differences based on race do exist.'¹⁴³

Special measures must advance the interests of those they are aimed at.¹⁴⁴ Applying a formal approach, in Australia the court's interpretation of the *RDA* is that it prohibits differential treatment based on race, and that, therefore, special measures must be used as an exception to the requirement to prohibit different treatment.¹⁴⁵ Special measures must also comply with the principle of non-discrimination.¹⁴⁶ They must have sufficient connection between the ground on which a distinction is based and the right affected and promoted. Distinctions based on irrelevant grounds are discriminatory. Tahmindjis states that special measures require the identification of inequalities; that is, an honest assessment of current conditions and an examination of history. Strategies to attain equality

¹³⁸ Ibid 48-49.

¹³⁹ Phillip Tahmindjis, 'Affirmative Action in a Democratic Society' (1997) 13 *QUTLJ* 204.

¹⁴⁰ McGregor, above n 124, 59.

¹⁴¹ Ibid.

¹⁴² Tahmindjis, above n 139, 204.

¹⁴³ Ibid 205.

¹⁴⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

¹⁴⁵ See, eg, Wojciech Sadurski, 'Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986-1988) 11(1) *Sydney Law Review* 5, 5-7; Jennifer Nielson, above n 103.

¹⁴⁶ McGregor, above n 124, 59-60.

will reflect the relevant society's view of equality.¹⁴⁷ This thesis demonstrates that this approach is lacking in the Cape York Welfare Reform.

IX CAPE YORK WELFARE REFORM

The CYWR is essentially based on ideals and controls said to be aimed at achieving 'social norms' and 'social responsibility'. The Commonwealth government describes it as 'a process of moving Aboriginal people from passive welfare dependence to engagement in the real economy.'¹⁴⁸ This involves Aboriginal people gaining 'real jobs', owning their own homes, and limiting the intervention of government at all levels in Aboriginal people's lives so that they are treated in the same way as 'mainstream Australia'. These goals are viewed as necessary by the Queensland and Commonwealth governments and the CYI on the basis that Cape York is 'socially underdeveloped'.¹⁴⁹ Alcohol abuse and 'passive welfare dependence' are regarded as causing deterioration of social norms on Cape York over the past 30 or 40 years.¹⁵⁰

An opposing view is that while Aboriginal people have struggled to gain greater autonomy, colonial history up to the present caused dependency on social security payments and government in Aboriginal communities. With colonisation came violence against Aboriginal peoples, the dispossession of their land, and the breakdown of their family structures and culture, resulting in trauma passed down through generations. It is valid to view dispossession and then the continued imposed management by the government of the missions and reserves within which Aboriginal people live as causing dependency.¹⁵¹

The CYI states that the problems in Cape York are not only caused by dispossession and racism, but to a large extent by 'social norms deficit.' These are vaguely defined as 'collapsed social norms' and more specifically referred to as 'perpetuat[ing] binge drinking, violence, passivity, humbugging and a lack

¹⁴⁷ Tahmindjis, above n 139, 200.

¹⁴⁸ Department of Social Services, Government of Australia, 'What is Welfare Reform?' <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/what-is-welfare-reform>>.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Sarah Maddison, 'Indigenous Autonomy Matters: What's Wrong with the Australian Government's 'Intervention' in Aboriginal Communities' (2008) 14(1) *Australian Journal of Human Rights* 41.

of parental engagement in their responsibilities to their children.’¹⁵² Deficit language is used by the CYI in a way which presents Aboriginal people as a problem, which justifies harsh, deficit-based policy which uses income management as a threat and method to enforce compliance with the norms of dominant non-Aboriginal culture in mainstream Australia. Social security for those living in CYWR communities has become conditional based on compliance with stated social responsibilities. These social responsibilities are generally not a condition imposed on other Australians who can freely access their social security money.

Noel Pearson’s views that unemployment payments reduce the incentive to engage in paid employment, encourage dependency and cause deterioration in commitment to mainstream values and norms are not new.¹⁵³ However, these views fail to acknowledge the aims of social security to relieve poverty, replace earnings, provide assistance when employment is not available or if people are unable to work for a variety of reasons, to protect people from working for unacceptable pay and conditions, to assist in stabilising the economy, and to reduce inequality and to promote social order.¹⁵⁴

According to the CYI¹⁵⁵ and the Commonwealth government, the four elements required to achieve the goals of the CYWR are ‘rebuilding of norms, reform of incentives, normalisation of housing and a retreat of government from the domain of individual responsibility.’ In 2008 the CYWR commenced as a four year trial in the predominantly Aboriginal communities of Aurukun, Hope Vale, Coen and Mossman Gorge. Initially it was to end on 1 January 2012, but was extended each year until 31 December 2015 and is now permanent. These communities – excepting Coen – were all previously controlled by either the Queensland government or by churches, with residents required to comply with strict rules governing all aspects of their lives. The era in which a deterioration

¹⁵² Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up*, above n 16, 17-18.

¹⁵³ Pearson, above n 26, 26-39.

¹⁵⁴ Julia Perry, Australian Institute of Family Studies, *One Language, Three Accents: Welfare Reform in the United States, the United Kingdom and Australia* <<https://aifs.gov.au/publications/family-matters/issue-56/one-language-three-accents>>.

¹⁵⁵ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up*, above n 16, 19-22, 26, 36, 44, 58, 64-67, 71, 79, 98 and 121.

of social norms due to alcohol and 'passive welfare dependence' was said to have occurred coincided with the rapid departure of government and mission control from these communities. The government and church regime had prohibited the exercise of traditional authority, although this is not acknowledged by the Queensland or Commonwealth governments or the CYI. As the Commonwealth government now concedes, in conducting tasks which people should be able to manage for themselves, personal capacity and responsibility were diminished.¹⁵⁶ Rather than admitting the effects of control and past management over intricate aspects of individuals' lives by successive Queensland governments and missions, followed by the sudden removal of these processes, the focus has been on blaming individuals for their predicament.

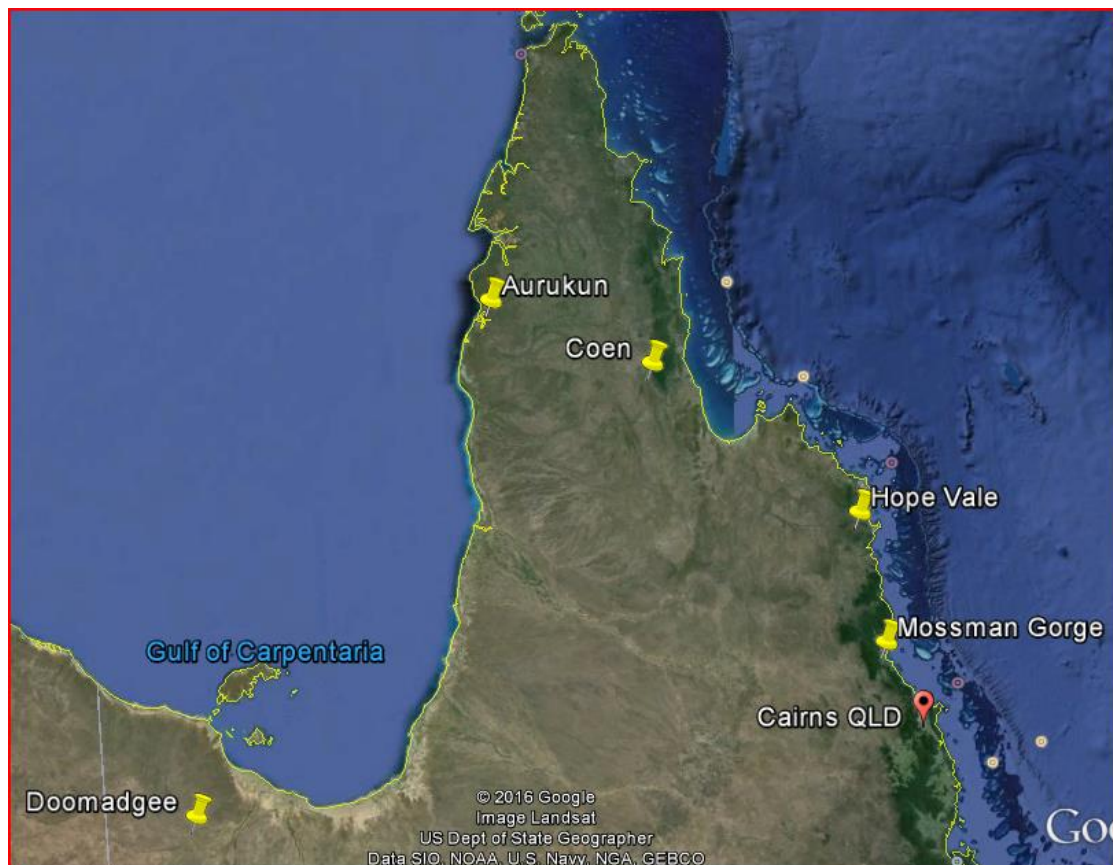


Figure 1: The Cape York Welfare Reform Communities¹⁵⁷

¹⁵⁶ Department of Social Services, 'What is Welfare Reform?', above n 148.

¹⁵⁷ Google Earth, Map of Cape York Peninsula, Gulf of Carpentaria and Cairns.

In an attempt to reinstate local authority in each community, elders have been appointed as Commissioners to the Family Responsibilities Commission (FRC). The FRC must sit with at least two local Commissioners from the relevant community and a legally qualified Commissioner,¹⁵⁸ unless the legally qualified Commissioner considers it appropriate for three local Commissioners to sit.¹⁵⁹ The legally qualified Commissioner is required to monitor all decisions.¹⁶⁰ Six local Commissioners from each community have been appointed to the FRC.¹⁶¹ In 2014, the FRC was extended to the Aboriginal community of Doomadgee in the Gulf of Carpentaria with the intention of increasing school attendance.¹⁶² However, income management was not implemented through the FRC in Doomadgee until 11 April 2016.¹⁶³

Under the *Family Responsibilities Commission Act 2008* (Qld) (*FRC Act*), the FRC receives notices from government agencies on community members receiving Centrelink payments (including the Community Development Employment Program, which changed to the Remote Jobs and Communities Program and is now known as the Community Development Programme) who are deemed to not be meeting their social responsibilities.¹⁶⁴ The FRC then decides if the person is required to attend a conference with them. The rebuilding of norms is also linked to child wellbeing so the social responsibilities include enrolling children in school and requiring adequate attendance, caring for children and not having child protection notifications or interventions, as well as compliance with tenancy agreements, and not receiving criminal convictions or domestic and family violence protection orders.¹⁶⁵ This last social responsibility was included in mid-December 2015. In late November 2014, the *FRC Act* was amended to extend its jurisdiction, by enabling it to provide notices to attend a FRC conference to parents living in a CYWR community whose child is convicted of offences (so long as the child's name has not been

¹⁵⁸ *Family Responsibilities Commission Act 2008* (Qld) s 50.

¹⁵⁹ *Ibid* s 50A.

¹⁶⁰ *Ibid* s 50B.

¹⁶¹ Department of Social Services, 'What is Welfare Reform?', above n 148.

¹⁶² Family Responsibilities Commission, *Quarterly Report 22* (October 2013 to December 2013) <<http://www.frcq.org.au/sites/default/files/Final%20FRC%20Quarterly%20Report%20No%2022.pdf>>.

¹⁶³ Department of Human Services, 'Income Management', above n 81.

¹⁶⁴ *Family Responsibilities Commission Act 2008* (Qld) ss 40-45, 90-96.

¹⁶⁵ *Family Responsibilities Commission Act 2008* (Qld) ss 40-44.

prohibited from publication).¹⁶⁶ One of the FRC's options is to income manage 60%, 75% or 90% of a person's social security payment for between 3 and 12 months.¹⁶⁷

This research is focused upon the income management component of the *FRC Act* and its application to predominantly Aboriginal populations. Income management removes choices from a person in terms of how they are able to spend their money. While income management may be aimed at restricting purchase of drugs and alcohol, it also limits money available to assist and share with other family members, to travel, to pay fines, and to spend as a person wishes. This limits a person's autonomy and enjoyment of human rights. The reason for the focus on income management in this thesis is that it has a disparate effect on Aboriginal people's enjoyment of human rights, thus raising issues of legislated racial discrimination in both the Queensland¹⁶⁸ and Commonwealth¹⁶⁹ jurisdictions. The representation of income management as a way to promote the rights of children while punishing and restricting the rights of particular adults (some of whom may not even have children) to receive and manage their social security payments requires analysis to assess whether, and for what reason, income management is likely to be held to be a special measure by an Australian court.

X THE IMPORTANCE OF THE RESEARCH

Human rights law in terms of special measures in Australia is relatively underdeveloped as the relevant Commonwealth anti-discrimination legislation was only introduced in 1975 and only a few cases have been brought before the courts.¹⁷⁰ This is particularly the case for special measures which restrict particular human rights while being said to promote others. These special measures are unique, explained as balancing rights, often in terms of the rights of those who could be seen as vulnerable (usually children and women) prevailing over rights of others. Often the human rights identified as being

¹⁶⁶ *Family Responsibilities Commission Act 2008* (Qld) s 43(b).

¹⁶⁷ *Family Responsibilities Commission Act 2008* (Qld) ss 69(1)(b)(iv), 70(2)(c), 74(3).

¹⁶⁸ *Anti-Discrimination Act 1991* (Qld) s 46.

¹⁶⁹ *Racial Discrimination Act 1975* (Cth) ss 9, 10, 13.

¹⁷⁰ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70; *Maloney v The Queen* (2013) 252 CLR 168.

promoted are mainly economic and social rights including rights to education, property, employment, self-determination and social security, along with safety and wellbeing. However, while those being impinged upon may include some of the same rights (self-determination, social security and property), the policy impairs the exercise of social rights such as the rights to privacy, equal treatment before legal organs, equal participation in cultural activities, the practice of traditions, customs and ceremonies, and the right to access services intended for use by the general public. Therefore, I question the connection between income management and its stated objectives of adequate advancement of Aboriginal people's enjoyment of human rights, as required by Art 1(4) *ICERD*.

Income management restricts a person's right to receive social security payments in the same way as other recipients. It requires a weighing process between different rights, whereby the promotion of some may mean that others are reduced or negated in particular circumstances. For example, a person's right to social security¹⁷¹ and their right to privacy¹⁷² are breached when information is shared between government agencies and the FRC and an order is made for the Commonwealth government to quarantine a certain amount of the money to be spent only on essentials such as rent, groceries, electricity, etc. On the other hand, the rights which government asserts¹⁷³ are promoted by income management include a child's right to benefit from social security,¹⁷⁴ the right to adequate food, clothing and housing,¹⁷⁵ and the right to

¹⁷¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 5(e)(iv) and 9; *International Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 11(1)(e), 13(a) and 14(2)(c).

¹⁷² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

¹⁷³ Explanatory Statement, Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013 (Cth) 7-8.

¹⁷⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 26.

¹⁷⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iii); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 27(3).

education.¹⁷⁶ However, promotion of these rights is questionable when single people or older people with no dependants are subjected to income management. The restriction of some rights while promoting others is not a process anticipated by *ICERD*, the *RDA* or the *Anti-Discrimination Act 1991* (Qld).

Imposed income management is punitive, being implemented when a person does not comply with one or more of the four obligations mentioned above, or because the person doesn't engage with the FRC. It is a different case where a person chooses to submit to voluntary income management. In assessing measures which impinge on a person's rights, courts have been required to re-define the analysis and arguments pertaining to special measures. The analytic process requires arguments that reposition members of the disadvantaged racial or ethnic group based on their level of vulnerability or disadvantage within that group. It also requires restricting the enjoyment of particular rights enjoyed by members of the group.

The High Court was called upon to decide these issues in *Maloney v The Queen*¹⁷⁷ (*Maloney*). Each of the judges provided separate reasons for their decision, with all but one finding racial discrimination, and all deciding that even a measure which restricts some human rights can still be a special measure. The main argument raised by Ms Maloney and rejected by the majority of the court was that the Alcohol Management Plans (AMP) could not be a special measure because there was inadequate consultation.¹⁷⁸ While the important

¹⁷⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 5(e)(v) and 13; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 28; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), arts 13-15, 17(2) and 21.

¹⁷⁷ (2013) 252 CLR 168.

¹⁷⁸ *Maloney v The Queen* (2013) 252 CLR 168.

issue of consultation has inspired much commentary in Australia,¹⁷⁹ there are no domestic precedents on the requirement of consultation for special measures. It is likely that this case in particular, as well as other recent case law in Queensland¹⁸⁰ that relate to liquor licensing legislation and prevent Aboriginal Shire Councils from holding a license to sell alcohol, and AMPs, can provide guidance closely related to the issues that arise when a person's social security payments are managed. Some of the older Queensland cases¹⁸¹ also provide guidance.

As explained at the start of this chapter, this is not the first time that the money and property of Aboriginal people has been managed in Queensland. The view by governments and others that otherwise competent Aboriginal people cannot manage their money, stems from the historical treatment of Aboriginal people since colonisation, and existing legislation is a continuation of that treatment and the view of Aboriginal people associated with it. Therefore, in this research I examine past legislation and policy on this issue to understand the context of the present legislation and practice. I analyse the interpretation of special measures over time in Australia, examining international human rights instruments, domestic legislation, case law and individual judgments. I then explore whether CYWR income management is likely to be held by the court to

¹⁷⁹ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [37] (Brennan J). Justice Brennan referred to the importance of the wishes of the beneficiaries of a special measure being of great importance in assessing if the measure had been taken for their advancement. His reasoning has been adopted by a number of commentators: Jonathon Hunyor, 'Is it Time to Re-Think Special Measures Under the Racial Discrimination Act?' *The Case of the Northern Territory Intervention* (2009) 14(2) *Australian Journal of Human Rights* 39, 54-56; Jumbunna Indigenous House of Learning, University of Technology Sydney, *Listening But Not Hearing: A Response to the NTER Stronger Futures Consultations June to August 2011*, March 2012 28 <<http://www.jumbunna.uts.edu.au/researchareas/ListeningButNotHearing8March2012.pdf>>; Alison Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Review* 46; Vivian and Schokman, above n 100, 78; Buckmaster, above n 19, 20-21; Greg Marks, 'Coercive Governance and Remote Indigenous Communities: The Failed Promise of the Whole of Government Mantra' (2008) 12(1), *Australian Indigenous Law Review* 13; Greg McIntyre, 'An Imbalance of Constitutional Power and Human Rights': The 2007 Intervention in the Northern Territory' (2007) 14 *James Cook University Law Review* 80, 106.

¹⁸⁰ *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2008) QSC 305; *Maloney v Queensland Police Service* [2011] QDC 139; *Morton v Queensland Police Service* [2009] QDC 233; *Morton v Queensland Police Service* [2010] QCA 160.

¹⁸¹ See, eg, *Mabo v Queensland* (1988) 166 CLR 186; *Gerhardy v Brown* (1985) 159 CLR 70; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Bligh v Queensland* [1996] HREOCA 28.

be a special measure. It is acknowledged that the Queensland and Commonwealth governments intend income management to be a special measure.¹⁸²

To date income management has not undergone legal challenge. Based on existing judicial reasoning I construct legal argument and refer to evidence to argue that income management is racially discriminatory and not a special measure.

XI OUTLINE OF THESIS

The origin of the CYWR and the manner of its development is examined in the next chapter. I refer to key research studies and the unique influence of a non-government organisation and its policy development. This provides context for an analysis of the relevant legislation. Some of this legislation has broader application in other parts of Queensland and other States and Territories. In order to provide a broader context to the CYWR I discuss other welfare reform measures. I examine legislation and policy applicable to the CYWR and critique it in broad terms, in consideration of its potential effects on human rights and fundamental legislative principles, including consultation. I provide data on the high cost of the CYWR to illustrate the impracticality of expanding it to other communities, and the difficulty in financial terms of sustaining it in the existing communities.

I examine the history of legislation and policy affecting the CYWR communities in Chapter 3, with a focus on control of movement, property and assimilation. This historical context illustrates the similarities between income management and previous legislation. I provide information on each CYWR community and highlight important events which have played a role in shaping these communities.

The history of anti-racial discrimination legislation in Queensland is examined in Chapter 4, to demonstrate both the necessity for strong legislation and the Queensland government's determination in continuing racist legislation,

¹⁸² *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4, 5.

policies and practices, including its contravention of the *RDA* for a number of years after its implementation. I also discuss the signing and ratifying of relevant international human rights instruments by Australia, with a particular focus on *ICERD* and its implementation through the *RDA*. International interpretations of a number of the international human rights instruments¹⁸³ introduced in Chapter 4 are examined in Chapter 5. Australia's obligation to take notice of the international framework is explained. Methods used by Australian courts in applying international instruments to cases where special measures are considered are critiqued. I predict the likely outcome to a challenge of income management in different international jurisdictions.

In Chapter 6, I examine the High Court's interpretation of relevant international human rights instruments to ascertain judicial interpretative methods, concentrating on special measures. I draw upon domestic cases which consider special measures, and analyse individual judgments and commentators' opinions in preparation for applying the interpretative approach applied by the court to date in the next chapter.

In Chapter 7, I predict the outcome of a legal challenge to the CYWR income management measure by applying the court's approach, as examined in Chapter 6. In this chapter I critique the interpretative approach applied by the court to date and identify provisions of the *FRC Act* and the human rights they affect (either by promoting particular rights and/or suppressing others). I examine legislative interpretation rules affecting Commonwealth legislation, demonstrating the need for stronger human rights protections in Australia.

¹⁸³ See, eg, *International Covenant on Civil and Political Rights*, opened for signing 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *International Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

I close by compiling the findings of the research, drawing conclusions and making recommendations. While the income management measure of the *FRC Act* and its extent provide a focus for the findings, I also discuss restrictions on the applicability of the findings and propose recommendations for law reform.

CHAPTER 2: THE CAPE YORK WELFARE REFORM: BACKGROUND

I INTRODUCTION

This chapter presents the history of the Cape York Welfare Reform (CYWR), as developed between 2007 and 2015. While the CYWR started as a four year trial, it was extended a number of times and now appears to be permanent. This has occurred without evidence of success and despite the requirement that special measures be temporary.¹ This lack of connection between income management and its aims is examined in more detail in Chapter 7.

A number of reports documenting alcohol and violence issues in Cape York communities, along with the existence of a high number of people receiving social security payments, were used to support the need for the CYWR.² The CYWR is premised on a deficit-based theory which supposes that receipt of social security payments and alcohol use result in a breakdown of social norms within Aboriginal communities.³ Income management follows the recent restrictive measure of Alcohol Management Plans (AMPs) established in each Queensland Aboriginal community, including three of the CYWR communities. Both measures are portrayed as special measures by Queensland and Commonwealth governments, aimed at promoting human rights of vulnerable people while restricting rights of others. Chapter 3 examines historical Queensland legislation which similarly treated Aboriginal people differently to people from the dominant Australian culture and restricted their rights.

At the same time that the CYWR was being planned, another regime was rapidly being developed for the Northern Territory (NT). The approach for the NT has some similarities to the CYWR, however, it applied more broadly in terms of Aboriginal people affected by it and in terms of the measures implemented under it. In this chapter I examine other income management

¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

² Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007) 18.

³ *Ibid* 17-18.

regimes which have also developed in discrete areas in Queensland and other States and Territories.

The timing of these policies and legislation indicates a new era in government policy based on neo-liberal paternalism. Neo-liberal paternalism assumes individual responsibility and that unemployed social security recipients are responsible for their position in society.⁴ The Commonwealth government has increased its surveillance of Aboriginal and Torres Strait Islander peoples by linking their contact with the criminal justice system, reports on child welfare, tenancy compliance and their children's school attendance to their receipt of social security payments. This places responsibilities on them to control certain behaviours, punishing them if they do not comply. This mode of thinking can be closely linked to historical legislation and policy in Queensland prior to the implementation of the *Racial Discrimination Act 1975 (Cth) (RDA)*. However, the CYWR differs in that it was developed by an Aboriginal man, Noel Pearson, and his Aboriginal organisation, the Cape York Institute for Policy and Leadership (CYI). This is perhaps what gives these processes 'legitimacy' in the eyes of government, despite them being controversial in nature because of their cost and application to predominantly Aboriginal communities and peoples.

The CYWR income management measure is unique, requiring both Commonwealth and Queensland legislation, with a statutory body administering the processes to implement the measure: the Family Responsibilities Commission (FRC). The *Families Responsibilities Commission Act 2008 (Qld) (FRC Act)* stipulates the role of the FRC.

Although it has been said that a consultation process occurred during the design phase of the CYWR, and prior to its implementation, the quality of the process is questionable. The process whereby the Hope Vale Council agreed to the CYWR, including the incentives provided, will be critiqued in this chapter. The importance of consultation to Aboriginal peoples' self-determination is discussed in detail in Chapter 4, however, as I explain in this chapter and in

⁴ Joe Soss, Richard C Fording and Sanford F Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (University of Chicago Press, 2011) 23.

more detail in Chapter 7, the High Court's position is that special measures do not require consultation with the affected people. This is despite the restrictive nature of income management and its disproportionate application to Aboriginal people.

The *FRC Act* is an extraordinary piece of legislation. It places great power into the hands of FRC commissioners, enabling them to gain knowledge into private aspects of peoples' lives and to coerce compliance with 'social responsibilities',⁵ using the threat that people's social security payments will be income managed. Despite these extensive powers, legal representation is not necessarily permitted and appeal rights are limited under the *FRC Act*. Another controversy regarding the CYWR, of which the FRC is a significant part, is its cost. In this chapter I examine the cost over time in relation to the small populations of the communities involved. One must therefore question the decision to remove the *FRC Act's* end date.

II ORIGINS OF THE CAPE YORK WELFARE REFORM: HOW DID IT DEVELOP?

The project design report for the Cape York Welfare Reform (CYWR) was produced in 2000 by the CYI and published in a report entitled 'From Hand Out to Hand Up'.⁶ However, it can be seen in other documents written by Noel Pearson, who was at that time both a Director and the Chairperson of the CYI, that he had already been developing a welfare reform model for Cape York over a number of years.⁷ The CYI now forms part of Cape York Partnership (CYP), of which Pearson is the Founder and Director of Strategy.⁸

⁵ These social responsibilities are set out in Chapter 1. They include enrolling children in school and requiring adequate attendance, caring for children and not having child protection notifications or interventions, as well as compliance with tenancy agreements, and not incurring criminal convictions or family violence protection orders.

⁶ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 1.

⁷ See, eg, Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson and Associates Press, 2000); Noel Pearson, 'Fundamental Transformation Through Radical Reform', (2006)
<http://www.balkanu.com.au/index.php?option=com_content&view=article&id=22&Itemid=16>.

⁸ Cape York Partnership, 'Board Members' <<http://capeyorkpartnership.org.au/agents-of-change/board-members/>>.

From 2000, the CYP implemented the Family Income Management Program (FIM), which provided financial literacy and voluntary income management. FIM was trialled in Queensland in Aurukun, Coen and Mossman Gorge between 2002 and 2004⁹ and later extended to Hope Vale, Cooktown and Napranum.¹⁰ The FIM is still in operation through a program called MPower.¹¹ MPower works through assisting people to budget and through automatic debits and savings accounts.¹² One income management model – which is being phased out – sees people’s money deposited into a general bank account with all other FIM clients’ money.¹³ This is similar to the past where Aboriginal people’s money was placed in one trust account and controlled by the Protector or the local police officer.¹⁴

The lead up to the development of the CYWR and the FIM commenced with Pearson’s 1999-2000 paper, ‘Our Right to Take Responsibility’,¹⁵ which critiqued ‘passive welfare’. This is the term used by Pearson and the CYI to describe social security payments, because they view them as not requiring reciprocity from the individuals receiving these payments. Pearson argues that ‘passive welfare’ and ‘traditional economy/lifestyle are not compatible’,¹⁶ as ‘passive welfare’ undermines traditional relationships and values, resulting in social problems and social breakdown.¹⁷ This statement overemphasises ‘traditional’ in a way that elevates it to an ideal that should not change, rather

⁹ See, eg, Cape York Institute for Policy and Leadership, above n 2; Department of Finance and Deregulation: Office of Evaluation and Audit (Indigenous Programs), Government of Australia, *Performance Audit of Money Management Service Strategies*, Canberra, July 2009, 2.

¹⁰ Cape York Institute for Policy and Leadership, above n 2.

¹¹ Cape York Partnership, MPower <<http://www.cyp.org.au/social-responsibility/family-income-management>>.

¹² Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Cape York Welfare Reform Evaluation 2012* (2013) 35.

¹³ This account was administered by a local service provider or an organisation called Cape York Financial Management Services.

¹⁴ See, eg, Sue Taffe, *Making a Difference: A 1960s Partnership Opposing Racial Discrimination*, (2000) 161 (Summer) *Overland* 62, 64-65 <<http://www.kooriweb.org/foley/resources/pdfs/68.pdf>>; National Museum Australia, *Collaborating for Indigenous Rights, Queensland Trust Fund, 1969-72* <http://indigenousrights.net.au/civil_rights/queensland_trust_fund,_1969-72>.

¹⁵ Cape York Institute for Policy and Leadership, above n 2, 23.

¹⁶ Noel Pearson, ‘Peoples, Nations and Peace, The Inaugural Mabo Oration’ (Speech delivered at the Anti-Discrimination of Queensland, Brisbane, 3 June 2005), 25 <<http://capeyorkpartnership.org.au/news/people-nations-and-peace-mabo-oration/>>.

¹⁷ *Ibid.*

than acknowledging that culture and traditions adapt to changing circumstances. However, it could be argued that mainstream employment may produce the same outcome that Pearson asserts 'passive welfare' achieves. This includes the breakdown of traditional relationships if a person works away from their family and cannot spend time with them. Further, if money is earned for individual wealth creation and material items are purchased for self-benefit, rather than sharing with kin, kinship obligations weaken. Pearson's philosophy seems to be that Aboriginal people should adopt western values – which prioritise employment and home ownership – and that these will provide for a better life.

The Commonwealth government believes 'passive welfare dependence' is connected to a lack of motivation and personal responsibility.¹⁸ The Commonwealth Development Employment Pro (CDEP), and free housing, were also said by the Commonwealth government and the CYI to diminish both mobility out of the communities and individual capacity to undertake 'real jobs'.¹⁹ Further, the Commonwealth government argues that past government services implemented to assist people, contribute to passivity and reduce people's capacity to do things themselves.²⁰ Examples are not provided by the Commonwealth government; however, managing people's income and property also fits this profile.

The CYI views three specific government policies as providing the basis for the era of 'passive welfare'. These are 'equal wages',²¹ introduced in 1965, which resulted in Aboriginal stock-workers losing their jobs; citizenship, introduced in

¹⁸ Department of Social Services, Government of Australia, 'What is Welfare Reform?' <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/what-is-welfare-reform>>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ However, the only industry that an Award applied to at the time was the pastoral industry. See Loretta de Plevitz, 'Working for the Man: Wages Lost to Queensland Workers "Under the Act"' (1996) 3(81) *Aboriginal Law Bulletin* 4.

1967, which provided 'equal rights',²² enabling Aboriginal and Torres Strait Islander people to drink alcohol in pubs; and eligibility for unemployment payments from 1959.²³ According to the CYI, the result of the combination of these policies is 'idle time, free money and the right to drink', resulting in 'passive welfare' and a collapse in social norms.²⁴ This critical assessment of rights and services available to other Australians, and their application to Aboriginal communities, is said by the CYI to result in negative consequences for Aboriginal peoples, reflecting new paternalism and generating the need to implement controls.²⁵ In the case of the CYWR – which aims to curb 'passive welfare' and social norms deficit – the controls are requirements to comply with social responsibilities with the threat of income management for the non-compliant. There does not appear to be any discussion regarding the negative consequences of this approach by the CYI or governments. The CYWR approach fails to acknowledge that unemployment may not be simply about a lack of work ethic, but more about lack of opportunity for employment, plus increased unemployment generally in Australia since the mid 1970s.²⁶

Pearson's CYI also draws on a number of reports as evidence of the collapse of social norms in Cape York.²⁷ These include a report from the Royal Commission into Aboriginal Deaths in Custody²⁸ (RCIADIC), the Aboriginal and Torres Strait Islander Women's Task Force on Violence Report²⁹, the Cape

²² Essentially the outcome of the referendum in 1967 in removing the words 'other than the aboriginal race in any State', in relation to the making of 'special laws', enabled the Commonwealth to enact beneficial laws for Aboriginal peoples. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 972–993. However, as with Industrial Awards not covering Aboriginal people in most areas of work, other legislation and policy in Queensland controlled Aboriginal people in a negative manner and treated them less favorably than non-Aboriginal people.

²³ Cape York Institute for Policy and Leadership, above n 2, 20.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Fred Argy, 'Australia at the Crossroads: Radical Free Market or Progressive Liberalism? Key Issues and Conclusions', (1998) 31(4) *Australian Economic Review*, 373-383.

²⁷ Cape York Institute for Policy and Leadership, above n 2, 18.

²⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

²⁹ Queensland Aboriginal and Torres Strait Islander Task Force on Violence and Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development, 2000).

York Justice Study³⁰ (CYJS) and the Cape York Peninsula Substance Abuse Strategy.³¹ The common findings in these reports show disproportionate contact by Aboriginal and Torres Strait Islander peoples with the criminal justice system and high rates of alcohol-related violence. The RCIADIC found that Aboriginal people were 29 times more likely to be detained in police custody than non-Aboriginal people and 15 times more likely to be detained in prison. It found that racism was the source of this over-representation. Aboriginal people were disadvantaged on all indicators when compared with other distinct groups in Australia, and with the Australian society as a whole.³² This disadvantage was found to stem from the brutal dispossession of land and forced relocations, resulting in destruction of Aboriginal economy, dramatically affecting Aboriginal culture, and introducing diseases which decimated Aboriginal populations. These profound consequences of colonisation, followed by the control and dependency encouraged by policies associated with the creation of reserves and missions, deliberately destroyed Aboriginal spiritual and cultural traditions. The RCIADIC asserted that forced dependence upon non-Aboriginal people came with a loss of independence and self-esteem, and engendered despair and alcoholism, all of which have contributed to Aboriginal people being over-represented in custody.³³

Similarly, the Aboriginal and Torres Strait Islander Women's Task Force on Violence report links intergenerational trauma to colonisation, dispossession, massacres, the forcible removal of children from their parents, inhumane treatment, oppression and neglect through discriminatory government policies. The report acknowledges that Aboriginal and Torres Strait Islander communities live in poor conditions in substandard and overcrowded houses, have poor health and access to education, suffer from high levels of unemployment and are welfare dependent.³⁴ These factors contribute to high

³⁰ Tony Fitzgerald and Queensland Department of the Premier and Cabinet, *Cape York Justice Study* (2001) 2 (Brisbane: Department of the Premier and Cabinet Press).

³¹ Noel Pearson, Apunipima Cape York Health Council, Cape York Partnership (Queensland) and Alcohol and Drugs Working Group, *Cape York Peninsula Substance Abuse Strategy* (Cape York Partnership Press, 2002).

³² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1-2, and *Regional Reports* chs 1.3, 9.3.1 and 12.1.

³³ *Ibid* chs 1.4 and 10.1.

³⁴ Queensland Aboriginal and Torres Strait Islander Task Force on Violence and Queensland

levels of alcohol abuse and violence within these communities. The report argued that implementing solutions to these issues would need a collective approach between government and communities, rather than simply blaming perpetrators of violence and providing a criminal justice response.³⁵ The racist practices inherent in the different facets of the criminal justice system (in policing, prosecuting and sentencing) were acknowledged by the Task Force as part of the problem, along with the failure to support victims of serious offences.³⁶

The CYJS, written in 2001 by Tony Fitzgerald, examined alcohol abuse in Cape York communities and its interrelationship with offending. Key to its recommendations was a holistic approach where the Queensland government was to work with the communities to find local solutions. It was recommended that if this did not work, or there was a failure to reduce alcohol abuse and violence within a three year period, the Deputy Director-General should be informed and a more drastic approach taken. This included prohibiting the supply and consumption of alcohol.³⁷

Despite the vast array of issues canvassed by the above studies – such as crime and justice, government services and funding, governance, future sustainability, health, education, land, and economic development – most of the recommendations made by Queensland governments since these studies were undertaken have focused on alcohol and alcohol-related violence. The CYI also saw alcohol as central to the problems in Cape York communities.³⁸

Pearson was heavily involved in the 2002 Cape York Peninsula Substance Abuse Strategy, which rejected a causal relationship between past injustices and substance abuse by Aboriginal people. The CYI concluded that the only way to deal with substance abuse was to have zero tolerance, build social, cultural and spiritual intolerance to substance abuse, manage the supply of alcohol, and assist people to manage their time and money through education

Department of Aboriginal and Torres Strait Islander Policy and Development, above n 29, x, xiii, 48, 51, 92, 160-166, 186, 193-195.

³⁵ Ibid 123, 190-191, 258.

³⁶ Ibid.

³⁷ Fitzgerald and Queensland Department of the Premier and Cabinet, above n 30, 43-83.

³⁸ Cape York Institute for Policy and Leadership, above n 2, 24.

and employment, rather than abuse alcohol. Part of the solution was to limit the supply of alcohol. It was argued that this could be implemented by the State suspending its availability through liquor licensing and policing powers.³⁹

The Cape York Peninsula Drug Abuse Strategy concluded that substance abuse is directly related to the nature and levels of violence in Cape York communities, that it is a primary cause of both poor health and Aboriginal people being over-represented in the criminal justice system, and directly destroys Aboriginal cultural heritage.⁴⁰ While this may be correct, there is a failure to acknowledge the effects of colonisation on Aboriginal peoples and their dispossession. Blaming Aboriginal people without identifying and addressing dispossession as the source of the problem is unlikely to result in change.

The Cape York Peninsula Drug Abuse Strategy uses dramatic language to label substance abuse in Cape York communities as an epidemic requiring an intensive response. Fitzgerald referred to Noel Pearson's writings, and used the concept of substance abuse as an 'epidemic' to conceptualise substance abuse as far-reaching and destructive in its effects. He recommended an integrated holistic response to reduce substance abuse.⁴¹ However, the response has now become one of individual blame. The State intervenes in the forms of control of liquor supply, criminal convictions and has established greater policing of members of Aboriginal communities.

In the early 2000s, Alcohol Management Plans (AMPs) – which restrict the type and amount of alcohol that can be brought into communities – were implemented in remote Aboriginal communities in Queensland. In 2008 and 2009, further restrictions were introduced with some communities being unilaterally declared 'dry', including, for example, Aurukun.⁴² While the CYI and the Queensland government acknowledge that AMPs have created some improvement in terms of increased safety for women and children, they view

³⁹ Pearson et al, above n 31, 7-8 and 13.

⁴⁰ Ibid 10-12.

⁴¹ Fitzgerald and Queensland Department of the Premier and Cabinet, above n 30, 43-83.

⁴² See, eg, *Liquor Amendment Regulation (No. 3) 2006* (Qld) sch 1A; *Liquor Amendment Regulation Amendment Regulation (No. 3) 2008* (Qld).

the violence and abuse levels as still too high and as contributing to poor parenting and social disruption.⁴³ This shows general failures in the implementation of AMPs.

The CDEP scheme – where the Commonwealth government paid CDEP participants a ‘top up’ payment to their social security payment⁴⁴ – was interpreted by the CYI and the Queensland government as providing a disincentive to work.⁴⁵ These programs provided part-time work for Aboriginal and Torres Strait Islander peoples and assistance to Aboriginal and Torres Strait Islander organisations. Most CDEP participants in the CYWR communities worked in public administration roles, which provided them with valuable training and experience, along with transferable skills.⁴⁶ Nevertheless, the CYI views people engaged in the CDEP in the same way as others receiving social security payments:⁴⁷ both are defined as ‘passive welfare’.⁴⁸

For Pearson, economic engagement presents surmountable challenges for Aboriginal peoples in the CYWR communities. Pearson explains Aboriginal cultural characteristics in terms of polar opposites to what is valued in a mainstream economy. Examples include communal wealth as opposed to individual wealth; kin loyalty versus impartiality; autonomy of the person as opposed to structured authoritarian processes; being part of the community versus self-advancement; and living with land rather than exploiting it for profit. However, Pearson sees greater challenges in the small size of the communities, distrust of outside investment, and communal land tenure, which, he asserts, fail to enable mortgages. Therefore, the answer according to Pearson, is for Aboriginal people to be mobile, ‘orbiting’ in and out of their community to engage in the ‘real economy’, which is essentially mainstream

⁴³ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 2.

⁴⁴ Department of Human Services, Government of Australia, *Community Development Employment Projects (CDEP) Program*
<<http://www.dss.gov.au/our-responsibilities/indigenous-australians/programs-services/communities-regions/community-development-employment-projects-cdep-program>>.

⁴⁵ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 1-3.

⁴⁶ Jon Altman, ‘Searching for the “Real” Economy on Cape York’, *Crikey* (online) 3 June 2013
<<https://www.crikey.com.au/2013/06/03/searching-for-the-real-economy-on-cape-york/>>.

⁴⁷ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 2.

⁴⁸ *Ibid* 6.

employment.⁴⁹ This approach acknowledges the difficulty in changing mainstream processes, or developing mainstream industry in remote and small communities, and the time it could take to change land tenure from communal (Deed of Grant in Trust) to freehold. Pearson's proposal of a mobile orbiting Aboriginal workforce idealises western culture, and requires Aboriginal culture to change. It is based on a new paternalism framework of obligations where social security payments are not required, and the person is independent, and the obligations are to themselves, to their family, to the community and to the state.

'Orbiting' assumes that Aboriginal people have a desire to work within 'mainstream' communities and economies. Orbiting would force people to choose between staying on or close to country in a community they understand in terms of culture, language, lore, social relationships and kinship structures, or moving to study or find work in a foreign environment. In fact, the conditions and locations of most of the communities chosen for the CYWR – Aurukun, Hope Vale, Coen and Doomadgee – do not make it easy to regularly 'orbit'. Further, the land tenure is mainly communal, consisting mostly of social housing. Therefore the person must be living in the community to have a house, unless they have a 99 year lease or a *Land Holding Act*⁵⁰ lease.

III THE CAPE YORK WELFARE REFORM

As part of the CYWR, the Family Responsibilities Commission (FRC) commenced in July 2008⁵¹ in Aurukun, Coen, Hope Vale and Mossman Gorge. These communities predominantly consist of Aboriginal people, with almost 3,000 people in total living within them. Approximately 1,800 of them receive social security payments or Community Development Program payments.⁵²

⁴⁹ Pearson, *Our Right to Take Responsibility*, above n 6, 5-6.

⁵⁰ These leases were granted under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld), and a number of lease entitlements remain. These entitlements may be granted now under the amended legislation: *Aboriginal and Torres Strait Islander Land Holding Act 2013* (Qld). They are colloquially referred to as 'Katter leases', because they were introduced by Bob Katter when he was the Queensland Minister for Aboriginal Affairs.

⁵¹ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, *Implementation of the Family Responsibilities Commission*, Final Report, September 2010, 4.

⁵² Jon Altman and Melissa Johns, *Indigenous Welfare Reform in the Northern Territory and Cape York: A Comparative Analysis*, Centre for Aboriginal Economic Policy Working Paper No. 44/2008, 13.

The FRC was extended to Doomadgee in 2014, which has a population of approximately 1,300.⁵³

The CYI⁵⁴ and the Commonwealth government state that the CYWR⁵⁵ supports community members to move from relying on social security payments to engaging in the economy by gaining jobs and running businesses, and moving from social housing into owning their homes.⁵⁶ However, at a practical level, due to high rates of unemployment, a lack of employment opportunities, communal land, native title and the very high cost of building in these remote areas, these opportunities presently do not exist or are minimal.⁵⁷

In 2008, Altman and Johns asserted that half of those working in the four communities⁵⁸ received CDEP wages.⁵⁹ Since 2008, some people transitioned from CDEP into 103 newly created jobs. Despite the goal of moving people from CDEP to jobs, many CDEP participants transitioned onto Newstart (unemployment benefit).⁶⁰ Newstart requires recipients to enter an employment pathway plan detailing activities they agree to do while looking for work.⁶¹ Numerous employment opportunities would have to be created in, or outside communities (to which people can orbit), in order that community members were employed.⁶² This demonstrates that it is not a simple case of people not wanting to work because they are comfortable on CDEP or receiving social security payments, but that there is simply not the work for them. Only

⁵³ Australian Bureau of Statistics, Government of Australia, *Census Quick Stats, Doomadgee Urban Centre/Locality, 2011, 31 October 2012* <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/UL315031>.

⁵⁴ Cape York Institute for Policy and Leadership, above n 2, 95-96 and 107-108.

⁵⁵ Department of Social Services, Government of Australia, above n 18.

⁵⁶ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, above n 51.

⁵⁷ Also, the cost to build a house is highly inflated due to the transport costs for materials and the practice of bringing in outside labour. Further, costs to maintain houses are expensive, with locals not being trained in maintenance and the present reliance on QBuild (the government building department).

⁵⁸ Aurukun, Hope Vale, Coen and Mossman Gorge.

⁵⁹ Altman and Johns, above n 52, 13.

⁶⁰ See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation 2012*, above n 11; Altman, above n 46, 2.

⁶¹ Department of Social Security, Government of Australia, *Guides to Social Security Law, 1.224 – What is a Job Plan?* <<http://guides.dss.gov.au/guide-social-security-law/3/2/8/30>>.

⁶² Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation 2012*, above n 12, 5.

Mossman Gorge has sufficient work available as it has tourism infrastructure and is close to the major town of Mossman.

Although the approach taken by the CYWR is presented as a means to assist Aboriginal people in a positive manner, it nevertheless focuses a certain amount of blame on Aboriginal people for the current predicaments of their communities. Although it engages the government to provide services,⁶³ it fails to require government accountability by correcting past oppressive actions, including retention of peoples' wages and restricting peoples' rights, or by recognising Aboriginal property rights, rectifying harm to families through compensation, or providing adequate housing and services.

Although the CYI has strong government support when it speaks on behalf of Aboriginal people in Cape York, it is questionable whether the CYI is a representative body of Cape York or any particular community. Eight Cape York Mayors raised concerns in September 2013 in regard to the Commonwealth government agreeing to provide funding to Pearson for his Cape York organisations. They argued that Pearson and the Commonwealth government had not consulted any of the Mayors or their communities on new policies.⁶⁴ In 2014, the Cape Indigenous Mayor Alliance, which includes the Aurukun Mayor, submitted to the Queensland Health and Community Services Parliamentary Committee that they did not want the FRC in the existing communities or extended to other Cape York communities unless there was an independent assessment and the Councils' informed consent.⁶⁵

⁶³ As part of the CYWR, the government has funded a number of services, generally provided through Wellbeing Centres. The FRC refers clients to these services; however, they are available to all community members.

⁶⁴ See, eg, Sharnie Kim, 'Cape York Mayors Snub Indigenous Leader Noel Pearson's Initiatives', *ABC News* (online), 3 September 2013 <<http://www.abc.net.au/news/2013-09-03/cape-york-mayors-snob-pearson-initiatives/4931044>>; ABC Radio National. 'Cape York Mayors Opposed to Pearson Plan', *ABC Breakfast Radio National*, 3 September 2013 (Fran Kelly) <<http://www.abc.net.au/radionational/programs/breakfast/cape-york-mayors-opposed-to-pearson-plan/4930886>>.

⁶⁵ Amos Njaramba, 'Family Responsibilities Commission Amendment Act', *Email to the Health and Community Services Committee*, 29 August 2014 <<http://www.parliament.qld.gov.au/documents/tableOffice/CommSubs/2014/FamRespComAmB14/002.pdf>>. Amos Njaramba was the CEO of the Napranum Aboriginal Shire Council at that time.

At its meeting in May 2014, the Aurukun Council resolved that the wider CYWR should not continue beyond 2014, though they did want the FRC to continue. Included in the reasons why the Aurukun Council did not want the wider CYWR was the belief that parents should be more involved in their children's schooling to increase school attendance without the input of the CYWR. There were many issues associated with the CYWR at that time. CYWR organisations such as the Wellbeing Centre, Opportunity Hub and Parenting Hub either didn't function or had not functioned well over the years; there was inadequate communication by the Cape York Partnership (CYP) with the community and Council about programs; the CYP and associated organisations had not paid their Council accounts; and the CYP failed to acknowledge Council's authority. The reason provided for continuation of the FRC was that it was the only functioning group of the CYWR in Aurukun.⁶⁶ This decision to continue the FRC may have occurred because three of the five Councillors were also local FRC commissioners. The lack of functional support services in that community to which the FRC could refer people limits the options for Aurukun commissioners compared to other FRC communities. Decreased referral options are likely to increase income management orders.

It is not clear why the Commonwealth (both Labor and Coalition) and Queensland (both Labor and Liberal National Party) governments have been so supportive in terms of funding and implementing policy and legislation proposed by Pearson's Cape York organisations, including the CYI. However, many of Pearson's views are likely to be palatable to politicians because they fit within the broader ideologies of paternalism: an Aboriginal person who offers solutions to difficult issues which he characterises as Aboriginal peoples' own fault. In 2007, Pearson publicly defended the Northern Territory intervention (NTI) (discussed below) and criticised Aboriginal leaders who opposed it.⁶⁷ In August 2013, prior to being elected as Prime Minister, Tony Abbott referred to

⁶⁶ Dereck Walpo, Mayor, Aurukun Shire Council, *Minutes of Ordinary Meeting of the Aurukun Shire Council* (26 May 2014) 2-3
<<http://www.aurukun.qld.gov.au/wp-content/uploads/2012/08/MEETING-MINUTES-ORDINARY-MEETING-26-MAY-2014.pdf>>.

⁶⁷ Australian Broadcasting Commission, Television, 'Noel Pearson Discusses the Issues Faced by Aboriginal Communities', Lateline, 26 June 2007 (Leigh Sales)
<<http://www.abc.net.au/lateline/content/2007/s1962844.htm>>.

Pearson as a ‘prophet’ and said that he looked forward to working even closer with him if elected.⁶⁸

IV THE COST OF THE CAPE YORK WELFARE REFORM

It is difficult to unpack data on funding allocated to the CYWR. It may be concluded that approximately \$220.2 million has been allocated to the CYWR from its commencement in 2008 to the end of 2015. The contributions over time from the Commonwealth and Queensland governments are set out in the table below.

Table 1 – Financial Cost to Governments for the Cape York Welfare Reform

Year	Commonwealth Funding	Queensland Funding
2008	\$48 million + \$3.8 million to set up the FRC ⁶⁹ + \$12 million for programs for school support initiatives ⁷⁰	\$48 million ⁷¹
2011	\$16.1 million (for two years) ⁷²	
2013	\$24.5 million for the CYWR trial and related programs in these communities ⁷³	\$5.65 million ⁷⁴

⁶⁸ Tony Wright, ‘Noel Pearson is a Prophet says Tony Abbott’, *Newcastle Herald* (online), 28 August 2013 <<http://www.theherald.com.au/story/1738078/noel-pearson-is-a-prophet-says-tony-abbott/?cs=3275>>.

⁶⁹ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 7.

⁷⁰ Mal Brough, Minister for Families, Community Services and Indigenous Affairs, ‘Cape York Welfare Reform Trials to Begin in 2008’ (Media Release, 18 July 2007) <http://www.formerministers.dss.gov.au/3609/cape_york_welfare_18jul07/>.

⁷¹ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 7.

⁷² Department of Finance, Government of Australia, *Budget Highlights Investment in Indigenous Affairs, Delivering Investment to Close the Gap 2011/12 Budget* <http://www.budget.gov.au/201112/content/ministerial_statements/indigenous/html/ms_indigenous-02.htm>.

⁷³ Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, ‘\$24.5 Million to Progress Cape York Welfare Reform’ (Media Release, 3 May 2013) <<http://www.formerministers.dss.gov.au/13113/24-5-million-to-progress-cape-york-welfare-reform/>>.

⁷⁴ Campbell Newman, Premier of Queensland, ‘Cape York Welfare Reform Trial Extended’ (Media Statement, 28 March 2013) <<http://statements.qld.gov.au/Statement/2013/3/28/cape-york-welfare-reform-trial-extended>>.

Year	Commonwealth Funding	Queensland Funding
2014	\$24.3 million (for two years) + \$2 million for the FRC's operations ⁷⁵	\$5.65 million + \$1.6 million for the FRC's operations ⁷⁶
2015		\$28.6 million (for four years) ⁷⁷

There is a discrepancy between the above information and the 2013 Explanatory Notes to the Family Responsibilities Commission Bill, which stated that from the commencement of the CYWR up to 31 December 2013, both the Queensland and Commonwealth governments' combined contribution totalled approximately \$123.45 million, with the Commonwealth government contributing \$75.9 million and the Queensland government \$47.55 million in direct costs.⁷⁸ The table above indicates a contribution of \$158 million by both governments for that period. Either way, this is a large sum of money for a small population of approximately 4,300 people, with the main stated outcome being improved school attendance rates in two of the communities.⁷⁹ Doomadgee, with a population of approximately 1,300, was only included in the CYWR from the end of 2014.⁸⁰ Given the cost and limited positive outcomes it is difficult to understand government support for its extension and inclusion of Doomadgee. To date neither government has mentioned an evaluation of the cost effectiveness of the CYWR.

⁷⁵ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Qld) 2.

⁷⁶ Ibid 2.

⁷⁷ Department of Finance, Government of Queensland, *Queensland Budget 2015/16* <<http://www.budget.qld.gov.au/regional-budget-statements/far-north-queensland.php>>.

⁷⁸ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Qld) 2.

⁷⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation 2012*, above n 12, 3-4, 29, 45.

⁸⁰ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Aboriginal and Torres Strait Islander Community Profiles: A Resource for the Courts, Doomadgee* (October 2014) <<https://www.datsip.qld.gov.au/resources/datsima/publications/justice-resources/doomadgee.pdf>>.

V HOW DOES WELFARE REFORM WORK IN OTHER AUSTRALIAN STATES AND TERRITORIES?

In the broader context, at around the same time as the CYWR was being developed, the 'Ampe Akelyernemane Meke Mekarle' (Little Children are Sacred) report on child abuse in the NT was published. The Federal Parliament quickly responded by passing the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (*SSOLA Act*), which amended social security legislation to implement a compulsory income management scheme for the NT. The *SSOLA Act*⁸¹ included the four original CYWR communities in its income management scheme and established a Queensland Commission⁸² to direct social security in regard to income managed payments.⁸³ The *SSOLA Act* also enabled a wider income management measure where any person in Australia in receipt of a social security payment could be income managed if their child was at risk of neglect, was not enrolled in school, or failed to attend school adequately.⁸⁴

The income management measures were initially only implemented in Aboriginal communities in the NT, but following criticism that the legislation was racially discriminatory, they were later applied to other 'disadvantaged areas' in the NT and other states with high concentrations of social security recipients. The areas outside the NT where income management regimes apply include Bankstown (NSW); Logan, Livingstone and Rockhampton (Queensland); Playford, Ceduna, Anangu Pitjantjatjara Yankunytjatjara Lands and the Greater Adelaide region⁸⁵ (South Australia); Shepparton (Victoria); and Perth metropolitan area, Peel region, Kimberley region, Ngaanyatjarra Lands and

⁸¹ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sch 1.

⁸² Ibid. Referred to in 'From Hand Out to Hand Up' as the Family Responsibilities Commission and legislated as such.

⁸³ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 2.

⁸⁴ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sch 1 and mentioned in the Explanatory Notes to the Family Responsibilities Commission Bill 2008 (Qld) 1-2.

⁸⁵ The Greater Adelaide Region includes Adelaide, Adelaide Hills, Burnside, Campbelltown, Charles Sturt, Gawler, Holdfast, Bay, Marion, Mitcham, Mt Barker, Norwood Payneham St Peters, Onkaparinga, Port Adelaide Enfield, Prospect, Salisbury, Tea Tree Gully, Unley, Walkerville and West Torrens.

Laverton (Western Australia).⁸⁶ Most of these communities have a high proportion of Aboriginal people, and therefore show that the discriminatory elements of income management measures are still largely directed towards Aboriginal people.

Two different systems of income management exist, and one or the other is instated depending on the community involved. Under one system a person is income managed if referred to Centrelink by a child protection authority, or a person volunteers for income management.⁸⁷ The other system includes referral by a child protection authority or a social worker to Centrelink; voluntary income management; those not studying full-time, not in apprenticeships; those granted the Unreasonable to Live At Home rate of payment; those under 16 years who are granted a Special Benefit payment; and those under 25 years released from prison and receiving a Crisis Payment within 13 weeks.⁸⁸

Income management in the NT is also directed at young people aged between 15 and 24 years who have been on a social security payment for three of the past six months; people aged over 25 years who have received social security payments for more than 12 of the last 14 months; and those who have been referred by the Department of Human Services social worker, a child protection authority or the Northern Territory Alcohol or Other Drugs Tribunal.⁸⁹

The most recent addition to the income management scheme is the cashless debit card trial, stated to be aimed at making the community safer by limiting money available for alcohol, drugs and gambling.⁹⁰ This regime began on 1 February 2016 and will end on 30 June 2018.⁹¹ It applies to three discrete trial

⁸⁶ Luke Buckmaster and Carol Ey, Parliament of Australia, 'Is Income Management Working?' (Parliamentary Library, Background Note 2011-12, 5 June 2012) 1 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagement>.

⁸⁷ This process occurs in the Greater Adelaide region, Perth metropolitan area, Peel region, and the Kimberley region.

⁸⁸ Department of Human Services, Government of Australia, *Income Management* <<http://www.humanservices.gov.au/customer/services/centrelink/income-management>>.

⁸⁹ *Ibid.*

⁹⁰ Department of Social Services, Government of Australia, *Cashless Debit Card Trial, Questions & Answers for the Ceduna region, Will My Human Rights be Breached?* <https://www.dss.gov.au/sites/default/files/documents/01_2016/ceduna_qa_280116.pdf>.

⁹¹ *Social Security (Administration) Act 1999* (Cth) s 124PF(1).

areas⁹² – Ceduna in South Australia, and Kununurra and Wyndham in Western Australia⁹³ – and includes managing 80% of a person’s social security payments.⁹⁴ As mentioned above, Ceduna already had an income management regime. The latest regime includes a debit card instead of a BasicsCard; however, they work in the same way, and the regime applies to all social security recipients in the trial areas.⁹⁵ The BasicsCard was described in Chapter 1. Halls Creek in Western Australia was initially targeted for the trial; however, the Shire President rejected it based on advice from the Aboriginal Advisory Committee representing community members in and around Halls Creek and the ineffectiveness of income management in the NT. The Western Australian government suggested that if the trial was not accepted, funding and services would not be provided.⁹⁶ It will be seen that a similar strategy was used by government in the CYWR to pressure Hope Vale to be included.

The initial income management process was included in the NTI.⁹⁷ It differed from the CYWR income management because people were generally income managed at 50%⁹⁸ based on where they lived, rather than for breaching ‘social responsibilities’. It was applied more broadly than income management under the CYWR, but its rate was less: the minimum rate of the CYWR income management is 60%, and the maximum is now 90%.⁹⁹

The NTI was repealed by Stronger Futures legislation, including the *Social Security Legislation Amendment Act 2012* (Cth) (*SSLA Act*) on 29 June 2012, while the *Stronger Futures in the Northern Territory Act 2012* (Cth) (*SFNT Act*) and the *Stronger Futures in the Northern Territory (Consequential and*

⁹² Ibid s 124PF(2).

⁹³ Department of Social Services, Government of Australia, *Cashless Debit Card – Trial Overview* <<https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditional/cashless-debit-card-trial-overview>>.

⁹⁴ *Social Security (Administration) Act 1999* (Cth) s 124PJ(1).

⁹⁵ Department of Social Services, *Cashless Debit Card – Trial Overview*, above n 93.

⁹⁶ Emma Young, ‘WA Government Strong-arms Halls Creek on Cashless Welfare: Shire’, *WAtoday.com.au* (online) 30 November 2015 <<http://www.watoday.com.au/video-news/video-wa-news/wa-government-strongarms-halls-creek-on-cashless-welfare-shire-20151201-glbub3.html>>.

⁹⁷ *Northern Territory Emergency Response Act 2007* (Cth).

⁹⁸ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 123XA(3), 123XB(3), 123XE(3) and 123XF(3).

⁹⁹ *Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013*, as repealed by *Social Services and Other Legislation Amendment Act 2014* (Cth).

Transitional Provisions) Act 2012 (Cth) (SFNT(CTP) Act) came into effect on 16 July 2012. The *SFNT Act* includes broad provisions aimed at controlling the sale and consumption of alcohol,¹⁰⁰ licensing arrangements for community stores,¹⁰¹ and modifying regulations relating to use, planning and infrastructure in relation to community living areas and town camps¹⁰² with the aim of promoting economic development and private home ownership.¹⁰³ The *SSLA Act* amended provisions in social security law relating to the School Enrolment and Attendance Measure (SEAM).

The *SFNT(CTP) Act* provided an end date of 17 August 2012 whereby township leases would transition to alternative voluntary leasing arrangements.¹⁰⁴ It also continued prohibited restrictions on pornographic material in remote communities.¹⁰⁵

The alcohol, land reform, community stores and prohibited material provisions in the *Stronger Futures* legislation have a sunset clause of 10 years, ending in mid-2022.¹⁰⁶ The amendments to income management and SEAM¹⁰⁷ in the *Social Security Legislation Amendment Act 2012* do not provide an end date.¹⁰⁸

SEAM was developed to encourage parents and carers to enrol their children in school and ensure that they attend. If a child is not enrolled or attending school and the parent or carer receives a 'schooling requirement payment', they may be offered support from a social worker or from other support services. However, parents and carers whose children do not attend school may have

¹⁰⁰ *Stronger Futures in the Northern Territory Act 2012 (Cth)* pt 2.

¹⁰¹ *Ibid* pt 4.

¹⁰² *Ibid* pt 3.

¹⁰³ Department of Social Services, Indigenous, Government of Australia, *Additional Information on Stronger Futures Legislation: What the Legislation Does* <<http://www.dss.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/additional-information-on-stronger-futures-legislation>>.

¹⁰⁴ *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth)* s 4 and sch 2.

¹⁰⁵ *Ibid* sch 3.

¹⁰⁶ The Australian government has also said there will be an independent review of these measures after three years. The legislation relating to alcohol abuse is to be reviewed two years after its enactment and a report provided to Parliament in three years.

¹⁰⁷ *Social Security (Administration) Act 1999 (Cth)* ss 123UD, 123UE.

¹⁰⁸ Department of Social Services, Government of Australia, *Additional Information on Stronger Futures Legislation: What the Legislation Does* <<http://www.dss.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/additional-information-on-stronger-futures-legislation>>.

their schooling requirement payment suspended.¹⁰⁹ If the payment is suspended for 13 weeks or more (this need not be continuous), and a parent or carer receives an enrolment or attendance notice and fails to comply with it, the Centrelink Secretary must decide if their payment is to continue to be suspended or cancelled.¹¹⁰ The Centrelink Secretary can decide to reinstate the payment upon an application, or on their initiative.¹¹¹ The money not paid during the suspension period may be paid to the parent/carers in a lump sum, as a series of regular payments, or otherwise as determined by the Centrelink Secretary.¹¹²

SEAM has been trialled in 14 schools in six NT communities¹¹³ since January 2009, and also in 30 schools in six trial sites in Queensland¹¹⁴, including Doomadgee and another remote Aboriginal community,¹¹⁵ between October 2009 and 30 June 2012.¹¹⁶ Under the Stronger Futures legislation, SEAM has been extended to 22 NT communities, all of which are Aboriginal. SEAM will run until 2021/2022 with \$107 million allocated to it by the Australian government.¹¹⁷

¹⁰⁹ See, eg, Department of Social Security, Government of Australia, *Guide to Social Security Law 3.1.10.10 Background to SEAM*

<http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssguide-3/ssguide-3.1/ssguide-3.1.10/ssguide-3.1.10.10.html>; Australian National Audit Office, Government of Australia, *Improving School Enrolment and Attendance through Welfare Reform Measure* <http://www.anao.gov.au/html/Uploads/Audit%20Work%20Program/anao_audit_work_program_2013%20FA/section_2/education_employment_and_workplace_relations.html>.

¹¹⁰ *Social Security (Administration) Act 1999* (Cth) ss 124H and 124M.

¹¹¹ *Ibid* ss 124J and 124N.

¹¹² *Ibid* ss 124J and 124N.

¹¹³ Katherine, Katherine Town Camps, Hermannsburg, Wallace Rockhole, Tiwi Islands and Wadeye.

¹¹⁴ Logan Central, Kingston, Woodridge, Eagleby, Doomadgee and Mornington Island.

¹¹⁵ Mornington Island.

¹¹⁶ Former Department of Education, Employment and Workplace Relations, Government of Australia, *Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) Trial (2009-2012), Final Evaluation Report* (May 2014), 1, 4

<<http://www.dpmpc.gov.au/indigenous-affairs/publication/improving-school-enrolment-and-attendance-through-welfare-reform-measure-seam-trial-2009-2012>>.

¹¹⁷ See, eg, Australian National Audit Office, Government of Australia, *Potential Audits: Stronger Futures in the Northern Territory – Improving School Enrolment and Attendance through Welfare Reform Measure*

<http://www.anao.gov.au/html/Uploads/Audit%20Work%20Program/anao_audit_work_program_2013%20FA/section_2/education_employment_and_workplace_relations.html>; Department of Prime Minister and Cabinet, Government of Australia, Submission No 48 to the Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into the Impact on Service Quality, Efficiency and Sustainability of Recent Commonwealth Indigenous Advancement Strategy Tendering Processes by the Department of Prime Minister and Cabinet*, 30 May 2015

In June 2012, the *Australian* newspaper reported that the Queensland government would scrap SEAM mainly due to its cost and its limited effect.¹¹⁸ However, in 2013 the Commonwealth government decided to implement SEAM in the CYWR communities, discussed further below. Between 2007 and 2012, \$31 million was spent on SEAM in Queensland and the NT, resulting in a 4% increase in school attendance rates for affected Queensland students. Though relapse was said to be common, there was only a 1% difference in attendance between trial schools and all public schools. Nevertheless, the Commonwealth government wanted to continue the trial in Queensland,¹¹⁹ setting aside funding of \$2.8 million for 2 years up to June 2014.¹²⁰

VI HOW HAS THE CAPE YORK WELFARE REFORM CHANGED OVER TIME?

The Explanatory Notes to the Family Responsibilities Commission Bill 2008 (Qld) (FRC Bill) explain that in 2006 then Premier Beattie agreed to the development phase of the Cape York Welfare Reform project. The CYI was named the leader in the development of the project, funded by the Commonwealth government with in-kind support from the Queensland government.¹²¹

The FRC Bill and the *FRC Act* subsequently included modifications to the model suggested by the CYI in 'From Hand Out to Hand Up'. These included a recommendation that each adult recipient of social security payments would be considered to have breached their responsibility in regard to their child's school attendance if their child was recorded as having three unexplained absences in one year.¹²² This was changed to three days unexplained absences in a term.

<<http://www.dpmc.gov.au/indigenous-affairs/about/children-and-schooling-programme/faq-improving-school-enrolment-and-attendance-through-welfare-reform-measure-seam#Where%20does%20SEAM%20operate?>>.

¹¹⁸ Rosanne Barrett, 'Queensland to Scrap Scheme Linking School Attendance to Welfare Payments', *The Australian* (online), 19 June 2012 <<http://www.theaustralian.com.au/national-affairs/policy/queensland-to-scrap-scheme-linking-school-attendance-to-welfare-payments/story-fn59nlz9-1226399220947>>.

¹¹⁹ *Ibid.*

¹²⁰ Department of Finance, Government of Australia, *Budget 2012-13, Part 2: Expense Measures (Continued), Families, Housing, Community Services and Indigenous Affairs, School Enrolment and Attendance in Queensland – Continuation* <http://www.budget.gov.au/2012-13/content/bp2/html/bp2_expense-09.htm>.

¹²¹ Explanatory Notes, Family Responsibilities Commission Bill 2008 1.

¹²² Cape York Institute for Policy and Leadership, above n 2, 8, 54.

It was suggested that even an absence in one term for three days with medical certificates, could be a trigger to prompt a case manager to investigate.¹²³ The CYI had also recommended that if a person was in breach of one of four responsibilities,¹²⁴ their social security payment would be paid in part or full to another person who was caring for that person's child(ren), when the child was under 6 years of age.¹²⁵ This was not included in the *FRC Act*.¹²⁶ In December 2015, the social responsibility of not being a respondent to a domestic and family violence protection order was included in the *FRC Act* as a further social responsibility.¹²⁷

In the Explanatory Notes to the FRC Bill, it is stated that the income management approach in the NT – which involves people being income managed automatically due to their place of residence – is not appropriate for the Cape York communities. This decision was justified on the basis that the CYI had ‘put some time and effort in putting the proposal for the welfare reform trial together.’¹²⁸ While simply acknowledging that there may be other approaches, the Explanatory Notes explain that the State and Commonwealth governments are committed to testing whether the CYI's reform trial has a ‘more positive and sustainable outcome than those tried to date.’¹²⁹

The stated objects of the *FRC Act* are ‘to support the restoration of socially responsible standards of behaviour and local authority in welfare reform community areas’,¹³⁰ and ‘to help people in welfare reform communities to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.’¹³¹ Similarly, the Explanatory Memorandum to the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (SSOLA Bill) sets out the aim of the CYWR as being to rebuild social norms by linking welfare payments to socially

¹²³ Ibid 54.

¹²⁴ These include enrolling children in school and requiring adequate attendance, caring for children and not having child protection notifications or interventions, as well as compliance with tenancy agreements, and not incurring criminal convictions.

¹²⁵ Cape York Institute for Policy and Leadership, above n 2, 10, 214.

¹²⁶ Ibid 211-212.

¹²⁷ *Family Responsibilities Commission Act 2008* (Qld) s 43(2)(b).

¹²⁸ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 7.

¹²⁹ Ibid 7.

¹³⁰ *Family Responsibilities Commission Act 2008* (Qld) s 4(1)(a).

¹³¹ Ibid s 4(1)(b).

responsible behaviours. These behaviours are broken down in terms of a focus on the wellbeing and education of children, and a response to truancy and child neglect.¹³²

At the Commonwealth level, there is a failure to acknowledge the importance of local Aboriginal authority as part of the process. At the Queensland level, the ultimate aim for the CYWR is to 'restore social norms and local authority and change behaviours in response to chronic levels of welfare dependency, social dysfunction and economic exclusion.'¹³³ It is unclear as to the origin and the exact nature of the norms and authority structures to which the CYWR refers. The inference is that many Aboriginal people in these communities have lost their way and need to be forced into line. As previously discussed, this deficit language is not new in Aboriginal policy. However, its use by an Aboriginal organisation is.¹³⁴

The stated objects of the *FRC Act* are 'to be achieved mainly by establishing the FRC to hold conferences about agency notices',¹³⁵ in a manner that encourages the relevant community members 'to engage in socially responsible standards of behaviour'¹³⁶ in a way that 'promotes the interests, rights and wellbeing of children and other vulnerable persons' living in the relevant community.¹³⁷ Within the Explanatory Notes to the FRC Bill there is a statement which refers to the welfare reform trial proposing 'pathways for Indigenous people to participate in economic activity in and beyond the communities.'¹³⁸ However, there is no discussion in terms of available employment in these communities, their isolation, the lack of infrastructure or assistance and skill development to set up businesses, or any assessment of the potential economic viability of prospective businesses. Further, the Bill describes no explicit methods to develop these pathways; rather, the legislation

¹³² Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) sch 1.

¹³³ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 1.

¹³⁴ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007) 7, 17-20.

¹³⁵ *Family Responsibilities Commission Act 2008* (Qld) s 4(2)(a).

¹³⁶ *Ibid* s 4(2)(b)(i).

¹³⁷ *Ibid* s 4(2)(b)(ii).

¹³⁸ Explanatory Notes, Family Responsibilities Commission Bill 2008 2.

at best is said to rely upon additional services to address alcohol, drug, gambling addictions and child and family wellbeing, as well as ‘interventions in employment, enterprise, education, income management, and housing, and greater investment in community capacity through social and physical infrastructure.’¹³⁹ The additional services – such as the wellbeing centres – generally require qualified staff such as psychologists who are sourced externally, thus not assisting in increasing local employment.

There is a failure to acknowledge and identify the strengths within these communities, including the abilities of existing community members who may not have ‘qualifications’ by western standards, but who are important in assisting and supporting other community members. Other than engaging elders as FRC commissioners, community strengths have not been incorporated into the CYWR. This may be because the CYWR is based on the deficit approach, which either ignores community strengths or assumes they do not exist.

A *The Legislative Process of Income Management*

The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (*SSOLA Act*) is legislation that enables the Centrelink Secretary to implement income management in the CYWR communities. The *SSOLA Act* specifies the type of Centrelink payments subject to income management;¹⁴⁰ the notification process by the Queensland Commission (FRC) to the Centrelink Secretary for income management;¹⁴¹ and the percentage and way in which the amount to be deducted is placed into a special account.¹⁴² Powers of the FRC in the *SSOLA Act* include directing the Centrelink Secretary in writing in regard to debits from the income managed account;¹⁴³ to cancel income management;¹⁴⁴ to disclose information to the Centrelink Secretary in relation to a person subject to income management or

¹³⁹ Ibid 3.

¹⁴⁰ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 123UF.

¹⁴¹ Ibid s 123UF(1).

¹⁴² Ibid ss 123XM, 123XO, 123XP.

¹⁴³ Ibid s 123ZK(2)(b).

¹⁴⁴ Ibid s 123ZD.

if it is considering giving a person a notice.¹⁴⁵ The latter is aimed to prevent people getting notices who are not under the FRC's jurisdiction.¹⁴⁶

In 'From Hand Out to Hand Up', it was suggested that recipients of Youth Allowance under 21 be subject to income management if they are unable to commence a traineeship or find employment within a three month period.¹⁴⁷ While not initially implemented, the Commonwealth Department of Human Services (DHS) informed in their 2013-14 budget that from 1 January 2013 it would refer 'disengaged youth'¹⁴⁸ to the FRC. 'Disengaged youth' are defined by DHS as including 16 to 21 years olds who live in one of the CYWR communities and receive Youth Allowance (other) with an activity test exemption or parenting payment included.¹⁴⁹ In relation to 'disengaged' youth of secondary school age, the FRC suggests that local commissioners work with disengaged youth to assist them in re-engaging in education, whether it be in local educational institutions, enrolment in boarding schools or through vocational training.¹⁵⁰ However, at this point there are no provisions in the *FRC Act* to implement this process.

In 2013, Jenny Macklin, the former Minister for Families, Community Services and Indigenous Affairs (as it then was called), stated that the local FRC commissioners informed the Commonwealth government that more work beyond the CYWR was required to ensure children in their communities were receiving an education and attending school each day. While the above FRC referral process was discussed, the School Enrolment and Attendance

¹⁴⁵ Ibid s 123ZEA.

¹⁴⁶ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11.

¹⁴⁷ Cape York Institute for Policy and Leadership, above n 2, 12.

¹⁴⁸ Disengaged youth are defined as 15 to 24 year olds receiving Youth Allowance, New Start Allowance, Special Benefit or Parenting payment for more than 13 weeks out of the last 26 weeks. See Department of Social Security, Government of Australia, *Guide to Social Security Law, 1.224 Who is Income Managed under the Disengaged Youth Measure* <<http://guides.dss.gov.au/guide-social-security-law/11/5/1/20>>.

¹⁴⁹ Department of Human Services, Government of Australia, *Budget 2013-14: Cape York Welfare Reform – Embedding and Building – Disengaged Youth* <<http://www.humanservices.gov.au/corporate/publications-and-resources/budget/1314/measures/welfare-payment-reform/54-10896>>.

¹⁵⁰ Family Responsibilities Commission, *Quarterly Report 20* (April 2013 to June 2013) 12 <<http://www.frcq.org.au/?q=content/quarterly-reports>>.

Measure (SEAM) was the eventual solution proposed by the Commonwealth government.¹⁵¹

Even if parents are being income managed, they may still have their payments suspended under SEAM. There do not seem to be any protections in relation to the prioritisation of the FRC process over SEAM. The *FRC Act* and the *Social Security (Administration) Act 1999* (Cth) are not sufficiently integrated in relation to these issues, and the *FRC Act* does not even mention SEAM. Unless there are clear guidelines on how these separate measures are to work, there is great potential for SEAM to supplant income management, placing families and their children in an even worse predicament. Consideration must be given to the fact that bureaucratic processes take time, and therefore, if social security payments are to be reinstated after being suspended, a family may be left with little or no money for a period of time. Cultural kinship ties will be important for these families to access money and food. This is one of the aspects of cultural life the CYWR attempts to eliminate by promoting individual responsibility.

VII FROM A TRIAL TO PERMANENCY

The CYWR was initially implemented as a four year trial. While the *FRC Act* was to cease on 1 January 2012, it was extended, initially until 31 December 2012,¹⁵² then to 31 December 2013,¹⁵³ then further extended to 31 December 2014.¹⁵⁴ Currently, there is no planned end date of the *FRC Act*. The timeframe was similarly amended in the Commonwealth legislation, but now its income management and related provisions in Cape York have an end date of 1 July 2017.¹⁵⁵ Given that both the current federal government and the Opposition Labor Party support income management, it is likely that CYWR income management will continue beyond that date.

¹⁵¹ Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, above n 73.

¹⁵² Explanatory Notes, Family Responsibilities Commission and Other Acts Amendment Bill 2011 (Qld) 1-4.

¹⁵³ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2012 (Qld) 1-4.

¹⁵⁴ See, eg, *Family Responsibilities Commission Act 2008* (Qld) s 152; Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Qld) 3.

¹⁵⁵ *Social Security (Administration) Act 1999* (Cth) s 123UF(1)(g) and (2)(h).

The initial decision to extend the trial in 2011 was said by to be based on the findings of a 2010 implementation review of the FRC,¹⁵⁶ and on Queensland government reports of community support following consultation.¹⁵⁷ The implementation review showed school attendance in Aurukun and Mossman Gorge improved and was maintained at its already high level in Coen and Hope Vale, while reported offences against the person and hospital admissions from assaults showed some reduction in some communities.¹⁵⁸ However, interpreting these results as being causally related to the CYWR and income management in particular, without comparing trends in similar communities, is questionable and possibly problematic. A later evaluation showed similar trends in crime reduction in non-CYWR communities.¹⁵⁹ The lack of connection between income management and these outcomes is examined in Chapter 7.

In 2012, when it was again decided to extend the FRC's operation, Glen Elmes, then Queensland's State Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs, indicated some reluctance.¹⁶⁰ He said he was awaiting a final evaluation report from the Commonwealth government and therefore not all the necessary data was available to make a fully informed decision. However, stakeholder and community consultation were said to provide widespread support for the FRC's continuation.¹⁶¹

Due to its cost, in March 2013 then Queensland Premier Newman announced that, though he believed it was successful, the CYWR trial would not be funded beyond the end of the year.¹⁶² Despite this, then Minister Elmes' view was that a large amount of money had already been expended on the CYWR covering only a very small population with few outcomes other than indications of increased school attendance. Similar Aboriginal communities were not

¹⁵⁶ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, above n 51.

¹⁵⁷ Queensland, *Parliamentary Debates*, Parliament, 23 August 2011, 2573 (Curtis Pitt).

¹⁵⁸ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, above n 51, 101, 108–110.

¹⁵⁹ *Ibid* 5.

¹⁶⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 12 September 2012, 1842–1843 (Glen Elmes).

¹⁶¹ *Ibid*.

¹⁶² AAP, 'Newman Reverses Decision to Cut Cape York Welfare Funds', *Sydney Morning Herald* (online), 29 March 2013 <<http://www.smh.com.au/opinion/political-news/newman-reverses-decision-to-cut-cape-york-welfare-funds-20130329-2gy0e.html>>.

receiving the same financial input or the extra services that came with it. On the other hand those communities did not necessarily want the CYWR.¹⁶³

Pearson was publicly scathing of the decision to end the trial.¹⁶⁴ It was also believed that Tony Abbott, the Commonwealth Opposition Liberal leader at the time,¹⁶⁵ intervened and the Queensland Government announced a day later that it would provide \$5.65 million to extend the trial.¹⁶⁶ This occurred in the context of the Queensland Liberal-National government cutting spending in a number of areas which included programs for Aboriginal and Torres Strait Islander people such as the Murri Court, the Queensland Indigenous Alcohol Diversion Program, and the funding of health workers in Aboriginal communities, plus eliminating thousands of public servant positions. These cuts occurred on the basis of the Premier's assertion that they were necessary to address Queensland's financial position.¹⁶⁷

It appears that the Coalition government was looking to the 2013 federal election and wanted to avoid negative press if the Queensland government cut the CYWR. Further, Pearson has a strong media presence; for example, he writes regular opinion pieces for the *Australian* newspaper.¹⁶⁸ Pearson has

¹⁶³ Australian Broadcasting Corporation, 'Lockhart River Says No to Cape Welfare Reform Trial', *News*, 4 April 2013 (Sharnie Kim and Kirsty Nancarrow) <<http://www.abc.net.au/news/2013-04-04/lockhart-river-says-no-to-cape-welfare-reform-trial/4609530>>.

¹⁶⁴ Peter Michael, 'Anger as Welfare Funds Run Dry', *The Cairns Post* (Cairns), 28 March 2013, 9.

¹⁶⁵ Following the federal election, Tony Abbott offered Noel Pearson the role of reviewing education programs for disadvantaged children and exploring implementation of direct instruction for these children (Patricia Karvelas and Justine Ferrari, 'Noel Pearson is Tony Abbott's Man to Fix Schools', *The Australian* (online), 31 August 2013) <<http://www.theaustralian.com.au/national-affairs/election-2013/noel-pearson-is-tony-abbotts-man-to-fix-schools/story-fn9qr68y-1226707920341#>>.

¹⁶⁶ Michael McKenna, 'Campbell Newman Acts to Save Cape York 'Tough Love'', *The Australian* (online), 30 March 2012 <<http://www.theaustralian.com.au/national-affairs/state-politics/campbell-newman-acts-to-save-cape-york-tough-love/story-e6frgczx-1226609248856>>.

¹⁶⁷ Daniel Hurst, 'Public Services Cuts 'Never to be Repeated': Newman', *Brisbane Times* (online), 19 September 2012 <<http://www.brisbanetimes.com.au/queensland/public-services-cuts-never-to-be-repeated-newman-20120919-26607.html>>.

¹⁶⁸ See, eg, Noel Pearson, 'Lives Saved, Futures Bettered', *The Australian* (online), 4 May 2013 <<http://www.theaustralian.com.au/opinion/columnists/lives-saved-futures-bettered/story-e6frg786-1226634888623#>>; Noel Pearson, 'Moral obligation is to save children first', 27 April 2013, *The Australian*

also been powerful in playing political parties against each other in matters such as legislation dealing with land use, including mining, development and agriculture around rivers¹⁶⁹ and a potential listing of a World Heritage Area in Cape York.¹⁷⁰ It is likely that the Commonwealth government would have viewed public argument over the extension of the CYWR as an unnecessary distraction in the lead-up to an election.

VIII CONSULTATION AND CONSENT – REQUIREMENTS FOR SPECIAL MEASURES

As mentioned in Chapter 1, consultation is viewed by many¹⁷¹ as an important, if not necessary step, when devising and implementing measures aimed at

<<http://www.theaustralian.com.au/opinion/columnists/moral-obligation-is-to-save-children-first/story-e6frg786-1226630257959#>>; Noel Pearson, 'The Aboriginal 'community' amounts to a dangerous myth for some and an alibi for others', *The Australian* (online), 8 December 2012 <<http://www.theaustralian.com.au/opinion/columnists/the-aboriginal-community-amounts-to-a-dangerous-myth-for-some-and-an-alibi-for-others/story-e6frg786-1226532383066#>>.

¹⁶⁹ For example, the *Wild Rivers Act 2005* (Qld).

¹⁷⁰ See, eg, Timothy Neale, 'A Substantial Piece in Life': Viabilities, Realities and Given Futures at the Wild Rivers Inquiries', 53 (November) 2009, *Australian Human Rights Review* <<http://www.australianhumanitiesreview.org/archive/Issue-November-2012/neale.html>>; Australian Broadcasting Commission, 'Pearson Discusses Wild Rivers Laws', *Lateline*, 15 July 2009 (Leigh Sales) <<http://www.abc.net.au/lateline/content/2008/s2627109.htm>>; Jared Owens and Lauren Wilson, 'Noel Pearson Brands Wild Rivers Law 'Colonialism'', *The Australian* (online), 30 September 2010 <<http://www.theaustralian.com.au/news/noel-pearson-brands-wild-rivers-law-colonialism/story-e6frg6n6-1225932005100>>; Sarah Elkes and Rosanne Barrett, 'Wild Rivers Act Crushes Aborigines: Pearson', *The Australian* (online), 5 November 2011 <<http://www.theaustralian.com.au/national-affairs/state-politics/wild-rivers-act-crushes-aborigines-pearson/story-e6frgcxz-1226186208583#>>; Lauren Wilson and Sarah Elkes, 'Noel Pearson Flays Steve Fielding's retreat on wild rivers laws', *The Australian* (online), 13 May 2011 <<http://www.theaustralian.com.au/archive/in-depth/pearson-flays-fieldings-retreat-on-rivers/story-e6frgd9f-1226054960728>>; AAP, 'Cape York Heritage Listing Bad for Health', says Pearson' *Brisbane Times* (online), 27 July 2009 <<http://www.brisbanetimes.com.au/queensland/cape-york-heritage-listing-bad-for-health-says-pearson-20090727-dxwb.html>>; Evan Schwarten and Crystal Ja, 'Govt Delays Plan to Protect Cape York', *The Sydney Morning Herald* (online), 9 February 2010 <<http://news.smh.com.au/breaking-news-national/govt-delays-plan-to-protect-cape-york-20100209-np4c.html>>; Patricia Karvelas, 'Garrett Urged to Bar Heritage Push for Cape York', *The Australian* (online), 22 May 2009 <<http://www.theaustralian.com.au/news/nation/garrett-urged-to-bar-heritage-push-for-cape-york/story-e6frg6nf-1225714534222>>.

¹⁷¹ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [37] (Brennan J); Jonathon Hunyor, 'Is it Time to Re-think Special Measures under the Racial Discrimination Act?' The Case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 54-56; Alistair Nicholson, Nicole Watson, Alison Vivian, Craig Longman, Terry Priest, Jason De Santolo, Paddy Gibson, Larissa Behrendt and Eva Cox, 'Listening But Not Hearing: A Response to the NTER Stronger Futures Consultations June to August 2011' (University of Technology Sydney: Jumbunna Indigenous House of Learning, March 2012) 28 <https://www.uts.edu.au/sites/default/files/ListeningButNotHearing8March2012_1.pdf>;

attaining equality for Aboriginal and Torres Strait Islander peoples. By mentioning consultation in the context of approval of time extensions for the CYWR, the State government signals an understanding of the importance of consultation at some level. However, there is no mention of consultation in the special measures provisions of the *RDA* or *ICERD*, nor any domestic precedents to support its requirement.

While consultation may not be a legal requirement of a special measure in Australia, it is an important aspect of community development and empowerment, certainly integral to the process of self-determination. A large part of self-determination is control of decision-making processes and future direction by those affected. This cannot occur if unwanted and intrusive measures are externally imposed. This view is reflected in the *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*, drafted by indigenous peoples and signed by Australia, as discussed below.

Aboriginal peoples are especially conscious of the pattern of protectionist legislation and policy imposed upon them regularly throughout Australia's history. It is understandable that consultation is viewed as an important part of making laws relevant and appropriate to their purpose.

In a democracy, it is assumed that those voted into power to make laws for the people will make the right decisions and that they know the people for whom these laws apply. This requires an Australian parliament to understand Aboriginal and Torres Strait Islander peoples' history, culture and diversity, otherwise they are likely to apply an incompatible approach. However, while the Queensland and Federal parliaments are elected bodies said to represent all Australians, Aboriginal and Torres Strait Islander peoples, given their

Alison Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Review* 46; Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78; Luke Buckmaster, Diane Spooner and Kirsty Magarey, 'Income Management and the Racial Discrimination Act' (Parliamentary Library, Background Note 2011-12, 28 May 2012) 19-20 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagementRDA>; Greg Marks, 'Coercive Governance and Remote Indigenous Communities: The Failed Promise of the Whole of Government Mantra' (2008) 12(1) *Australian Indigenous Law Review* 13.

percentage (3%)¹⁷² of the population, unique culture, lack of significant representation within these parliaments, and the absence of a representative advisory body, may have difficulty being heard or understood.

Anthony suggests that income management illustrates the government's denial of equal rights to welfare for Aboriginal peoples. This is due to a view of Aboriginal peoples as failed citizens and undeserving of the same treatment as people from the dominant culture.¹⁷³ Through this interpretation we can see that the blame the government places on Aboriginal people for not complying with western standards has instigated what the government believes is necessary intervention and compliance.

In Chapter 6 I will show how government power is reinforced by the High Court's formal interpretative approach of the *RDA* and *ICERD* in particular, as well as its deference to the legislature. These nullify domestic checks and balances expected in a democracy, expanding governmental power despite the *RDA* intent to prohibit discrimination.

In *Maloney v The Queen*¹⁷⁴ (*Maloney*), Crennan J relied on the fact that counterbalancing democratic processes exist in Australia, and therefore consultation or consent is not a precondition to the legality of legislation, especially protective legislation, though it may be precautionary or desirable in some sense.¹⁷⁵ Unfortunately this conception of 'democracy' fails to identify and understand it as a majoritarian process and its lack of ability to accommodate difference in minority culture, views and values.

¹⁷² Australian Bureau of Statistics, Government of Australia, *Estimates of Aboriginal and Torres Strait Islander Australians*, June 2011
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

¹⁷³ Thalia Anthony, 'The Return to the Legal and Citizenship Void: Indigenous Welfare Quarantining in the Northern Territory and Cape York' (October, 13 2009), *Balay: Culture Law and Colonialism*, 10 (2009) 29-44
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488549>.

¹⁷⁴ (2013) 252 CLR 168.

¹⁷⁵ *Maloney v The Queen* (2013) 252 CLR 168, [135] (Crennan J).

A Consultation

Article 15(2) *UNDRIP*¹⁷⁶ emphasises the importance of Nation States consulting and cooperating with indigenous peoples to eliminate discrimination and promote positive relationships between indigenous peoples and wider society. Consultation as part of implementing a special measure is important in Australia, not only as an element of self-determination, but also with regard to particular measures which may restrict rights.

Traditional special measures – such as Abstudy, scholarships and dedicated employment positions – have not been challenged by those in receipt or eligible for them. These measures apply to Aboriginal and Torres Strait Islander people generally, and provide individuals with the choice of pursuing them. However, more recent measures such as imposed alcohol restrictions and imposed income management in Cape York target particular Aboriginal people in particular Aboriginal communities. The people targeted by the measures have no choice as to whether to accept or reject them. The measures are said to restrict particular rights in order to promote other rights or rights of others.¹⁷⁷ This is examined in more detail in Chapter 7.

Rights restricted by income management could include the right to social security, because the person is unable to freely access all their social security payment, and the right to privacy, because a person's personal information is shared between agencies and the FRC. On the other hand, it may be argued that income management promotes the right to social security for children and the right to an adequate standard of living on the basis that parents/carers are limited to spending the money on priority needs.

General Recommendation 32 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) provides that:

¹⁷⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). *UNDRIP* was adopted by the General Assembly on Thursday, 13 September 2007.

¹⁷⁷ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 3.

States parties 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.¹⁷⁸

Despite *ICERD* not mentioning consultation, it was reiterated by the CERD that *ICERD* is 'a living instrument' which requires it to be interpreted based on contemporary society and its broad scope.¹⁷⁹ The previous Special Rapporteur¹⁸⁰ on the situation of human rights and fundamental freedoms of indigenous people, the CERD,¹⁸¹ the Human Rights Committee,¹⁸² and the Committee on Economic, Social and Cultural Rights¹⁸³ have all criticised the lack of consultation in the NTI. Although consultation was said to have occurred in Cape York, this must be similarly questioned.

It will be seen in Chapter 6 that the judges in *Maloney v The Queen*¹⁸⁴ did not accept the recommendations of the CERD as binding. Ward also asserts that, although Committee recommendations are not binding, they can be used to provide guidance to a State Party to assist it in complying with its international obligations relating to a convention.¹⁸⁵ She argues that the same principle applies to comments by the Special Rapporteur, despite an expectation that their comments would be highly respected.

Consistent with this view, consultation as a requirement of special measures in domestic case law has not gained traction with most Australian judges, despite

¹⁷⁸ Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, CERD/C/GC/32 (24 September 2009).

¹⁷⁹ *Ibid.*

¹⁸⁰ James Anaya, Special Rapporteur, *Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Situation of Indigenous Peoples in Australia*, U.N. Doc HRC/15/37/Add.4 Appendix B (1 June 2010).

¹⁸¹ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Australia – Concluding Observations*, 77th sess, UN Doc CERD/AUS/CO/15-17/CRP.1 [16] (2-27 August 2010).

¹⁸² Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations*, 95th sess, UN Doc CCPR/C/AUS/CO/5 [14] 16 March – 3 April 2009.

¹⁸³ Committee on Economic Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations*, 44th sess, UN Doc E/C.12/AUS/CO/4 [15] 4-22 May 2009.

¹⁸⁴ (2013) 252 CLR 168.

¹⁸⁵ See, eg, Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', (2011) 10(2) *Northwestern Journal of International Human Rights* 57; *Maloney v The Queen* (2013) 252 CLR 168.

suggestions by many domestic commentators¹⁸⁶ that it is a requirement. Without consultation or the choice to accept or reject special measures, this is another form of paternalism. Justice Brennan, the only judge to discuss the concept of consultation in *Gerhardy v Brown*¹⁸⁷ (*Gerhardy*) clearly expressed his view of the consequences of imposed measures when he stated:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. 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.¹⁸⁸

As the measure in *Gerhardy* was not controversial for those viewed as benefiting from it, the other judges may not have turned their mind to consultation or consent. Indeed, until 2010,¹⁸⁹ measures viewed as special measures had not been legally challenged by those affected by them.

Historical approaches of legislating for Aboriginal people were based on paternalism, without consideration and understanding of the effects of such legislative processes on them, including on their dignity. The new paternalism approach is derived from this same thinking and its harsh consequences are immediately obvious. In the case of income management and alcohol restrictions, Aboriginal people are treated differently, believed to be less responsible than non-Aboriginal people, and punished through criminal convictions and fines if they breach AMPs. It is clear how an Aboriginal person's dignity would be adversely affected by these measures.

¹⁸⁶ See, eg, Marks, above n 171, 13, 15; Hunyor, above n 168, 49; Vivian, above n 171, 53; Vivian and Schokman, above n 171, 88.

¹⁸⁷ (1985) 159 CLR 70.

¹⁸⁸ Ibid [37] (Brennan J).

¹⁸⁹ See, eg, *Aurukun Shire Council v Chief Executive, Office of Liquor, Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Morton v Queensland Police Service* [2010] QCA 160.

There is a move towards governments engaging in some form of consultation when applying special measures where such measures restrict human rights.¹⁹⁰ It is likely that governments understand the importance of consultation; however, their consultation processes are dubious. In cases such as the implementation of the NTI, consultation occurred after measures were implemented, rather than when being developed.¹⁹¹ The Commonwealth government excused its late consultation in the NT as necessary to prevent harm to children. As previously mentioned in this chapter, the CYWR consultation process lacks detail. Martin commented that the Aurukun Council never asked that its community be part of the CYWR trial, but agreed to it because it was told that if it didn't it would lose its CDEP,¹⁹² which despite this, was cut on 1 July 2013.¹⁹³ Similarly, as further discussed in this chapter, Hope Vale Council appeared to agree due to other attractive incentives from the Commonwealth government and Indigenous Business Australia.

Consultation was raised as an essential element of a special measure by the appellant in *Maloney*. Submissions relied on the CERD's Recommendation 32 that s 8(1) *RDA* and Art 1(4) are to be interpreted to include consultation with those affected and that the implementation of special measures require 'free, prior and informed consent.'¹⁹⁴ However, it will be seen in Chapter 7 that most of the judges read the text of s 8 *RDA* and Art 1(4) *ICERD* as not requiring consultation.¹⁹⁵

Governments' lack of understanding of cultural matters, including societal structures of different groups and the impacts of legislation and policy, can

¹⁹⁰ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Cth) 3.

¹⁹¹ Vivian, above n 171.

¹⁹² Phillip Martin, 'Potemkin in Cape York: The Politics of Misrepresentation in Aurukun's Welfare Reform Trials', Seminar held at CAEPR, ANU (2 April 2008). Seminar excerpts podcast available at <<http://www.anu.edu.au/caepr/events08.php>>.

¹⁹³ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Aboriginal and Torres Strait Islander Community Profiles: A Resource for the Courts*, Aurukun (October 2014) 30 <<http://www.datsima.qld.gov.au/resources/datsima/publications/justice-resources/aurukun.pdf>>.

¹⁹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 19.

¹⁹⁵ *Maloney v The Queen* (2013) 252 CLR 168, [24] (French CJ), [91] (Hayne J), [134]-[135] (Crennan J), [186] (Kiefel J), [240] (Bell J).

result in measures with high levels of non-compliance. For example, in Aboriginal communities where there are alcohol restrictions, Queensland government data shows no reduction in conviction rates for alcohol carriage offences from when they were first recorded in 2004, up to March 2012.¹⁹⁶ This could reflect the lack of consultation and failure to accept alcohol restrictions by some community members.

B Consent

Varying views of the practical meaning of ‘free, prior and informed consent’ exist, ranging from a right to veto to a right to ensure meaningful participation by indigenous peoples in decisions directly affecting them.¹⁹⁷ Article 19 *UNDRIP* requires government to consult and cooperate in good faith with indigenous people. Article 19 – clearly aimed at government intervention and programs – also requires government to gain free, prior and informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.

Therefore, consent generally requires the intended recipients of measures to agree to a measure as a group, prior to its implementation. Consent is also said to proceed from the right to self-determination. The right to self-determination is found in Art 3 *UNDRIP*¹⁹⁸, Art 1 in both the *International Covenant on Civil and Political Rights (ICCPR)*¹⁹⁹ and *International Covenant on Civil, Economic and Social Rights (ICESCR)*,²⁰⁰ all documents which Australia has signed. General Recommendation 23 of the Committee on the Elimination of Racial Discrimination requires States to ensure indigenous peoples have equal rights of participation in public life and that no decisions

¹⁹⁶ Department of Aboriginal and Torres Strait Islander Partnerships, Government of Queensland, *Quarterly Bulletin on Key Indicators in Queensland’s Discrete Indigenous Communities: (January-March 2012)* <<http://www.datsip.qld.gov.au/resources/datsima/publications/key-reports/quarterly-jan-mar-2012.pdf>>.

¹⁹⁷ Ward, above n 185.

¹⁹⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). Australia adopted *UNDRIP* on 3 April 2009.

¹⁹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁰⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

relating directly to indigenous peoples are made without their informed consent.²⁰¹

Three *UNDRIP* Articles contain the right to ‘free, prior and informed consent.’²⁰² While *UNDRIP* is not a binding document, it has been signed by Australia, and the expectation is that it will be used for guidance by governments and courts. In fact, *UNDRIP* has been referred to in a number of Australian court cases.²⁰³ Some of these are discussed in Chapter 4. In the case of *Minister for Immigration and Ethnic Affairs v Teoh*,²⁰⁴ a majority of the High Court affirmed that international instruments are only enforceable in domestic law if they are given legislative effect, but even so, there is a legitimate expectation that the terms of the instrument will be considered.²⁰⁵ Therefore, where legislation is ambiguous, courts should favour a construction consistent with *UNDRIP* due to the Executive’s act of ratification and because prima facie Parliament wants to give effect to Australia’s obligations under international law.²⁰⁶ It is clear that if judges do not accept consultation as an essential element of special measures, they are also unlikely to consider consent as a requirement.

²⁰¹ Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples*, 51st sess, UN Doc A/52/18, annex V [122] (26 September 1997).

²⁰² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 10, 19 and 29.

²⁰³ See, eg, *R v Maloney* [2012] QCA 105, [13] (McMurdo P) referred to arts [1] and [2] *UNDRIP*. President McMurdo also referred to arts 2 and 26 *ICCPR* [11] and arts 1, 2 and 7 of the Universal Declaration of Human Rights [10]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *Morton v Queensland Police Service* [2010] QCA 160, [18] (McMurdo P); *Wurridjal v Commonwealth* (2009) 237 CLR 309 [269] (Kirby J); *Aurukun Shire Council v CEO Officer of Liquor and Racing in the Department of Treasury* [2010] QCA 37, [33] (McMurdo P); *Cheedy on behalf of the Yindjibarndi People v Western Australia* [2011] FCAFC 100, [75]-[77], [109] (North, Mansfield, Gilmour JJ); *Thompson & Dean* [2011] FMCAfam 1074, [98] (Harman FM) referred to the consistency of ss 60B(3) and 60CC(6) *Family Law Act 1975* (Cth) and arts 12 and 13 of the *Universal Declaration on the Rights of Indigenous Peoples*; *Knightley & Brandon* [2013] FMCAfam 148, [117] (Harman FM) mentioning that placing children with a particular person enlivens the children’s rights under the *Family Law Act 1975* (Cth) as well as the *International Convention on Economic, Social and Cultural Rights* and the *Universal Declaration on the Rights of Indigenous Peoples*.

²⁰⁴ (1995) 183 CLR 273.

²⁰⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, [29], [32], [34] Mason CJ and Deane J, [3] (Gaudron J agreeing with Mason CJ and Deane J on this point), [29], [32], (Toohey J).

²⁰⁶ *Ibid* [26] Mason CJ and Deane J).

C Consultation and the Cape York Welfare Reform

In her Second Reading Speech for the FRC Bill, Queensland Premier Bligh noted that Aurukun and Hope Vale – through Council resolutions, and Mossman Gorge and Coen – through community board resolutions, had signed up to the CYWR for four years.²⁰⁷ However, the views of members of some of the communities in the CYWR were not as clear. Despite the government's assertion that the four participating communities had agreed to the CYWR in 2007,²⁰⁸ some members of these communities suggest that the FRC had been imposed without adequate consultation and explanation. Hope Vale residents and their Council are continuously recorded as being dissatisfied with the presence of the FRC.²⁰⁹ In March 2013, when the Queensland government announced its decision to not extend the CYWR, Mayor McLean of Hope Vale publicly stated that he agreed with the Regional Organisation of Councils of Cape York and Torres Shire that the CYWR had failed, adding that 'outsiders had done nothing but create rifts in the community.'²¹⁰ In 2010, Mayor McLean was reported as saying the problems in Hope Vale were no closer to being solved, and that the community had remained the same since the CYWR started.²¹¹ However, despite the above, the Explanatory Notes in June 2013, relating to the FRC's extension to the end of 2014, recorded that the Hope Vale Council now supported the CYWR and FRC.²¹²

²⁰⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 332 (Anna Bligh, Premier).

²⁰⁸ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, above n 51, 151.

²⁰⁹ See, eg, Gordon Dean, *Taking Responsibility: Queensland's Family Responsibilities Commission* (Cairns, Queensland, Family Responsibilities Commission Press, 2013) 57-59; Explanatory Notes, Family Responsibilities Commission and Other Acts Amendment Bill 2011 (Qld) 8-9; Explanatory Notes, Family Responsibilities Commission Amendment Bill 2012 (Qld) 6; Australian Broadcasting Commission, 'Decision to cut Cape York welfare trial 'absurd'', *ABC News*, 27 March 2013 (Sharnie Kim and Kirsty Nancarrow) <<http://www.abc.net.au/news/2013-03-27/decision-to-cut-cape-york-welfare-trial-absurd/4597378>>.

²¹⁰ Editorial, Breaking news, 'Pearson Appalled by Cape York Program Cut', news.com.au (online), 27 March 2013 <<http://www.news.com.au/national/breaking-news/qld-govt-axes-cape-welfare-program/story-e6frku9-1226607388944>>.

²¹¹ Australian Broadcasting Corporation, 'Welfare Reform Attracts Residents Back to Cape York', *ABC News*, 26 November 2010 (Kerrin Binnie and Brad Ryan) <<http://www.abc.net.au/news/2010-11-26/welfare-reforms-attract-residents-back-to-cape-york/2351612>>.

²¹² Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Qld) 3-4.

The detail provided by the CYI in regard to the consultation processes is extremely sparse: barely any information is provided about consultation in Hope Vale and Aurukun.²¹³ Both of these communities have raised lack of consultation as an issue in terms of implementation of the CYWR. In a report by Gordon Dean, it was noted that the Chief Executive Officer (CEO) of the Hope Vale Council had stated that the Hope Vale community believed that the CYWR was imposed upon it. Two FRC local commissioners from Hope Vale also stated that their community did not know about the FRC or the CYWR at its commencement. The CEO of the Aurukun Council criticised the lack of communication with the Council and community in relation to the CYWR. Five FRC local commissioners from Aurukun reported that although there were meetings to consult with the community on the CYWR, a lot of people didn't attend and didn't know what the FRC was.²¹⁴ This was despite the CYI having documented extensive consultations with the communities during its design, including 120 people in Aurukun, 98 in Hope Vale, 62 in Mossman Gorge and 60 in Coen.²¹⁵ An evaluation of the CYWR in 2012 recorded that community stakeholders felt that they were not adequately consulted or informed during the CYWR's implementation phase.²¹⁶ This makes people resistant to change and the processes of the FRC.²¹⁷ The extent and process of the consultation was also questioned by Philip Martin. Martin, who previously worked for Cape York Partnership (CYP) on the CYWR in Aurukun, stated that no community consultation occurred there.²¹⁸ He also described a community consultation in Hope Vale in which only seven people attended, five of whom were CYP employees.²¹⁹ Martin concluded that the consultation process was hasty, with premature conclusions, and suggested that the initial CYWR and FRC proposal were already drafted prior to consultation. According to Martin, the process was essentially aimed at gaining approval, rather than providing genuine involvement of the community in planning.²²⁰ This resulted in a process where

²¹³ See, eg, Cape York Institute for Policy and Leadership, above n 2, 149-150.

²¹⁴ Dean, above n 209, 57-59.

²¹⁵ Cape York Institute for Policy and Leadership, above, n 2, 48-49, 149-150.

²¹⁶ Department of Families, Housing, Community Services and Indigenous Affairs, above n 62, 25.

²¹⁷ Dean, above n 209, 57-60.

²¹⁸ Martin, above n 192.

²¹⁹ Altman and Johns, above n 52, 11.

²²⁰ Ibid.

policy was developed without proper consideration given to need, nor consideration and understanding of the desires of those intended to be affected by the measures. The policy was therefore based on assumptions held by those developing it.²²¹

D *Blurring of the Consultation Process – The True Cost of Agreement*

Overcrowded housing exists in most Cape York communities, including Hope Vale. At the time the CYWR was being developed in 2007, the CYI stated that the Commonwealth government was committed to building new houses in return for the Hope Vale community implementing a ‘responsibilities framework’²²² called the Hope Vale Guugu Yimithirr Warra Welfare Reform Agreement.²²³

The agreement was signed by the Hope Vale Council, the Commonwealth government and the CYI on 11 May 2007, and provided for \$10 million to be available to support initiatives from the Commonwealth government and up to \$5 million in home loan support from Indigenous Business Australia (IBA) for the Hope Vale community.²²⁴ These houses were to be purchased by community members through IBA loans, and the Council was to identify up to 20 eligible families or individuals. The Hope Vale Council boundary was moved to include the freehold land. The Commonwealth Government was to develop and service 40 lots on the land and build a display home on it.²²⁵

Due to communal land tenure in Aurukun, Hope Vale and Doomadgee, their Councils are currently unable to generate revenue from land rates. Previously, Aurukun Council relied heavily upon profits generated from alcohol sales at their canteen.²²⁶ However, AMPs and the removal of liquor licenses from Councils saw a large reduction in monies available to Councils to conduct their functions. The need for housing and other infrastructure in these communities,

²²¹ Martin, above n 192.

²²² Cape York Institute for Policy and Leadership, above n 2, 43.

²²³ Ibid 191.

²²⁴ Cape York Institute for Policy and Leadership, above n 2, 191-196.

²²⁵ Ibid.

²²⁶ *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [7] (McMurdo P), [64] (Keane JA).

and the limited funding and opportunities to generate monies, are likely to place pressure upon Councils to agree to funding arrangements which would objectively be viewed as unfair and unnecessary.

Despite the Hope Vale Council's cooperation in relation to housing,²²⁷ Explanatory Notes to FRC legislation record Council's expressed dissatisfaction when consulted.²²⁸ This took the form of asking, firstly, for stronger engagement from all levels of government and for them to engage through the Queensland government coordination office at Hope Vale; and secondly, that resources be allocated to help community members transition from social security to employment and home ownership.²²⁹ Thirdly, while the Council is recorded as supporting CYWR services, it expressed the view that it should receive funding to implement these services,²³⁰ and that more jobs funded by the CYWR should be held by community members.²³¹

This context and the above agreement by Hope Vale suggest that it may have been signing up to much more than the CYWR trial. The strong incentives placed before the Council, the money on offer and the requirement of the Council to implement a 'responsibilities framework' would have made it difficult, if not impossible, for the Council to disagree with the CYWR without jeopardising this funding. These negotiations were occurring at the same time as the consultation for the CYWR.

IX HOW DOES INCOME MANAGEMENT UNDER THE FAMILY RESPONSIBILITIES COMMISSION ACT 2008 (QLD) WORK?

Aboriginal and Torres Strait Islander people are appointed local commissioners in the welfare reform community where they live²³² by the Governor in

²²⁷ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2013 (Qld) 3-4.

²²⁸ Explanatory Notes to the Family Responsibilities Commission and Other Acts Amendment Bill 2011 (Qld) 8-9; Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2012 (Qld) 6.

²²⁹ Explanatory Notes to the Family Responsibilities Commission and Other Acts Amendment Bill 2011 (Qld) 9.

²³⁰ Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2012 (Qld) 8.

²³¹ Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2013 (Qld) 4.

²³² *Family Responsibilities Commission Act 2008* (Qld) s 12(4).

Council.²³³ The minister recommends local commissioners²³⁴ after asking for nominations by the community justice group (CJG), or if no CJG exists, any relevant community groups²³⁵ for the area. The CJG or community group must consider the eligibility requirements, including whether a) the person is Aboriginal or Torres Strait Islander; that b) the person is a member of the CJG or a relevant community group; c) the person is an elder or respected person in the community or d) the Minister considers the person to be of good standing, living in or having a close connection with the community.²³⁶ The Minister must consult with the FRC Board about these appointments.²³⁷ The FRC Board is constituted by one person nominated by the Minister – who automatically becomes the Chairperson, a person nominated by the Commonwealth government; and a person nominated by the Cape York Institute for Policy and Leadership (CYI).²³⁸ Noel Pearson is CYI's nominee.²³⁹ The legally qualified commissioner must understand Aboriginal and Torres Strait Islander history and culture.²⁴⁰ Two local commissioners from the relevant community and a legally qualified commissioner sit in FRC conferences,²⁴¹ unless the legally qualified commissioner considers it appropriate for three local commissioners to sit.²⁴² The legally qualified commissioner is required to monitor all decisions;²⁴³ however, there is no process to resolve disagreement between commissioners.

The FRC may receive a notice from government agencies informing it that a person is not meeting their social responsibilities, including enrolling children in school and requiring adequate attendance; caring for children and not having child protection notifications or interventions; not receiving criminal convictions

²³³ Ibid s 12(2).

²³⁴ Ibid s 12(3).

²³⁵ Ibid s 14(2).

²³⁶ Ibid ss 14(3), 18.

²³⁷ Ibid s 13.

²³⁸ Ibid s 18.

²³⁹ Family Responsibilities Commission, Government of Queensland, *Quarterly Report 29* (July 2015 to September 2015) 14
<http://www.frcq.org.au/sites/default/files/FINAL%20FRC%20Quarterly%20Report%20No%2029_0.pdf>.

²⁴⁰ *Family Responsibilities Commission Act 2008* (Qld) s 17.

²⁴¹ Ibid s 50.

²⁴² Ibid s 50A.

²⁴³ Ibid s 50B.

or domestic and family violence protection orders; and compliance with tenancy agreements.²⁴⁴ In such cases, the commissioners can require community members receiving social security to attend a conference. In providing notices, government agencies don't always know if a person is receiving social security payments. The FRC has the power to check the names with Centrelink.²⁴⁵ The nature of the information, and the breach of privacy enabled by the *FRC Act* information sharing provisions,²⁴⁶ is discussed in Chapter 7.

The FRC decides if the person is required to attend a conference. At a conference, the FRC can take no further action,²⁴⁷ reprimand the person,²⁴⁸ recommend²⁴⁹ or direct²⁵⁰ attendance at a support service, or order income management.²⁵¹ Before ordering income management, the FRC is required to 'consider whether it is more appropriate in all the circumstances merely to direct the person to attend an appropriate community support service under a case plan.'²⁵² However, the *FRC Act* reduces the transparency of FRC decisions because of its closed nature and discretion to allow legal representation. This restricts the ability to scrutinise FRC decisions. This will be discussed in detail in Chapter 7, while the limited right to appeal is considered below.

If the FRC decides to income manage a person, they provide a notice to the Centrelink Secretary stating the time period and percentage of the payment to be income managed.²⁵³ A range of social security payments²⁵⁴ can be subject to income management.²⁵⁵ Governments have intended most of these payments to act as a safety net for people who are unable to work for a range

²⁴⁴ Ibid ss 40-44.

²⁴⁵ See, eg, ibid s 92, *Social Security (Administration) Act 1999* (Cth), s 123ZEA.

²⁴⁶ *Family Responsibilities Commission Act 2008* (Qld) pts 4, 8.

²⁴⁷ Ibid s 69(1)(a).

²⁴⁸ Ibid s 69(1)(b)(i).

²⁴⁹ Ibid 69(1)(b)(ii).

²⁵⁰ Ibid s 69(1)(b)(iii).

²⁵¹ Ibid s 69(1)(b)(iv).

²⁵² Ibid s 69(2).

²⁵³ Ibid ss 69(1)(b)(iv), 74.

²⁵⁴ These include widow allowance, youth allowance, Abstudy, Newstart allowance, sickness allowance, partner allowance, disability support pension, wife pension, sole parent pension, bereavement pension, disability wage supplement, mature age partner allowance, special needs pension, income support bonus and baby bonus.

²⁵⁵ Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Guide to Social Security Law*, Version 1.197 (12 August 2013) <http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssguide-11/ssguide-11.2/ssguide-11.2.5.html>.

of reasons, and also to assist people to look for work and to study. Most social security recipients in Australia are not required to meet the social responsibilities described above, unless they live in a community covered by the various income management programs previously mentioned.

Certain provisions of the *FRC Act* demonstrate that income management is punitive: it is blatantly used to punish when a person does not attend an FRC conference,²⁵⁶ or does not conform to a case plan and attend a service.²⁵⁷

The FRC can make an order for most social security payments to be income managed at 60%, 75% or 90% of the amount received for regular payments, and at 100% for one-off payments, such as the baby bonus.²⁵⁸ Income management at 90% was introduced from 1 January 2014 to apply to people who failed to comply with case plans and ‘resisted engagement with support services’.²⁵⁹ The *FRC Act* also enables a person to be called before the FRC simply for a notification to the Department of Child Safety, despite the notification not being investigated, proved or even provided to the person by the Department. This is clearly a breach of natural justice. Section 4(3)(b) of the *Legislative Standards Act 1992* (Qld) requires legislation to have sufficient regard to individual rights and liberties which includes legislation being consistent with the principles of natural justice. However, any requirement for natural justice has apparently been overridden by the need to intervene early in regard to issues of safety and wellbeing of children and to prevent ‘problem behaviour’ further deteriorating. It is also justified on the basis that a person’s liberty is not affected and they will not be deprived of an income.²⁶⁰ This process clearly fails to respect a person’s privacy and natural justice on the basis that intervention by the FRC ‘may’ potentially assist a child. This approach is not consistent with a fair process inviting respect and displaying

²⁵⁶ *Family Responsibilities Commission Act 2008* (Qld) s 66.

²⁵⁷ *Ibid* s 81.

²⁵⁸ Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Income Management for Cape York Welfare Reform* <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/income-management-for-cape-york-welfare-reform>>.

²⁵⁹ Cape York News, *Understanding Income Management*, (December 2013) 11 <http://issuu.com/cy institute/docs/cyi022_cape_york_news_dec_2013_-_fi>.

²⁶⁰ Explanatory Notes, *Family Responsibilities Commission Bill 2008* (Qld) 10.

legitimacy. The consequence of a person not attending two conferences for a notification of this nature is likely to result in them being income managed. This is an intrusion Aboriginal people are expected to accept as part of the CYWR and as part of receiving Centrelink payments. It fails to consider what is fair and that this approach imposed on Aboriginal people is intrusive and burdensome, treating these people differently and in a discriminatory manner.

Some community members are concerned that double jeopardy can be an issue in relation to the *FRC Act*, particularly for those individuals referred to the FRC because they have received a criminal conviction and punishment.²⁶¹ Double jeopardy occurs when a person is punished twice for the same offence. In response to the argument that income management imposed on a person without their consent is punitive and therefore the person is exposed to double jeopardy, the government states that the 'purpose of the income management regime is not punitive.'²⁶² The inference is, unless the intent of a measure is to punish rather than help people, it is not double punishment (jeopardy).²⁶³

However, people living in the CYWR communities are treated differently to other people in Cape York and beyond. This occurs because governments portray income management as not depriving a person of their income.²⁶⁴ It has always been the view that social security payments are inalienable²⁶⁵ and anyone eligible to receive them does so as a legal right.²⁶⁶

Income management is based on the assumption that people in the CYWR communities (who are predominantly Aboriginal) are required to comply with certain responsibilities before they can be trusted to manage their Centrelink payments, despite Centrelink recipients in most other communities not being required to comply with these responsibilities. However, as mentioned earlier in this chapter, income management exists in the NT, where 30% of the

²⁶¹ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, above n 51, 51.

²⁶² Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 9.

²⁶³ *Legal Services Commissioner v Singh* [2012] QCAT 181, [18]-[19].

²⁶⁴ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11.

²⁶⁵ *Social Security (Administration) Act 1999* (Cth) s 60(1).

²⁶⁶ Peter Yeend and Carol Dow, Parliament of Australia, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth), *Bills Digest*, No. 27 of 2007-08, 7 August 2007.

population is Aboriginal,²⁶⁷ and in a number of other communities,²⁶⁸ most of which have a high proportion of Aboriginal people.

Income management is justified by the State and Commonwealth governments as a way to ensure that social security monies will benefit vulnerable people, including children. However, income management is not necessarily based on the idea that people are financially incompetent, but is, rather, applied punitively.

A Questioning a Family Responsibilities Commission Decision

If a person disagrees with an FRC decision, they have the right to appeal. The appeal can be taken to a Magistrates Court, and is restricted to questions of law.²⁶⁹ The FRC decision cannot be stayed pending appeal.²⁷⁰ The Magistrate has the same powers as the FRC commissioners and can therefore make a decision to rescind, set aside or change the FRC's decision.²⁷¹ The Explanatory Notes to the FRC Bill explain that if an appeal application were to stay an FRC decision, it is likely it would encourage people to appeal in order to try to avoid the FRC decision, and consequently undermine the effect of the trial. The importance of a stay of FRC decisions is that if a person is income managed for three or six months, the appeal process could take that long or longer and will therefore have no practical effect for the person if the FRC decision is held

²⁶⁷ Australian Bureau of Statistics, Government of Queensland, *Estimates of Aboriginal and Torres Strait Islander Australians*, June 2011
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

²⁶⁸ In Bankstown (NSW), Logan and Rockhampton (Queensland), Playford (South Australia) and Greater Shepparton (Victoria) people on social security payments who have been referred by the Department of Human Services social worker as being vulnerable to financial crisis or referred by a child protection authority due to a child in the person's care being deemed to be 'at risk' are vulnerable to income management. In the Northern Territory, all young people aged between 15 and 24 years who have been on a social security payment for three of the past six months; for people aged over 25 years who have received social security payments for more than 12 of the last 14 months; or those who have been referred by the Department of Human Services social worker, a child protection authority or the Northern Territory Alcohol or Other Drugs Tribunal, will be income managed. In the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands (South Australia) and Ngaanyatjarra Lands (NG Lands) and Laverton Shire in Western Australia people will be income managed if they are referred by a child protection authority or the Department of Human Services social worker. Mainly Aboriginal peoples live in the APY Lands and the NG Lands (Department of Human Services, *Income Management*, above n 88).

²⁶⁹ *Family Responsibilities Commission Act 2008* (Qld) s 111.

²⁷⁰ *Ibid* s 112

²⁷¹ *ibid* s 114

to be incorrect. It is usual practise in civil law for a decision to be stayed once a court accepts the appeal application.²⁷² A right to review of FRC administrative processes and merits of decisions is said to reside with the Ombudsman.²⁷³ No examples of appeals or reviews have been recorded.

The failure to provide an adequate review process is a breach of fundamental legislative principles. Of concern is that if the FRC fails to consider particular factual information before them, it may make an incorrect decision in relation to a person's rights, particularly when ordering income management.²⁷⁴ The likelihood of this occurring is increased by the structure and informal nature of the FRC.

Local commissioners, while required to apply western legal concepts, are not legally trained and many conferences will be in local language or Aboriginal English. Therefore issues may be lost in translation to the legally qualified Commissioner or Deputy Commissioner who are not Aboriginal. Also, because the format of the conference is informal, a person may not have the opportunity to provide all of their relevant information, or it may not be considered or weighted correctly. It is unlikely that a person will be legally represented; therefore, they may not understand the process or even understand matters raised about them by the FRC. This process is conducive to inhibiting natural justice.²⁷⁵ I analyse the process and its effects on human rights in Chapter 7.

B *Income Management as a Special Measure*

In her Second Reading Speech to the FRC Bill 2008, then Queensland Premier Anna Bligh acknowledged the CYWR's uniqueness, stating that it 'is a ground breaking trial, unique in the world'.²⁷⁶ Though she raised concerns relating to the *RDA*, she 'drew comfort' from the fact that the Commonwealth government, when legislating for the NTI, had deemed the interventions (which included the future establishment of the FRC) to be special measures and therefore exempt

²⁷² *Civil Proceedings Act 2011* (Qld) s 7(4).

²⁷³ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11.

²⁷⁴ *Legislative Standards Act 1992* (Qld) s 4(3)(a).

²⁷⁵ *Ibid* ss 4(3)(b) and 4(3)(g).

²⁷⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 332 (Anna Bligh, Premier).

from the operation of the *RDA*.²⁷⁷ The speech provided the government with a context for the radical approach of quarantining social security income; that is, 'to address dysfunction that has become normalised'.²⁷⁸ The Queensland government also indicated that the *FRC Act* was a special measure,²⁷⁹ and stated that by conducting further consultation when extending the trial its status as a special measure would be maintained.²⁸⁰ This was despite no legal requirement to consult.

Sections 4 and 5 *SSOLA Act* provided that the *FRC Act* and other related legislation (e.g. the *Social Security (Administration) Act 1999* (Cth)) are special measures and therefore excluded from the operation of Part II *RDA* (the Part which prohibits racial discrimination) and any Queensland law prohibiting discrimination. While these sections were subsequently repealed,²⁸¹ and Part II *RDA* reinstated, the stated intention that the relevant provisions and acts be special measures remained. The ramifications of this are discussed in Chapter 7.

Rather than diminishing the human rights of the Aboriginal people to whom income management applies, income management is described in the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* (Cth) (*SSOLA Bill*) as promoting rights for Aboriginal children. The Explanatory Memorandum to the *SSOLA Bill* refers to Australia's international obligations under the *Convention on the Rights of the Child (CROC)*²⁸² and the *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*. In referring to *CROC*, emphasis is placed on the requirement 'to protect children from abuse and exploitation and ensure their survival and

²⁷⁷ Ibid 333.

²⁷⁸ Ibid 332.

²⁷⁹ Explanatory Notes, Family Responsibilities Commission Amendment Bill 2011 (Qld) 8-9.

²⁸⁰ Ibid 12; Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2011 (Qld) 6; Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2012 (Qld) 3, and Explanatory Notes to the Family Responsibilities Commission Amendment Bill 2013 (Qld) 3.

²⁸¹ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) cl 3.

²⁸² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

development and that they benefit from social security.²⁸³ When referring to *ICERD*, the Explanatory Memorandum states that Australia must 'ensure that people of all races are protected from discrimination and equally enjoy their human rights and fundamental freedoms.'²⁸⁴ Further, it relied on the argument that to bring about substantive equality people need to be treated differently, rather than all the same.²⁸⁵

Differential treatment is elaborated upon in the Explanatory Memorandum to the Social Services and Other Legislation Amendment Bill 2013 (Cth). This is in terms of the objective of the CYWR to support 'the restoration of socially responsible standards of behaviour' and to assist community members 'to resume and maintain primary responsibility for the wellbeing of their community and the individuals and families within their community.'²⁸⁶ It is further stated within the Bill that the results of reviews and consultations in relation to the CYWR demonstrate that the differential treatment positively impacts on individuals, families and the broader communities.²⁸⁷

In applying these human rights notions to welfare reforms in Queensland (in particular Cape York) and the NT it was asserted that the special measures 'are the basis of action to improve the ability of Indigenous peoples to enjoy these rights and freedoms.'²⁸⁸ However, there is a lack of connection between the *FRC Act's* objects and income management, which, as I argue in Chapter 7, indicates that it cannot be a special measure.

X CONCLUSION

The CYWR was developed by Pearson and the CYI, and funded and adopted by the Commonwealth and Queensland governments. While the CYWR is a distinct model with a local statutory body, different models have been implemented elsewhere, often with hard-hitting approaches to income

²⁸³ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Explanatory Memorandum, Social Services and Other Legislation Amendment Bill 2013 (Cth) 3.

²⁸⁷ *Ibid.*

²⁸⁸ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 3.

managing Aboriginal communities in the NT and under the debit card trial. These approaches have been altered over time, with the debit card trial being the most recent approach. Harsh measures like SEAM have been introduced where existing measures are not resulting in general compliance. In an attempt to force them into education or employment, young people are also subject to the measures.

The 'need' for social reform approaches arises from the connection Pearson draws between Aboriginal people relying on social security payments and what he refers to as a 'collapse in social norms'.²⁸⁹ He provides evidence of this from a number of reports²⁹⁰ that examine the state of Aboriginal people's lives.²⁹¹ These reports document the disproportionate contact Aboriginal and Torres Strait Islander peoples have with the criminal justice system, and high rates of alcohol related violence. While some of the reports link these issues to colonisation, or to policies and legislation causing dispossession, forced relocation, oppression and dependence, Pearson rejects these connections. His conclusion is important because the cause of a problem usually determines the response. Pearson views substance abuse and social security payments as the specific cause of problems in Cape York communities, as well as for Aboriginal and Torres Strait Islander peoples elsewhere. This approach diverts attention from governments and their responsibilities, and focuses blame on Aboriginal peoples.

At the same time that AMPs were introduced and liquor licenses removed from Councils to deal with alcohol related issues, the CYWR was implemented in an attempt to gain compliance with other desired social norms. The harshest measure which affects many in the communities – whether they use substances or not – is the isolation of a large proportion of social security payments as a way of controlling the behaviour of Aboriginal people, and thus essentially their

²⁸⁹ Cape York Institute for Policy and Leadership, above n 2, 19-20.

²⁹⁰ See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 28; Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence report*, above n 29; Fitzgerald and Queensland Department of the Premier and Cabinet, above n 30; Noel Pearson, Apunipima Cape York Health Council, Cape York Partnership (Queensland) and Alcohol and Drugs Working Group, above n 31.

²⁹¹ Cape York Institute for Policy and Leadership, above n 2, 18.

lives. The FRC model uses local Aboriginal people in roles as local commissioners, chosen on the basis of their community involvement and standing to assert authority over community members brought before them.

Another reason put forward by Pearson to explain the strong connection between social security payments and the deterioration in social norms is that Aboriginal people in Cape York have failed to become engaged in the mainstream economy. However, one of the most complex and insoluble issues identified in relation to the CYWR communities is their isolation. The CYWR is portrayed as putting into play a process aimed at preparing people for work, and ready to 'orbit' in and out of their community to engage in work. Due to the isolation and limited housing in the CYWR communities, it is not realistic for a person or their family to 'orbit' in and out of their community on a regular basis. It is also unclear whether this lifestyle is even desired by Aboriginal people in these communities. The social norms being sought relate to western concerns, including a particularly western focus on and cultural understanding of the importance of certain jobs and forms of housing, which differ from the social norms and cultural beliefs of Aboriginal people. The CYWR supposes that Aboriginal cultures can be assisted to align with these aspirations, even if people have to leave their communities to attain these goals.

While CDEP was shunned by Pearson, the CYI and possibly the Commonwealth and Queensland governments, the practical reality was that it played a role for Aboriginal people and their communities. Due to the nature and isolation of these communities, when CDEP work was removed and not rolled into paid positions, people were left without work and communities lost valuable services.

Initially the CYWR was a four year trial, but it was extended each year and is now permanent. When the Queensland Liberal National Party was in power in 2013, it raised issues about the cost and application of the CYWR to a small number of communities. However, intervention by Tony Abbott, the Commonwealth Opposition Leader at the time, its continuation as a joint State-Federal government process, and the influence of Pearson, illustrate that the CYWR is highly politically charged. There has been no cost benefit analysis,

despite two reviews of the scheme, nor any mention of an exit strategy, indicating that either the CYWR will continue for as long as governments will fund it, or that it will simply cease when the money runs out.

Another controversial aspect of the CYWR is that the consultation process has always been questionable. Despite a process being documented by the CYI, the views of community members portray a lack of understanding and knowledge of the process the CYI's consultation process. The example provided above in relation to Hope Vale indicates that housing and other incentives unrelated to the CYWR may have enticed the Council to agree to the CYWR. This is not a denigration of the Council. It is well understood that each community lacks sufficient housing, infrastructure, jobs and funds, and that it is the role of councils as well as the Queensland and Commonwealth governments to do their best to provide for community needs. However, in the case of the CYWR communities, or at least Hope Vale, assistance from the Commonwealth government bound it to accept the CYWR, a process it has no control over.

While governments in Australia seem to acknowledge the importance of at least some form of consultation, courts do not consider consultation as a requirement for special measures. I have suggested that consultation, while it may be important in terms of developing the most suitable measures and delivering them in the most effective way, it was generally not an issue for those targeted by 'traditional' special measures. Although consultation was raised by Brennan J in *Gerhardy v Brown*,²⁹² its importance has not arisen until recently with the introduction of measures limiting rights, such as imposed income management and alcohol restrictions targeting Aboriginal people.²⁹³

Lawyers arguing for consultation in *Maloney* focused on the importance of consultation, and the nature of the measure, without fully contemplating the restrictive formal interpretative approach of the court and its strong deference to the legislature. These issues are examined in detail in Chapter 6 and applied to income management in Chapter 7.

²⁹² (1985) 159 CLR 70, [37] (Brennan J).

²⁹³ *Maloney v The Queen* (2013) 252 CLR 168.

Another controversial aspect of the CYWR is its effects on the human rights of Aboriginal people. Initially, the *RDA* was suspended and therefore didn't apply to the *FRC Act*, but later, without any substantial amendments, the *FRC Act* became subject to the *RDA*. There has not been a challenge to any of the provisions of the *FRC Act* under the *RDA*; however, due to the effect of some of the provisions (particularly income management), they may give rise to potential actions. Although the *FRC Act* disproportionately affects Aboriginal people, it is explained away as a special measure. This disproportionate effect of income management, and information sharing provisions – both restricting particular human rights – are the biggest hurdles for governments. The Commonwealth government indicated its confidence that its legislation was not discriminatory after it applied income management to non-Aboriginal communities, and then reinstated the *RDA*. However, this line of reasoning does not assist the Queensland government because the CYWR remained unchanged, and continued to target Aboriginal people, rather than being extended to the broader community. This remains an issue in relation to the CYWR income management measure being discriminatory, despite other income management measures in major towns and suburbs in Queensland. This is discussed in detail in Chapter 7.

The Queensland government has the added challenge of satisfying its fundamental legislative principles, but it justifies non-compliance with the principles on the basis that the *FRC Act* is aimed at changing particular negative behaviours and because leaders of each community supported the legislation and CYWR. This argument was supported at the Commonwealth level on the basis that it improved Aboriginal people's ability to enjoy their rights and freedoms.²⁹⁴

Of concern are the infringements of the primary principles of our legal system. For example, child protection notifications that have not been investigated and are therefore unsubstantiated are provided to the FRC, and parents or carers who are called before the FRC may need to explain something that may be beyond their knowledge and understanding. Where a domestic and family

²⁹⁴ Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013* (Cth) 6-8.

violence protection order application has been made by police, and respondents do not attend court, orders are made in their absence. Alternatively, respondents may agree to the protection order without making admissions to the facts. In doing so, they may not realise that they will be referred to the FRC where the assumption will be that they perpetrated violence. While these are defects in the *FRC Act* and its processes, they also compromise the legitimacy of the FRC. Another threat to its legitimacy is the lack of community members' understanding of its role. The issue of double punishment was raised in relation to the FRC's powers, especially to order income management. The simple reply that the FRC responses are not punitive²⁹⁵ is unlikely to be the view or experience of a person called before it or a person who receives an income management order, especially if they have already been convicted and punished by a court.

Unlike a number of administrative or even judicial decision-making bodies, the FRC does not have a merits review process. This is perplexing, especially given its relaxed nature, the interrelationships between members of the community, and the strong likelihood that the person called before it is unlikely to understand its processes, or be able to inform the Commission of all relevant information. However, there is an underlying presumption that if a notification is received by the FRC, that the information is correct and the major task is to work out what to do with the person. A simple response of income management occurs when a person doesn't engage with the FRC, seemingly without requirement to assess their needs. It is concerning that this is essentially a legal process dealing with peoples' legal rights by a statutory body mainly constituted by non-legally qualified people. It is a shame that this is not a true community model where local authority can exist in its traditional form. The FRC is a similar model to appointing Aboriginal people as community police: its basis is western law and paternalism. The process fails to question the existing structure and appropriateness of imposed structures and decision making processes. Rather, placing Aboriginal people within mainstream structures is assumed to make the structures culturally appropriate.

²⁹⁵ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 9.

While it is difficult to locate precise information on the money expended on CYWR, it is a significant sum. Despite this expenditure, as I explain in Chapter 7, income management in CYWR communities has not produced any substantiated positive outcomes.

In the next chapter I will examine the history of legislation affecting CYWR communities and provide a brief historical context of each community.

CHAPTER 3: THE CAPE YORK WELFARE REFORM: THE FIVE COMMUNITIES AND THEIR LEGISLATIVE HISTORY

I HISTORY OF POLICY AND LEGISLATION IN QUEENSLAND AFFECTING ABORIGINAL PEOPLES

In this chapter I examine legislation historically applied to the Cape York Welfare Reform (CYWR) communities. In his Cape York Justice Study of 2001 (CYJS), Fitzgerald stated that '[a] knowledge of the legislative regimes that have shackled Aboriginal families and segregated their communities is essential for any understanding of the root causes of many of today's upheavals.'¹ Aboriginal peoples have always been portrayed by governments as 'deficient', incapable of managing their own affairs, whether personal or at a community level, and therefore requiring control by government.

History provides a mechanism to understand the views of government, and to reflect on the different ways in which forms of control have developed. Today, while policy and legislation in this regard remain similar to that of the past – despite enactment of the *Racial Discrimination Act 1975* (Cth) – the reasons for implementing new policy and legislation differ to those of the past. A formal interpretation of inequality not only assumes that treating Aboriginal people like others will achieve equality, but that Aboriginal people should assimilate to the 'mainstream' (white) culture and to adopt mainstream values via a new form of paternalism.

The arrival of European colonists was not welcomed by Aboriginal people. During first contact, and for many years after, Aboriginal people suffered diseases such as smallpox, influenza and syphilis in devastating proportions. Many Aboriginal people were killed by European colonists, and especially by police. Many of the surviving Aboriginal people were moved off their traditional

¹ Tony Fitzgerald and Queensland, Department of the Premier and Cabinet, (2001) 2 *Cape York Justice Study* 4.

lands and placed on missions or reserves. Their land was mainly taken over by European pastoralists.²

Aboriginal people have never ceded their land and continue to maintain strong connections to it. Some of these connections have been fractured over time due to the imposition of non-Aboriginal laws, prohibitions on practising culture and speaking local languages, disruption to the land through mining, farming and development, and people forcibly being moved away. Oppressive Queensland legislation of different kinds was directed at protecting, managing and assimilating Aboriginal people. All these factors have gravely disrupted Aboriginal peoples' culture, including their ability to pass lore, language and knowledge of country on to younger generations.

Most of the CYWR communities are in remote areas of Cape York, or in the case of Doomadgee, in the lower Gulf of Carpentaria. Their remoteness has meant that Aboriginal peoples in and around these communities have been able to maintain their traditional lifestyles. They have therefore been seen as in need of protection from disease, alcohol and exploitative employers, despite government regulating their pay so that they received less money than non-Aboriginal people. Aboriginal cultural practices were seen as holding Aboriginal people back and therefore practising traditional ceremonies and speaking indigenous languages were forbidden. While Aboriginal people in these communities continue their traditions, this is seen as a threat to their wellbeing and progression in contemporary Australia. The CYWR has aimed to change cultural practices to encourage these Aboriginal people to adopt mainstream Australian values and leave their communities.

As Altman and Hinkson explain, the State has, through an array of policies, continuously tried to remove the 'risk' posed by Aboriginal peoples who do not conform to mainstream norms and values. Risk is represented by governments as constituted by an unhealthy and impoverished welfare-dependant population

² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of Charlie Kulla Kulla* (1990) 5; Bruce Elder, *Blood on the Wattle - Massacres and Maltreatment of Aboriginal Australians Since 1788* (3rd ed, 2003); Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

that represents increased future costs to government, social risk to public health and over-representation in the criminal justice system.³ The risk is perceived by federal and state governments as not only an issue for Aboriginal communities and individuals, but for the Australian nation as a whole.

After colonisation, government policies were implemented in an attempt to eliminate or eradicate Aboriginal people.⁴ Other policies included the segregation of Aboriginal communities and individuals from the European colonists and their descendants, which then led to the development of policies of assimilation, meant to 'improve' the lives of Aboriginal people. Self-determination constituted the first positive recognition of Aboriginal cultural difference, including recognition of different forms of land ownership, some elements of customary law and some support for Aboriginal organisations.⁵ The self-determination era in the early 1980s was brief, based on the Queensland government requiring Aboriginal people to run their Councils in the same way as non-Aboriginal Councils.

A *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld)*

In her analysis of *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld) (APRSO Act)*, Kidd states that 'the terms of the Act confirm a primary concern with monitoring inter-racial relations rather than with racial segregation.'⁶ Thornton and Luker comment that under *The APRSO Act* the Queensland government exercised extraordinary levels of control over Aboriginal people's lives.⁷ Reserves – often in isolated areas – were established under this and subsequent legislation.⁸ 'Protectors', mainly police officers, were appointed by the government. Protectors were empowered to

³ Jon Altman and Melinda Hinkson, 'Very Risky Business: The Quest to Normalise Remote-Living Aboriginal People, in Marston, Carey and Gascoigne (eds), *Risk, Welfare and Work* (University of Melbourne Press, 2010) 186-187.

⁴ Ibid 186.

⁵ Ibid 185-187.

⁶ Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs – The Untold Story* (University of Queensland Press, 1997) 47-48.

⁷ Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *UNSW Law Journal* 649.

⁸ Museum of Australian Democracy, *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Qld)* <<http://foundingdocs.gov.au/item-did-67.html>>.

make decisions on all facets of Aboriginal people's lives, including whether an Aboriginal person could be employed⁹ and where Aboriginal people could live. The Queensland government could force Aboriginal people to live on reserves¹⁰ and to move people from one reserve to another, sometimes as punishment for certain behaviours.¹¹

Certain people were exempted from being required to live in a reserve, including those who were lawfully employed,¹² those with a permit to be absent from a reserve, a woman married to and living with a non-Aboriginal man, and other people for whom the Minister opined adequate provision had been made.¹³ *The Aboriginals Protection and Restriction of the Sale of Opium Act Amendment Acts of 1934* (Qld) widened control to include people of any mixture of Aboriginal descent, where previously it was limited to people of Aboriginal/European descent. Young people under 21 years (previously 16 years) were in the government's control and all exemption certificates were cancelled.¹⁴ Exemption certificates enabled Aboriginal people to live as Europeans on the basis that they had European and Aboriginal heritage and were therefore believed to be able to manage their property. However, they were unable to associate with other Aboriginal people or practice their traditional cultures.¹⁵

Aboriginal people on reserves were prohibited from exercising their traditional rites or customs. Reserves were either controlled by the government or by religious missions. Although the churches were required to comply with

⁹ See, eg, Kidd, above n 6, *The Way We Civilise: Aboriginal Affairs – The Untold Story*, 48; Thornton and Luker, above n 7.

¹⁰ While exemption could be applied for, it was usually required that the person show that they could manage their own affairs and that they did not associate with other Aboriginal people. An exemption could be revoked at any time and exemptions did not mean that the person's money and property would be released to them from the control of the Chief Protector. From Kathy Frankland, Community and Personal Histories, Queensland Department of Communities, *A Brief History of Government Administration of Aboriginal and Torres Strait Islander Peoples in Queensland* (1994) 7 <http://www.slq.qld.gov.au/__data/assets/pdf_file/0008/93734/Admin_History_Aboriginal_and_Torres_Strait_Islanders.pdf>.

¹¹ See, eg, *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 9; Kidd, above n 6, *The Way We Civilise: Aboriginal Affairs – The Untold Story*, 49.

¹² A Protector could allow an Aboriginal person to be employed by a trustworthy person: *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 10.

¹³ *Ibid.*

¹⁴ Fitzgerald, above n 1, 2.

¹⁵ Frankland, above n 10, 7.

legislation,¹⁶ the government still controlled mission communities through directions and funding agreements.¹⁷

Attwood, Burrage, Burrage and Stokie suggested five reasons why colonial governments created Aboriginal reserves.¹⁸ They were places intended to protect Aboriginal people from the negative effects of contact with Europeans – such as the impacts of disease and alcohol, from exploitation by European employers to protect Aboriginal women from white men. Reserves were also seen as self-sufficient communities supervised by Europeans, or where Aboriginal people could be independent through employment in the pastoral industry or in other areas. Reserves were also used as places to socialise Aboriginal people with the aim of assimilation into the mainstream, ‘white’ community; however, for many people in towns, reserves were a place where Aboriginal people were ‘out of sight, out of mind’. Reserves also provided a cheap labour pool¹⁹ whereby the government hired out Aboriginal labour and received the workers’ wages.²⁰ Government Regulations in 1919 set Aboriginal wages in the pastoral industry at two-thirds the rate of non-Aboriginal workers. The rate remained virtually unchanged until the late 1960s.²¹

Although Aboriginal people comprised most of the work force in the cattle industry, these workers only received a portion of their wage as pocket money, often never receiving the money owed to them.²² This remains an issue today, as the Queensland government used the money as general revenue, profited from interest on the monies invested, and was, and is, unwilling to acknowledge that the monies were held in trust for those from whom they were taken and that it had a fiduciary duty to act in good faith as a trustee.²³

¹⁶ *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

¹⁷ *Baird v Queensland* [2006] FCAFC 162.

¹⁸ Bain Attwood, Winifred Burrage, Alan Burrage and Elsie Stokie, *A Life Together, A Life Apart: History of Relations Between Europeans and Aborigines* (Melbourne University Press, 1994) 5-6.

¹⁹ *Ibid*, 5-6.

²⁰ Loretta de Plevitz, ‘*Working for the Man: Wages Lost to Queensland Workers 'under the Act'*’, (1996) 3 *Aboriginal Law Bulletin* 4-8.

²¹ See, eg, Fitzgerald, above n 1, 2; *ibid*, 4.

²² See, eg, de Plevitz, above n 20, 4; Thornton and Luker, above n 7, 648-649.

²³ Rosalind Kidd, *Stolen Wages – US and Queensland*
<<http://www.linksdisk.com/roskidd/tpages/t31.htm>>.

This Act was in place from 1897 to 1939; however, it essentially continued under the guise of different legislation until the early 1970s,²⁴ with underpayment of wages continuing until approximately 1984.²⁵

B *The Aboriginal Preservation and Protection Act, 1939 to 1946 (Qld)*

In the case of *Baird v Queensland*,²⁶ Dowsett J referred to a letter dated 8 August 1950 from the Deputy Director of the Department of Health and Home Affairs, which said that an implied policy of *The Aboriginal Preservation and Protection Act 1939 to 1946* (Qld) was to provide protection and guidance with the ultimate aim of providing self-control. However, despite the stated policy to protect against exploitation,²⁷ in practice the government exploited Aboriginal people through underpayment of wages and mismanagement of their monies.²⁸ Further, this Act required a percentage²⁹ of wages to be contributed to a Welfare Fund for the general benefit of Aboriginal people, and that all Aboriginal people living on reserves and settlements work without pay on development and maintenance of the reserves for up to 32 hours a week.³⁰ The Welfare Fund also included monies from proceeds of sales of produce, store sales from reserves, deceased estates, fines or fees, and interest from all trust accounts.³¹

Initially, Aboriginal residents on reserves were given rations and pocket money; however, Dowsett J referred to a passage from 'Gangurru'³² where the Hope Vale Mission Board stated that this could only have a detrimental effect, inferring that it created dependency. This changed over time so that those working received payment for their work, while some left the community to do work in mining or as stockmen.³³

²⁴ Garth Nettheim, *Victims of the Law: Black Queenslanders Today* (George Allen & Unwin Press) 5.

²⁵ *Bligh v Queensland* [1996] HREOCA 28.

²⁶ [2005] FCA 495.

²⁷ *Baird v Queensland* [2005] FCA 495 21.

²⁸ Fitzgerald, above n 1, 15-17.

²⁹ Five percent of gross earnings for a person without dependants and ten percent from those with dependants. This money was withheld from the wage paid to the person.

³⁰ See, eg, de Plevitz, above n 20; Thornton and Luker, above n 7, 649.

³¹ Frankland, above n 10.

³² 'Gangurru' provides a detailed history of the Cape Bedford and Hope Vale Lutheran missions. See Howard Pohlner, *Gangurru*, (Hope Vale Mission Board, Queensland, 1986).

³³ *Baird v Queensland* [2005] FCA 495, at 25-27.

The first Aboriginal councils were elected on reserves in the 1940s. They played a purely advisory role, with governance and law remaining in the hands of the State.³⁴ Aboriginal people were explicitly excluded from voting in State elections, had no access to alcohol, and had their movements and relationships controlled. Certificates of exemption required Aboriginal people to sever their relationships with their families back on missions and with other Aboriginal people.³⁵ Children – especially those of ‘mixed blood’ – were taken, not because of neglect, and were often adopted out, or employed by white families as servants.³⁶ This was to progress assimilation by removing children from their family and culture. These children came to be known as the ‘Stolen Generation’.

During this period, the *Aboriginals Regulations 1945* (Qld) were enacted. The Regulations were similar to *The APRSO Act*, with increased powers for the Director of Native Affairs in the specific areas of Aboriginal property, Aboriginal courts, Aboriginal police and Aboriginal gaols.³⁷ Aboriginal courts will be explained below.

C The Aborigines' and Torres Strait Islanders' Act of 1965 (Qld)

The 1960s were a time of national and international pressure on Queensland to remove its discriminatory controls over Aboriginal people. The Queensland government responded by making Aboriginal people free citizens, unless they were deemed in need of ‘assistance’.³⁸ In the same decade, Aboriginal people became formally equal in terms of citizenship, due to enfranchisement at a Commonwealth level in 1962, and at a state level in 1965. The result of the federal referendum in 1967 meant that Aboriginal people could be counted as Australian citizens and the Commonwealth was given the power to make laws

³⁴ Michael Limerick, 2010, *Scoping paper: Indigenous Council Capacity-Building in Queensland*, Prepared for the Australian Centre for Excellence of Local Government, 6. <http://www.acelg.org.au/upload/program5/1280998171_ACELG_Scoping_Paper_Qld_Indigenous_Councils.pdf>.

³⁵ Fitzgerald, above n 1, 2.

³⁶ Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney, 1997, ch 5.

³⁷ Frankland, above n 10, 9.

³⁸ Fitzgerald, above n 1, 3 and 11.

for Aboriginal and Torres Strait Islander peoples. However, Aboriginal people continued to be viewed and treated as the 'other'.³⁹

Despite the above measures aimed at achieving equality, Aboriginal people living on reserves in Queensland came under the *Aborigines' and Torres Strait Islanders' Act of 1965* (Qld) (*1965 Act*) and were termed 'assisted' persons.⁴⁰ The Director of Native Affairs and a Magistrates Court could also declare any Aboriginal or Islander person not living on a reserve to be 'assisted'. Protectors – renamed as District Officers under the Act – retained the power to manage the property of Aboriginal people if they decided it was in the best interests of that person.

John Belia, an Aboriginal stockman from Mount Isa, challenged the Department of Aboriginal and Islander Affairs' classification of him as 'assisted'. The process of classifying a person as 'assisted' was somewhat automatic because it was assumed that it was likely that Aboriginal people could not manage their own affairs. In court, Belia was questioned as to his ability to recognise the value of different amounts of money, the intent being that if he could do so, he would prove himself able to manage his own finances. The court found in Belia's favour.⁴¹ However, the court did not require the government to prove why it had classified Belia as an assisted person.

At this time, Aboriginal people required permits to live on reserves. These permits could be revoked by the Director, who could transfer people between communities at will. Although Aboriginal people could legally drink alcohol, they could not do so on reserves. The governance of children was explicitly mentioned in the Act; dormitories became places to detain children on missions and reserves who attempted to escape, were undisciplined, didn't comply with

³⁹ Thornton and Luker, above n 7, 651-652.

⁴⁰ All assisted Aboriginal and Torres Strait Islander people were issued with Certificates of Entitlement. They, or the Director, could request that the Certificates of Entitlement be cancelled if it was thought the person no longer needed to be subject to the Act.

⁴¹ See, eg, Sue Taffe, 'Making a Difference: A 1960s Partnership Opposing Racial Discrimination' (2000) 161 (Summer) *Overland* 62, 64-65; National Museum Australia, Collaborating for Indigenous Rights, *Queensland Trust Fund, 1969-72: Taking the Act to Court* <http://indigenoustrights.net.au/civil_rights/queensland_trust_fund,_1969-72>.

hygiene requirements, were viewed as idle, or were thought to be irresponsible at work.⁴²

The Governor-in-Council could, by regulation, establish Aboriginal courts in communities where Aboriginal Councils existed. These courts exercised jurisdiction, functions, duties and powers as prescribed. Essentially and unusually, the Queensland Parliament delegated these important matters to the executive.⁴³

Aboriginal courts at the time were either constituted by two or more Aboriginal Justices of the Peace, or, if this was not possible for any reason, by three members of the Aboriginal Council. The courts continued with amendments under the *Aborigines Act 1971* (Qld).⁴⁴ Issues relating to these courts included inadequate legal training or experience by those applying laws and a lack of legal representation for those before the courts. Section 9 *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) provided an entitlement of legal representation and access to equivalent rights of appeal as in a Magistrates Court. Nettheim comments that these requirements were ignored for several years, the appeal issue not being addressed properly until 1979.⁴⁵

Today, Justice of the Peace (JP) Magistrates are still present in most Aboriginal communities.⁴⁶ Indication of a guilty plea is required for a person to be referred by police to a JP Magistrates Court and the same issues continue in terms of lack of representation and knowledge of appeal rights.⁴⁷ This is important, as JP Magistrates have most of the powers held by other Magistrates, including

⁴² Fitzgerald, above n 1, 3.

⁴³ Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 99.

⁴⁴ Ibid 100.

⁴⁵ Ibid 100-103.

⁴⁶ Department of Justice and Attorney-General, Government of Queensland, *Remote Justice of the Peace (Magistrates Court) Program* <http://www.courts.qld.gov.au/__data/assets/pdf_file/0003/205644/cip-fs-remote-jp-mag-court-program.pdf>.

⁴⁷ Chris Cunneen, Fiona Allison, Heron Loban, Garth Luke and Kate Munro, The Cairns Institute, James Cook University, *Evaluation of the Remote JP Magistrates Court Program: Final Report* (October 2010) 10 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/88904/evaluation-of-the-remote-jp-magistrates-court-program.pdf>.

being able to sentence people to imprisonment. However, they tend to rely heavily upon fines as punishment.⁴⁸

D *Aborigines Act 1971 (Qld) and the Aborigines Regulation of 1972 (Qld)*

The *Aborigines Act 1971 (Qld) (1971 Act)* allowed permits to be issued⁴⁹ which enabled Aboriginal people to live on reserves⁵⁰ or to visit the reserves.⁵¹ However, if a person left the reserve the permit was terminated if it was a residence permit, unless the departure was temporary. Aboriginal people did not have a right to be on a reserve of their choosing; only particular government officials had such a right.⁵²

Specific by-laws were created for Aboriginal reserves, referred to as Queensland Aboriginal Council By-Laws. Despite the name, the by-laws were not developed by Aboriginal Councils, but were a standard set of by-laws imposed upon them and their communities by the Queensland government. The by-laws applied in each Aboriginal reserve⁵³ from the 1970s until the early to mid-1980s.⁵⁴ The content of the by-laws differed from those that applied to non-Aboriginal communities in that the by-laws for Aboriginal people granted the Reserve Manager greater control over people's private affairs.⁵⁵ Reserve Managers were appointed by the Queensland government, with reserve community members and the Council⁵⁶ being answerable to the Manager.⁵⁷ These controls enabled the Reserve Manager to place certain prohibitions on Aboriginal communities. For example, the Reserve Manager could prohibit

⁴⁸ Ibid 37-39.

⁴⁹ From Aboriginal Councils and the Director, both having the power to revoke permits.

⁵⁰ Frankland, above n 10, 10.

⁵¹ Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 43.

⁵² Ibid 44-45.

⁵³ The exceptions to this were Aurukun and Mornington Island which were de-gazetted as reserves in 1978.

⁵⁴ Australian Human Rights Commission, *Aboriginal Reserves By-laws and Human Rights, Occasional Paper No. 5* (Australian Government Publishing Service Press, 1983) 22-23.

⁵⁵ For example, Chapter Four refers to a prohibition on telling tales about others 'so as to cause domestic trouble or annoyance to such person.'

⁵⁶ *Aborigines Regulations 1972 (Qld)* r 19.

⁵⁷ Australian Human Rights Commission, above n 54, 40-41.

gambling, could require a person to have a health check, could supervise hygiene and sanitation, and could prohibit traditional practices.⁵⁸

As a result of the *1971 Act*, beer canteens were approved for reserves, and Aboriginal Councils were able to sell beer four hours a day. A court could prohibit a person buying or consuming beer where it was believed the person drank excessively and wasted their money, injured their health or disrupted their family's peace and happiness. State police could also be stationed where necessary.⁵⁹

The *Aborigines Regulation of 1972 (Qld) (1972 Regulation)* stated that Aboriginal workers were to be employed based on award conditions where they existed, otherwise they were entitled to the basic wage. However, Aboriginal workers on reserves continued to be paid rates that were under award wages – if at all – and excluded from award conditions. Workers deemed aged, infirm or slow were paid even less.⁶⁰

When the *1971 Act* was passed, the term 'assisted' no longer applied. However, Aboriginal people whose property was previously managed continued to be managed, unless the Director approved a request that it cease. In 1974, the *Aborigines Act and Torres Strait Islanders Amendment Act 1974 (Qld)* repealed the provision of the *1971 Act* pertaining to management of property. Aboriginal and Torres Strait Islander people could then manage their own property, although they were required to complete and sign a written notification, witnessed by a Justice of the Peace, and give it to the District Officer before this could occur.⁶¹ In 1975, the Commonwealth Government implemented the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)*, which required an Aboriginal person's consent for their property to be managed,⁶² and the *Racial Discrimination Act*

⁵⁸ Ibid 25, 26, 28, 29, 30 and 38.

⁵⁹ Fitzgerald, above n 1, 3, 15.

⁶⁰ Thornton and Luker, above n 7, 649-650.

⁶¹ Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 7.

⁶² *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)* s 5(1).

1975 (Cth) (*RDA*),⁶³ which included a similar provision. The *RDA* prohibited discrimination and implemented the *International Convention on All Forms of Racial Discrimination (ICERD)*. Section 10 *RDA* ensures that where legislation reduces or nullifies the rights enjoyed by persons of a particular race, those persons are able to enjoy the rights to the same extent as others.⁶⁴ In referring to rights, s 10 *RDA* incorporates the rights listed in Art 5 *ICERD*.⁶⁵

The above legislation enabled employment conditions on reserves to be challenged. In *Bligh v Queensland*,⁶⁶ before the Human Rights and Equal Opportunity Commission (HREOC), the Queensland government argued that industrial awards – which provide minimum wages and conditions – did not apply to Aboriginal people on reserves.⁶⁷ The government also argued that the complainants were paid for work ‘in an institutional, social welfare and training setting’, as opposed to an industrial setting.⁶⁸ The government said that under the *1971 Act* and the *1972 Regulation*, Aboriginal people on Palm Island had to work if the Director or Manager of the Reserve required and therefore there was no employer and employee relationship. Commissioner Carter rejected this, saying it did not apply from 1975 because of the *RDA*,⁶⁹ and was not supported by evidence.⁷⁰

The government’s alternate argument was that there was no industrial award for the work requiring the employees to be paid at a particular rate, nor were specific terms and conditions relevant. In that case, the complainants were employed on the same terms and conditions as others with similar qualifications and in similar circumstances.⁷¹ The remaining argument of the government was one of particular application to this thesis. The government argued that the entire *1971 Act* and the *1972 Regulations* were a special measure for the

⁶³ Also see, the *Racial Discrimination Act 1975* (Cth) s 10(3) for an equivalent provision to the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) s 5.

⁶⁴ *Racial Discrimination Act 1975* (Cth) s 10(1).

⁶⁵ *Ibid* s 10(2).

⁶⁶ [1996] HREOC 28.

⁶⁷ *Bligh v Queensland* [1996] HREOCA 28.

⁶⁸ *Ibid* 12.

⁶⁹ In 1975 the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) and the *RDA* were enacted prohibiting racial discrimination.

⁷⁰ *Bligh v Queensland* [1996] HREOCA 28, 21-22.

⁷¹ *Ibid* 12.

benefit of Aboriginal people. Therefore, any complaint that they were discriminatory was excepted by s 8(1) *RDA*. This was despite an absence of provisions in the *1971 Act* referring to employment of Aboriginal people by the Director, or any provisions relating to employment terms and conditions. Similarly, the *1972 Regulations* only referred to employment of Aboriginal peoples who were not on a reserve.⁷²

Commissioner Carter rejected the first two arguments of the government. He held that the government's first argument relating to a training wage ignored the reality of Aboriginal people's employment status and failed 'to do justice to the considerable work skills' of the complainants.⁷³ He found that each complainant was discriminated against in their employment because they were paid less than they were entitled, based on their race.⁷⁴ In regard to this inferior treatment of Aboriginal people, Carter C commented that the policy stemmed from the 'paternalism towards Aborigines who were seen as being in need of protection'.⁷⁵ He said that while it could be argued that the policy intention was honourable, the government intended to discriminate even though they thought the reasons were justified.⁷⁶

On the issue of special measures, Carter C said that the *1971 Act* and the *1972 Regulations* could not be said to have the sole purpose⁷⁷ of securing the adequate advancement of Aboriginal people to ensure they enjoyed the rights to equal pay, just and favourable conditions of work equality, and so on.⁷⁸ Rather, Carter C said that the legislation was administered in a way that denied Aboriginal people, including the complainants, the enjoyment and exercise of these rights.⁷⁹ Therefore, Carter C said the legislation could not be defined as

⁷² Ibid 12, 35.

⁷³ Ibid 20.

⁷⁴ Ibid 31, 32.

⁷⁵ Ibid 32.

⁷⁶ Ibid 32.

⁷⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

⁷⁸ Ibid art 5(e).

⁷⁹ *Bligh v Queensland* [1996] HREOCA 28, 36.

a special measure, requiring the government to pay \$7,000.00 to each complainant for unpaid wages.⁸⁰

Employment conditions were just one of many deficiencies endured by Aboriginal people on missions and reserves in the 1970s. Fitzgerald noted that the Queensland government acknowledged that dysfunction experienced by Aboriginal people was exacerbated by increased rents and that high unemployment would result in low morale and alcoholism.⁸¹ During this period, another significant, related issue was the quality of housing on the reserves. This remains an issue for CYWR communities. In the CYJS, Fitzgerald found living conditions on reserves were inadequate. In the mid-1970s, Aurukun only had one water tap for each ten houses, six showers and one laundry for 650 people. Housing was substandard and described by Fitzgerald as huts people had said 'should be burned'.⁸² People suffered severe illnesses, such as malnutrition, scabies and venereal disease due to the environments in which they lived. Fitzgerald referred to the Queensland Institute of Medical Research, which found a link between malnutrition, inadequate housing and access to essentials such as clean running water, as well as a lack of separate areas in houses to shower, prepare food and wash clothes. The government ignored this research, and instead blamed parents as incompetent. It sent welfare officers into communities to inspect homes and liaison officers to watch over school attendance, to write reports on the state of people's homes, and to pursue rent monies. Domestic advisors encouraged mothers to access medical facilities and encouraged interest in health, education and home beautification.⁸³ All of these efforts were directed at the presumption that Aboriginal people were deficient. It failed to acknowledge and address the fundamental issues of overcrowding and lack of adequate basic services, such as water and housing.

⁸⁰ Ibid 38-39.

⁸¹ Ibid 36.

⁸² Fitzgerald, above n 1, 12.

⁸³ Ibid 12-13.

E The 1980s – Self Determination?

As a result of the *RDA*, and the requirement to pay adequate wages to Aboriginal people on reserves, the Queensland government sought further funding from the Commonwealth government based on the view that federal legislation was responsible for the increased wages, and therefore that the Commonwealth should fund the increase. In the 1980s, when funding was not forthcoming, the Queensland government sacked a number of workers in Aboriginal communities, which required the Commonwealth to provide unemployment benefits. By the late 1980s, after a period of diminished funding for the maintenance of these communities, their assets and infrastructure, the Queensland government handed local government functions to Aboriginal Councils, as part of a self-management policy.⁸⁴ The *Community Services (Aborigines) Act 1984* (Qld) replaced the *Aborigines Act 1971* (Qld),⁸⁵ vesting Aboriginal Councils with local government authority status.⁸⁶ While there was significant progress in recognising the rights of Aboriginal peoples' during the era of self-determination, it was essentially 'a bureaucratic notion imposed on Indigenous communities, with limited institutional capacity, who were expected to comply with bureaucratic frameworks.'⁸⁷

In 1986, the Department of Community Services started to hand core functions of community government to Aboriginal Councils. The Council members received minimal training or capacity development. There was supposed to be a transition period where the Queensland Department of Community Services Transitional Functions Unit provided training and support; however, this did not occur. By this point the communities had experienced long term financial,

⁸⁴ Michael Limerick, above n 34, 6-7.

⁸⁵ Frankland, above n 10, 11.

⁸⁶ Limerick, above n 34, 6.

⁸⁷ Jill Webb, 'Indigenous Peoples and the Right to Self Determination' (2012) 13 *Journal of Indigenous Policy* 95. See also Australian Human Rights and Equal Opportunity Commission, *Social Justice Report* (2002) 28 <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/hreoc-social-justice>>; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4 39; Tim Rowse and Australian National University, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination*, North Australia Research Unit, Australian National University Darwin (1992), 98 <<https://digitalcollections.anu.edu.au/handle/1885/9045>>.

industry, resource and asset deprivation, including overcrowded and deficient housing, and entrenched poverty.⁸⁸

Hope Vale Council was recorded as saying at the time that 'self-management' was the trend and that money was provided for them to govern everything.⁸⁹ However, while there may have been enough money, the Councils lacked the capacity to conduct their official tasks. Aboriginal Councils were now required to do the same tasks as non-Aboriginal Councils, but without income from rates, and with the additional tasks of managing social welfare functions, including: providing and maintaining community housing; managing employment programs including CDEP; running a community police force; delivering social programs such as local justice initiatives; drug and alcohol abuse prevention; suicide prevention; family support; aged care; and child care. A 2001 Queensland government report showed that Aboriginal Councils had 59 areas of functional responsibility, compared to 34 for non-Aboriginal Councils.⁹⁰ Councils usually took on the additional responsibilities that would be generally outside the jurisdiction of non-Aboriginal Councils because of the lack of other organisations to conduct them in Aboriginal communities. Further, Aboriginal Councils often conducted private sector functions including acting as bank agents, running petrol stations, retail stores, post offices⁹¹ and selling alcohol.

The CYJS led to a Green Paper review⁹² of Aboriginal and Torres Strait Islander community governance. As a result, the *Community Services (Aborigines) Act 1984* (Qld) was repealed so that Aboriginal Councils could be transitioned to operate under the *Local Government Act 1993* (Qld).⁹³ Under the *Local Government Act 2009* (Qld) Aboriginal Councils now have the same reporting requirements as non-Aboriginal Councils,⁹⁴ but continue to have greater responsibilities than non-Aboriginal councils.

⁸⁸ Fitzgerald, above n 1, 13-14.

⁸⁹ See Limerick, above n 34, 6.

⁹⁰ Ibid 7.

⁹¹ Ibid 9.

⁹² Conducted by the Queensland Department of Aboriginal and Torres Strait Islander Policy in 2003.

⁹³ The *Local Government (Community Government Areas) Act 2004* (Qld) was the transitioning legislation, running for four years.

⁹⁴ Limerick, above n 34, 7.

II LAND MATTERS

Aboriginal reserves were governed by the *Land Act 1962 to 1978 (Qld)* (*Land Act*). Tenure was vulnerable as reserves were only intended to be temporary under the Queensland government's assimilation policy.⁹⁵ It was not expected that Aboriginal people would continue to live on reserves and for them to become fully functioning communities. In 1975, the Commonwealth government established the Aboriginal Land Fund Commission, which then became the Aboriginal Development Commission. The Commission was created to receive funding to buy land for Aboriginal people. While working well in other States, in Queensland only 18% of land was freehold, with most being leased Crown land. Many proposed purchases were denied because there was a Cabinet policy against land acquisition for Aboriginal people, with the Queensland Minister retaining absolute discretion over the transfer of leasehold land under the *Land Act*.⁹⁶

Between 1974 and 1976, the Winchanam people from Aurukun applied to acquire leasehold land between Aurukun and Coen for cattle grazing,⁹⁷ but were refused by the Queensland government on the basis of the abovementioned Cabinet policy.⁹⁸ The refusal was challenged in the High Court in *Koowarta v Bjelke-Petersen*,⁹⁹ by arguing racial discrimination under ss 9 and 12 *Racial Discrimination Act 1975 (Cth)* (*RDA*). The Queensland government asserted that the *RDA* was not valid and therefore the Queensland government had full power to refuse the transfer. However, in 1982 the High Court¹⁰⁰ held the *RDA* was valid, falling within the external affairs power¹⁰¹ and thus finding for the Winchanam people,¹⁰² who were the Traditional Owners of

⁹⁵ Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 36-37.

⁹⁶ *Ibid* 9.

⁹⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 177 [2] (Gibbs CJ).

⁹⁸ See, eg, *ibid*; Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 9.

⁹⁹ (1982) 153 CLR 168.

¹⁰⁰ The High Court decided that the *Racial Discrimination Act 1975 (Cth)* was enacted to implement the *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*, with the external affairs power in the Constitution providing the Commonwealth the power to pass the *RDA*. The Queensland Government raised the validity of the *RDA*, however the High Court decided it was valid.

¹⁰¹ *Commonwealth of Australia's Constitution Act 1900 (Cth)* s 51(xxix).

¹⁰² See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; Race Discrimination Commissioner, Zita Antonios, *Battles Small and Great: The First Twenty Years of the Racial Discrimination Act*, 1995 (Australian Government Publishing, 1995) 16-17.

the area. The Queensland government thwarted the result by changing the tenure status of the land to a National Park to prevent its transfer.¹⁰³ In 2010 the Queensland Premier moved legislation to revoke part of the National Park to transfer to the Winchanam people.¹⁰⁴ Almost two years later, a large area of the land was transferred to the Winchanam people and a joint management agreement was reached between the Queensland government and the Winchanam people, and the Queensland government apologised for the past wrong.¹⁰⁵

In 1982 the Queensland government passed the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld),¹⁰⁶ which enabled it to grant Aboriginal reserve land to Aboriginal Councils as Deeds of Grant in Trust (DOGIT). The legislation was amended in 1984, enabling the resumption of land granted in trust.¹⁰⁷ This was supposed to fulfil Aboriginal peoples' desire for self-management. However, the terms of the tenure required ministerial approval before Councils could lease it to residents. Aboriginal Councils relied upon funding from rents, alcohol sales, federal pensions and CDEP. However, funding was inadequate to pay staff and conduct their functions. There were no funds to maintain infrastructure. Fitzgerald commented that limited funding and lack of political power meant Aboriginal Councils were being set up to fail. Councils' funding position forced them into heavy reliance upon alcohol sales.¹⁰⁸

In 1984, Bob Katter – the then Queensland Minister for Aboriginal and Islander Affairs – gave all Aboriginal communities DOGIT in support of Aboriginal self-management. While DOGIT meant the land was communal and could not be

¹⁰³ Australian Broadcasting Corporation, Radio National, 'John Koowarta's Case and the Racial Discrimination Act at 40', *Earshot*, 18 May 2015 (Lorena Allam) <<http://www.abc.net.au/radionational/programs/earshot/the-racial-discrimination-act-at-40/6478198>>.

¹⁰⁴ Department of National Parks, Sport and Racing, Government of Queensland, *Nature Culture and History* (25 February 2015) <<http://www.nprsr.qld.gov.au/parks/oyala-thumotang/culture.html>>.

¹⁰⁵ Australian Broadcasting Corporation, 'Cape York Land Agreement Makes History', *7:30 Report*, 22 May 2012 (Peter McCutcheon) <<http://www.abc.net.au/7.30/content/2012/s3508700.htm>>.

¹⁰⁶ There was no consultation with the relevant communities in regard to this legislation.

¹⁰⁷ Frankland, above n 10, 11.

¹⁰⁸ Fitzgerald, above n 1, 30-32.

sold or transferred for private gain, it also meant that the Queensland government could continue to control and benefit from mining over these areas.¹⁰⁹

III PAST POLICIES FOR MANAGING ABORIGINAL PEOPLES' MONEY AND PROPERTY

There is a long history of state government interference with Aboriginal peoples' property rights. From 1901, the Queensland government managed the property of Aboriginal people under its control. This included the possession, sale or disposal of a person's property. By 1919, the wages of rural Aboriginal workers were paid to the government, while community workers were not paid at all. Requests for funds or vouchers for local stores had to be made to Protectors with information provided on what was to be bought. Requests were often rejected depending on the Protectors' view of the need for particular goods. There was widespread fraud by Protectors and others, poorly-kept records contained irregularities, and unused withdrawal slips were already thumb-printed and witnessed. Aboriginal people often had to travel hours to see a Protector. Police acting as Protectors refused requests on the basis that they were too busy or because they considered them unjustified.¹¹⁰ While this was occurring, Aboriginal families were living in dire poverty, despite the Government holding \$16.8 million of Aboriginal peoples' money by the 1960s.¹¹¹

Underpayment of wages was also a consistent issue for Aboriginal peoples. In the 1970s, Aboriginal women with children were financially better off on social security than a husband's wage. This resulted in households without men, which caused issues for men who started to question their sense of self-worth, while women and children missed out on their support.¹¹²

¹⁰⁹ Kidd, above n 6, *The Way We Civilise: Aboriginal Affairs – The Untold Story*, 325.

¹¹⁰ Rosalind Kidd, 'The Requirement for Accountability', (paper presented at Queensland University of Technology, Brisbane, June 2006)
<<http://www.linksdisk.com/roskidd/tpages/t28.htm>>.

¹¹¹ Fitzgerald, above n 1, 15-17.

¹¹² *Ibid* 16-17.

Although the CDEP was a Commonwealth government initiative, it was suggested by the Queensland government as a part-time work 'solution' to rising unemployment for a number of reasons, including equal wages.¹¹³ CDEP money was given to Aboriginal Councils to pay CDEP staff, rather than to the Queensland government, as was once contemplated. The Queensland government opposed this because by bypassing it, Councils were given the power to decide work projects and pay wages.¹¹⁴ The CDEP scheme was essentially similar to the later work for the dole schemes with pay rates slightly higher than unemployment payments and often using unskilled labour. Fitzgerald states that most CDEP work was in public administration and community services; however, in non-Aboriginal communities, these roles were funded by state and local governments.¹¹⁵ This is effectively another example of how Aboriginal people and their organisations are treated differently by governments, to their disadvantage.

IV ABORIGINAL COMMUNITY 'REFORM'

The consequences of past policies of colonisation and dispossession have been negative and wide-ranging for Aboriginal people. In 1995, the Race Discrimination Commissioner stated that '[t]he link between dispossession and mistreatment, social disintegration, economic marginalisation, unacceptable health standards and lack of opportunity is widely documented.'¹¹⁶ It is arguable that these policies continue today, most notably in the form of imposed Alcohol Management Plans (AMPs), child protection, land tenure, behaviour change and income management in the CYWR.

A vast array of issues – including crime and justice, government services and funding, governance, a sustainable future, health, education, land and economic development – were canvassed by the CYJS. These were and are

¹¹³ Ibid 20-21.

¹¹⁴ Ibid 20-21.

¹¹⁵ Ibid 21-22.

¹¹⁶ Race Discrimination Commissioner, *Alcohol Report, Racial Discrimination Act 1975: Race Discrimination, Human Rights and the Distribution of Alcohol* (Australian Government Publishing Service, 1995) 4.

still considered central to the problems in Cape York communities.¹¹⁷ However, key to the report was a holistic approach where government was to work with the communities to find local solutions. Despite this, the recommendations most referred to have, to date, been in regard to alcohol and alcohol-related violence. The National Report for the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) also targeted alcohol:

[A]lcohol is ... particularly problematic for Aboriginal people owing to their long-term disadvantaged position, their changed status with regard to their land, the destruction of their societies, and the resulting reduction in their self-esteem.¹¹⁸

These views identify alcohol abuse as symptomatic of the conditions imposed upon Aboriginal and Torres Strait Islander people since colonisation. However, an alternative view, provided by Pearson and the CYI – who designed the CYWR¹¹⁹ – supports drastic and punitive measures in the form of imposed AMPs and income management, claiming that alcohol itself is the root cause of these conditions rather than the other way around. For example, the CYJS stated that if alcohol abuse and related violence didn't reduce within three years from the time of its report in 2001, the government should take a more drastic approach to controlling alcohol consumption.¹²⁰

This recommendation was adopted. Since 2002, legislation¹²¹ has been implemented in Queensland restricting access, possession and consumption of alcohol in Aboriginal communities through AMPs, with non-compliance resulting in people being criminally charged. Community Justice Groups (CJGs) were used as a mechanism for the government to consult with

¹¹⁷ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007) 24.

¹¹⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 87, 303.

¹¹⁹ See, eg, Noel Pearson, Apunipima Cape York Health Council, Cape York Partnerships and Alcohol and Drugs Working Group, *Cape York Peninsula Drug Abuse Strategy* (Queensland Cape York Institute for Policy and Leadership Press, 2002) 7-8, 13; Cape York Institute for Policy and Leadership, above n 117, 23.

¹²⁰ Fitzgerald, above n 1, 56, 60.

¹²¹ See, eg, *The Liquor Act 1992* (Qld), the *Aboriginal Communities (Justice, Land and Other Matters) Act 1984* (Qld); *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld).

communities on alcohol and criminal justice related issues. CJGs include Aboriginal and Torres Strait Islander people from the relevant community. Their roles include: assisting community members to understand the justice system; assisting the court when dealing with matters that affect Aboriginal and Torres Strait Islander people; advocating for change to the justice system through court based initiatives; facilitating improved relations between Aboriginal and Torres Strait Islander people, police and courts; and, establishing partnerships with community organisations and the government to implement strategies preventing contact with the justice system.¹²²

In 2008, the Queensland government stated that \$100 million Commonwealth and State funding would be committed to Aboriginal and Torres Strait Islander communities over four years to assist the communities to go as 'dry' as possible. Premier Anna Bligh told the Queensland Aboriginal community Mayors that the services and supports that could be offered included new detoxification and rehabilitation programs, programs like Murri Watch and Cell Watch, sobering up facilities and support for community patrols, greater enforcement of alcohol restrictions with extra support from police and liquor licensing, programs focusing on before and after school activities, and more Police Citizen Youth Clubs and activities for people of all ages.¹²³ However, most of these initiatives were not implemented.

In 2008, the Queensland government further restricted alcohol carriage limits. Though the Queensland government acknowledged that two communities¹²⁴ did not consent to it, it still decided to tighten the limits, a decision made based on the number of hospitalisations from assaults in these communities.¹²⁵ At the

¹²² Department of Justice and Attorney-General, Government of Queensland, *Evaluation of Community Justice Groups*, Final Report (November 2010) 1-2
<http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf>.

¹²³ See, eg, Office for Aboriginal and Torres Strait Islander Partnerships, Department of Communities, Government of Queensland, *Alcohol Reforms – Community Visits* (April 2008) in Explanatory Notes, *Liquor Amendment Regulation (No. 4) 2008* (Qld) 4; Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Queensland Closing the Gap Report: 2008/2009* 57
<<http://www.datsima.qld.gov.au/resources/atsis/government/programs-initiatives/closing-gap/2008-09-annual-report/ctg-0809-safe-communities.pdf>>.

¹²⁴ Yarrabah and Hope Vale.

¹²⁵ *Liquor Amendment Regulation (No. 3) 2008 (Qld)* 4.

same time, the CYWR was being formulated. This became another answer for the government and the CYI to the complex issues in Aboriginal communities in Cape York.¹²⁶

Present legislation and policy – including the CYWR, the Northern Territory intervention (NTI)¹²⁷ and government imposed AMPs – are the outcomes of discussions about the role welfare dependency plays in causing breakdowns in social norms and dysfunction within Aboriginal communities. It is arguable that these policies are strategically the same as those alleged to cause dependency, and will result in further dependency rather than empowerment. However, it is important to acknowledge continued resistance by Aboriginal people of paternalistic laws and policies.¹²⁸

V THE FIVE CAPE YORK WELFARE REFORM COMMUNITIES

This section provides contextual and historical background on each of the five CYWR communities – Aurukun, Hope Vale, Coen, Mossman Gorge and Doomadgee – in order to enable a better understanding of life in these communities. Historical information assists in explaining why these communities suffer from excessive alcohol consumption, unemployment and high crime rates, and have been considered in need of intervention by child protection services. While each of these communities has a unique history, commonalities exist in terms of the impact of the legislation, policies and practices described in this chapter. The following discussion highlights that the interventions and harms were substantially caused by what were usually portrayed as well-intended State and Commonwealth government policies. It also serves to inform the difficult relationship between these communities and governments.

¹²⁶ Cape York Institute for Policy and Leadership, above n 117, 7-8.

¹²⁷ The Northern Territory intervention (NTI) was a swift response by the Commonwealth government to a report ('Ampe Akelyernemane Meke Mekarle' (Little Children are Sacred) on child abuse in the Northern Territory. The NTI included a number of measures, one being compulsory income management.

¹²⁸ Sarah Maddison, 'Indigenous Autonomy Matters: What's Wrong with the Australian Government's 'Intervention' in Aboriginal Communities' (2008) 14(1) *Australian Journal of Human Rights* 41, 49-52.

Today, local, state and federal governments have different responsibilities in relation to these communities. In 1901, the *Commonwealth Constitution* stated that the Commonwealth could legislate for any race except Aboriginal people.¹²⁹ This left the power over Aboriginal affairs in the hands of the states, until the referendum in 1967.

The five communities are diverse in terms of their locations, populations, cultures and external influences. While this may assist in understanding how a measure such as income management may impact community members, it does not assist in informing us why these communities were chosen for the CYWR. It will be seen that each of the CYWR communities differ in many ways, but nevertheless, while there is some flexibility within the CYWR approach, the CYWR assumes the same issues and priorities for each community.

The goals of the CYWR are to rid the communities of 'passive welfare', to require people to acquire 'social responsibility', engage them in the 'real economy' and to re-introduce authority structures and positive social norms.¹³⁰ Some of the ways in which attainment of these goals have been quantifiably measured are: school attendance rates; individuals undertaking volunteer work; crime rates; rates of alcohol abuse; timely payment of rent, maintaining their houses and taking pride in their homes; rates of private home ownership; occurrences of disputes between neighbours; movements from social security to paid employment; individuals 'orbiting' from the community for work; and people establishing businesses.¹³¹ It is not clear that these desired outcomes are in fact linked to the CYWR goals or a priority for community members.

The most recent evaluation of the CYWR in 2012 showed improvements in school attendance rates in Aurukun and Mossman Gorge, while Coen and Hope Vale maintained their already high attendance rates.¹³² At this time, Doomadgee was not included in the CYWR. Child abuse and neglect data

¹²⁹ *Commonwealth of Australia's Constitution Act 1900* (Cth) s 51(xxvi) (since amended).

¹³⁰ Department of Families, Housing, Community Services and Indigenous Affairs, Families and Children, Government of Australia, *What is Welfare Reform?* <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/what-is-welfare-reform>>.

¹³¹ Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Cape York Welfare Reform Evaluation 2012* (2013) 27.

¹³² *Ibid* 29.

showed no statistically significant upward or downward trend in the communities.¹³³ While there was a statistically significant downward trend in the overall offence rate in the communities, this same trend was found in other Aboriginal and Torres Strait Islander communities.¹³⁴

The 2012 evaluation describes the CYWR design as based on compliance emanating from the Family Responsibilities Commission's (FRC) power to order income management. The evaluation also states that people were being 'shamed' at a FRC conference. The apparent aim of such 'shaming' was to have income management and shame work together, providing incentives to change the behaviour of enough people in a way which would influence other individuals, so that they could also strive to become part of the wider group. This process involves internalising values and accepting changes in social and cultural norms.¹³⁵ It is a deficit approach, focusing blame solely on Aboriginal people rather than identifying broader structural issues such as over-policing, which, for example, leads to people being charged with offences such as public drunkenness and public nuisance where non-Aboriginal people would not be charged; discriminatory legislation such as AMPs; over-representation in the criminal justice system; and service provision issues in terms of the quality and appropriateness of education and housing.

A Aurukun

Aurukun is on the west coast of Cape York, approximately 900 kilometres north east of Cairns and 178 kilometres south of Weipa.¹³⁶ Aurukun is inland from Archer Bay and lies between the Ward and Watson Rivers, and includes wetlands covering 1.1 million hectares.¹³⁷ Aurukun also includes 15 homelands (also called outstations).¹³⁸ Traditional owners often affiliate with one or more homelands, spending varying amounts of time there for reasons such as: returning to country; retreating from the monotony of town life, its rules and

¹³³ Ibid 36

¹³⁴ Ibid 42.

¹³⁵ Ibid 28.

¹³⁶ Aurukun Shire Council, *Annual Report (2011/2012)*, 10 <http://aurukun.qld.gov.au/wp-content/uploads/2012/08/2011-2012_Annual-Report.pdf>.

¹³⁷ Aurukun Wetland Charters, *The Aurukun Wetlands* <<http://www.aurukunwetlandcharters.com/wetlands.html>>.

¹³⁸ Aurukun Shire Council, *Annual Report (2011/2012)*, above n 136.

conflicts; spending time with family; and teaching children lore. The population of Aurukun was estimated at 1,398 people in the 2011 Census with 92% of the population being Aboriginal and/or Torres Strait Islander.¹³⁹

The Aurukun shire is 750,000 hectares of Aboriginal Land.¹⁴⁰ Until 2013, it was held under a 50 year lease,¹⁴¹ granted to the Council¹⁴² as trustee¹⁴³ with a term until 3 November 2059.¹⁴⁴ The land was 'transferable land', and therefore had to be granted for the benefit of Aboriginal people. In 2013, the town area was transferred as Aboriginal freehold to the Council. Most of the remaining land was transferred to the Traditional Owner corporation: the Ngan Aak-Kunch.¹⁴⁵ For the purposes of mining, Aboriginal land is considered 'reserve' land and the consent of the Governor in Council is required before a mining lease can be granted.¹⁴⁶

Most of the Aurukun population are Wik and Wik Way people consisting of five clan groups,¹⁴⁷ most of whom speak Wik Mungkan as their first language,¹⁴⁸ and English as their second or third language.¹⁴⁹ The clan groups traditionally

¹³⁹ Australian Bureau of Statistics, Government of Australia, *National Regional Profile: Aurukun (S) (Local Government Area), Population/People, Estimated Resident Population – at 30 June 2011*

<http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=30250&dataset=ABS_REGIONAL_L_LGA&geoconcept=REGION&datasetASGS=ABS_REGIONAL_ASGS&datasetLGA=ABS_REGIONAL_L_LGA®ionLGA=REGION®ionASGS=REGION>.

¹⁴⁰ *Aboriginal Land Act 1991* (Qld) s 10.

¹⁴¹ *Local Government (Aboriginal Lands) Act 1978* (Qld).

¹⁴² By the Governor in Council as per s 3 of the *Local Government (Aboriginal Lands) Act 1978* (Qld) to be held in trust by the council for residents of the community (*Local Government (Aboriginal Lands) Act 1978* (Qld) s 5).

¹⁴³ Fitzgerald, above n 1, 29.

¹⁴⁴ Aurukun Shire Council website <<http://aurukun.qld.gov.au/shire-profile/our-shire/location-characteristics/> and <http://aurukun.qld.gov.au/council/the-elected-council/>>.

¹⁴⁵ Aurukun Shire Council, *Annual Report* (2014/2015), 6-7 <<http://www.aurukun.qld.gov.au/wp-content/uploads/2012/08/Initial-Draft-Scanned-Annual-Report-2015.pdf>>.

¹⁴⁶ See, eg, *Aboriginal Land Act 1991* (Qld) s 202(2); *Mineral Resources Act 1989* (Qld).

¹⁴⁷ These are the Apalech, Winchanam, Wanam, Chara and Puutch, comprising seventeen families.

¹⁴⁸ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Incorporating the Quarterly Report on Key Indicators in Queensland's Discrete Indigenous Communities; Aurukun Community Perspective* (April 2011 – June 2011) 27 <<http://www.datsima.qld.gov.au/resources/atsis/government/programs-initiatives/aurukun.pdf>>.

¹⁴⁹ Family Responsibilities Commission, *Community Engagement Guidelines: Aurukun*, 5 <http://www.frcq.org.au/sites/default/files/Community%20Engagement%Aurukun%20web_0.pdf>.

did not live together, and conflict arises as a result of the forced proximity.¹⁵⁰ Aurukun becomes isolated in the wet season when flooding is regular,¹⁵¹ limiting road access.¹⁵² Roads are mostly unsealed outside of Aurukun.¹⁵³

Housing in Aurukun is overcrowded.¹⁵⁴ The Council's 2014/15 Annual Report suggests that there are 45 staff and agency houses for those from outside Aurukun, and 215 community houses¹⁵⁵ for 1,295 local Aurukun people.¹⁵⁶ The number of houses for outsiders increased from 16 in 2010,¹⁵⁷ reflecting the fact that external intervention is used in the community, rather than via the employment of local community members. In 2010, the Commonwealth government funded a 10 year housing program to construct 91 houses and complete 247 refurbishments.¹⁵⁸

There is little work in Aurukun, except that required for the administration of the community and in the many health and social support services, with most staff being non-Aboriginal. Most people are paid through Centrelink payments. Organised recreation activities are minimal with card games being popular.¹⁵⁹

Historically, Aurukun was established by the Presbyterian Church as a mission in 1904.¹⁶⁰ It encouraged Aboriginal people to abandon their traditional lifestyles and focus on farming, building, the pastoral industry, nursing and domestic activities. Aboriginal people were recruited as church elders and councillors.¹⁶¹ However, many things quickly went wrong in Aurukun. The

¹⁵⁰ Australian Broadcasting Corporation, 'Six Pack Politics', *Return to Aurukun*, 2 May 2011 (David Marr) <http://www.abc.net.au/4corners/special_ed/20110502/aurukun/>.

¹⁵¹ The wet season usually occurs between October and April.

¹⁵² Aurukun Shire Council website <<http://aurukun.qld.gov.au/shire-profile/our-shire/location-characteristics/>>.

¹⁵³ Family Responsibilities Commission, above n 149.

¹⁵⁴ Aurukun Shire Council website <<http://aurukun.qld.gov.au/shire-profile/our-shire/challenges-disadvantages/>>.

¹⁵⁵ Aurukun Shire Council, *Annual Report* (2014/2015), above n 145, 12-13.

¹⁵⁶ Australian Bureau of Statistics, Government of Australia, above n 139.

¹⁵⁷ Bruce Flegg (Queensland Minister for Housing and Public Works), 'Twelve New Houses to be Built in Aurukun', (Media Statement, 24 October 2012) <<http://statements.qld.gov.au/Statement/2012/10/24/twelve-new-houses-to-be-built-in-aurukun>>.

¹⁵⁸ Aurukun Shire Council, *Annual Report 2010* 8 <<http://aurukun.qld.gov.au/wp-content/uploads/2012/08/Annual-Report-2009-2010-final.pdf>>.

¹⁵⁹ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987* (1990) 7.

¹⁶⁰ *Ibid* 2.

¹⁶¹ *Ibid* 5.

Queensland government grant offered to the church to run the community failed to cover the cost of shelter. Malaria and syphilis devastated the population.¹⁶² Segregated dormitories were established in 1908 for Aboriginal children. The dormitory system removed children from the family setting, thus disrupting cultural transmission and social life for families and the community.¹⁶³ Dormitories were recorded as closing in 1966;¹⁶⁴ however, Aboriginal activist Patricia Miller states that in practice dormitories still existed in Aurukun up to and beyond their removal pursuant to the *Aborigines Regulation of Queensland 1972* (Qld) (*1972 Regulations*).¹⁶⁵

In the 1950s, stock workers on the mission – who were being vastly underpaid – expressed their disapproval to the Queensland government. When the Director of Native Affairs visited, he was made to feel unwelcome. This resulted in seven people, labelled ‘agitators’, being moved to Palm Island, a place of punishment for ‘non-compliant’ Aborigines and ‘trouble makers’.¹⁶⁶ As the island is 65 kilometres north-west of Townsville, it was not easy for people to return to their communities.

In the late 1960s, mining work between Aurukun and Weipa became available to Aboriginal workers.¹⁶⁷ While many men also worked as stockmen, there was a collapse in the cattle industry at this time due to a slump in meat prices. Social security payments for unemployment became available to Aboriginal peoples during the late 1960s,¹⁶⁸ though non-Aboriginal people had had access to

¹⁶² Fitzgerald, above n 1, 29.

¹⁶³ Andrew Lattas and Barry Morris, ‘The Politics of Suffering and the Politics of Anthropology’ in Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (University of New South Wales Press, 2010) 69.

¹⁶⁴ See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987*, above n 159; *ibid*.

¹⁶⁵ Patricia Miller was mentioned as stating this by Edward St. John in ‘Discrimination and the Law’ in Garth Nettheim (ed), *Aboriginal Human Rights and the Law* (Australian and New Zealand Book Company Press, 1974) 23.

¹⁶⁶ Fitzgerald, above n 1, 7.

¹⁶⁷ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987*, above n 159, 5.

¹⁶⁸ *Ibid*.

social security payments in different forms since 1907 (aged pensions), and unemployment benefits from 1945.¹⁶⁹

In the early 1970s, the Presbyterian Church which managed Aurukun pushed for self-management for and by the people of Aurukun. This was rejected by the Queensland government and viewed as an attempt to advance Aboriginal ownership and management of land.¹⁷⁰

The 1970s was the start of Aurukun people using mainstream structures such as the justice system to claim rights in land and to fight against discriminatory treatment arising from the inequality between Aboriginal and non-Aboriginal people. It will be shown below that Aurukun people were blatantly disrespected and interfered with by successive governments in decisions pertaining to land. The consequences of these decisions are not limited to these points in time but have had long-term consequences for the community, continuing to the present day. While land has cultural and economic importance to Aboriginal people,¹⁷¹ it has economic importance for governments, miners, developers and farmers, especially when it is mineral or resource rich, as is the case with bauxite around Aurukun. The Queensland government has persistently denied Aboriginal people the right to own land or to be compensated for its use by others, due to the presence of bauxite. The case of *Koowarta v Bjelke-Petersen*,¹⁷² as discussed earlier, displays the strength of the Aurukun community, dispelling the notion that the community is passive. So too do several other cases discussed below.

The Wik and Wik Way peoples also had native title determined over separate areas of their country in 1996,¹⁷³ 2000,¹⁷⁴ 2004,¹⁷⁵ 2009¹⁷⁶ and 2012.¹⁷⁷ While

¹⁶⁹ Andrew Herscovitch and David Stanton, Australian Institute of Family Studies, 'History of Social Security in Australia' (2008) 80 *Family Matters* 53
<<http://www.aifs.gov.au/institute/pubs/fm2008/fm80/hs.pdf>>.

¹⁷⁰ *Baird v Queensland* [2005] FCA 495, [81] (Dowsett J).

¹⁷¹ Heather McRae, Garth Nettheim, Laura Beacroft, and Luke McNamara, *Indigenous Legal Issues: Commentary and Materials* (Law Book Company Information Services 1997) 163.

¹⁷² (1982) 153 CLR 168.

¹⁷³ *Wik Peoples v Queensland* (1996) 187 CLR 1.

¹⁷⁴ *Wik Peoples v Queensland* [2000] FCA 1443.

¹⁷⁵ *Wik Peoples v Queensland* [2004] FCA 1306.

¹⁷⁶ *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789.

¹⁷⁷ *Wik and Wik Way Native Title Claim Group v Queensland* [2012] FCA 1096.

such determinations may provide Traditional Owners with the right to negotiate when approached by miners or developers who wish to access and use their country, they do not have the right to stop mining or development,¹⁷⁸ nor to use the land as others with freehold title can. At best, native title rights and interests recognised in land are mainly non-exclusive recognition of ‘traditional’ rights such as hunting, camping and collecting materials, and do not provide any ownership in land.

Questions regarding the use of land led to other questions regarding, for example, whether the community had the right to consultation. In the mid-1970s, the Queensland government enacted the *Aurukun Associates Agreement Act 1975* (Qld) (*AAA Act*) to assist in developing mining infrastructure to access bauxite deposits in the area. Aurukun residents complained of inadequate consultation in relation to the *AAA Act* and that the process for royalties would not benefit them. The Aurukun people mounted a challenge in the Queensland Supreme Court, which held that the government owed a special obligation to the Aurukun community.¹⁷⁹ This special obligation arose due to the Director of Aboriginal and Islanders Advancement being trustee of Aurukun land reserved for Aboriginal inhabitants of the State under the *Land Act 1910* (Qld) and *Land Act 1962* (Qld). The *Aborigines Act 1971* (Qld) enabled the Director – as the trustee of reserves – to enter into agreements with miners to access reserves and to require the payment of royalties to the Director as trustee for the benefit of Aboriginal peoples on the reserve or other Aboriginal peoples, as provided by the agreement. The agreement stated that monies were held in trust on behalf of Aboriginal peoples. Aurukun Aboriginal residents argued that by entering the agreement the Director was in breach of trust, because the Director was required to hold the royalties for the residents, rather than for Aboriginal people generally.¹⁸⁰

The Queensland government successfully appealed the decision to the Privy

¹⁷⁸ This is the same for other landholders, including freehold land.

¹⁷⁹ See, eg, *Peinkinna v Director of Aboriginal and Islander Advancement* [1976] QSC Unreported; Garth Nettheim, *Victims of the Law: Black Queenslanders Today*, above n 24, *Victims of the Law: Black Queenslanders Today*, 10.

¹⁸⁰ *Peinkinna v Director of Aboriginal and Islander Advancement* (Unreported, Supreme Court of Queensland, Full Court, 1976).

Council,¹⁸¹ which decided that no such obligation existed. The Commonwealth government then intervened to assist the Aurukun community by withholding export licenses from mining companies until agreement between it and the Queensland government was reached to the satisfaction of the Aurukun community.¹⁸²

The battle for bauxite continued when, in 1978, the Queensland government attempted to take control of Aurukun, saying it was in the community's best interests. The Aurukun community initially welcomed the Commonwealth's support, which came in the form of opposition to the Queensland government's planned takeover, as it viewed the takeover as a way for the Queensland government to access bauxite deposits in the area, to the detriment of their traditional country and culture.¹⁸³ The Commonwealth Parliament passed the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 (Cth)*¹⁸⁴ on 10 April 1978 to allow the communities to move towards self-management and to prevent the Queensland government from taking control of Aurukun. The Queensland government responded by de-gazetting the Aurukun Aboriginal reserve¹⁸⁵ so that the Commonwealth legislation did not apply.¹⁸⁶ A compromise was reached and the Queensland government passed the *Local Government (Aboriginal Lands) Act 1978 (Qld)*, which provided Aurukun with limited local government status.¹⁸⁷ The Council became the Shire Council of Aurukun with a lease for 50 years granted to them over the old reserve area.¹⁸⁸

The Aurukun community no longer trusted the Commonwealth government. The government had told the community that consultation would occur prior to

¹⁸¹ *Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286.

¹⁸² Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 10.

¹⁸³ David MacDougall and Judith MacDougall (Directors), *Takeover*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1980, DVD.

¹⁸⁴ For this legislation to be triggered the Commonwealth Minister for Aboriginal Affairs had to make a declaration, which would have occurred after a request from either a Council, community or a majority of adults from a community.

¹⁸⁵ The Commonwealth legislation was worded to only apply to 'Aboriginal reserves' not 'former Aboriginal reserves'.

¹⁸⁶ The legislation only applied to reserves, not former reserves.

¹⁸⁷ The area of reserve area then came under the *Local Government Act 1936-1937 (Qld)*. Frankland, above n 10, 11.

¹⁸⁸ Australian Human Rights Commission, above n 54, 18.

any decisions being made, but this did not happen. Rather, the community heard on the radio that the Uniting Church and the Queensland government were going to manage their community jointly, without offering them a chance for consultation. The following day, the Queensland Premier, Sir Joh Bjelke-Petersen, publicly announced that he had won out over the Commonwealth government and was going ahead with the takeover, without consulting the community.¹⁸⁹ The Church denied agreeing to this. It was revealed that the Commonwealth government had proposed the option to the Queensland government only on the condition that it had to be put before the Church and the Aurukun people, and agreed to by both these parties.¹⁹⁰

There were further attempts by the Queensland government to take control of Aurukun. On 15 August 1978, soon after the Premier's announcement, the Queensland government declared that there was a 'reign of terror'¹⁹¹ in Aurukun and dismissed the Aurukun Council on the basis that it refused to work with or have anything to do with the Queensland government. The government then announced it would bring in police and appoint an Administrator. Councillors went to Canberra to lobby the Commonwealth government for support and applied to the Queensland Supreme Court for an interim injunction to stop the Queensland government's actions. While successful in obtaining the injunction, it was discharged on 18 August 1978. Both strategies failed.¹⁹²

At the same time as portraying the community as an unsafe and undesirable place to live because of alcohol abuse, Russell Hinze, Minister for Local Government, told the Aurukun community that they could have an alcohol canteen. Hinze justified this on the basis that the government would look bad internationally if it applied different rules to different communities.¹⁹³ Initially, the Aurukun community was against a canteen, noting the effects of alcohol in

¹⁸⁹ MacDougall and MacDougall, above n 183.

¹⁹⁰ Ibid.

¹⁹¹ Although no charges were laid. The Minister Russell Hinze explained the lawlessness as people arranging for the Council to vacate the area when there was to be a visit by the Premier, so that the Premier had no one to engage with. Hinze said that the Premier informed that people said there were people who were drunk on the morning before the Premier's visit and a shot was fired (Australian Broadcasting Corporation, 'Six Pack Politics', *Return to Aurukun*, 2 May 2011 (David Marr) <http://www.abc.net.au/4corners/special_ed/20110502/aurukun/>).

¹⁹² Nettheim, above n 24, *Victims of the Law: Black Queenslanders Today*, 12-14.

¹⁹³ Australian Broadcasting Corporation, 'Six Pack Politics', above n 150.

Weipa, saying children were starving while the adults spent all their money on alcohol, and were always drunk.¹⁹⁴ However, by 1985, the Aurukun Shire Council voted for an alcohol canteen.¹⁹⁵

The Council was granted the license to run the canteen using profits to fund Council functions, such as building houses.¹⁹⁶ This income was important because there were no privately-owned houses from which to raise revenue from rates.¹⁹⁷ The canteen was introduced without consultation and a number of community members were disturbed by the effects of the canteen in that it diverted money from essentials such as food and caused alcohol-related violence.¹⁹⁸

By 1990, the Aurukun community was experiencing 'extreme poverty, a severe housing shortage, rampant crime rates including nine murders in five years,¹⁹⁹ sexually transmitted diseases, alcohol and malnutrition'.²⁰⁰ The housing shortage was ongoing; in 1990 it was reported that 900 people lived in 118 houses, with up to 20 people living in some houses.²⁰¹

A number of meetings were held in Aurukun, leading up to local community members voting on 24 March 1990 on whether the canteen should be closed. Of those who voted, 189 (41%) wanted the canteen closed and 269 (59%) wanted it to remain open.²⁰² Even though the canteen was only open for limited hours,²⁰³ it absorbed 12% of the community's income.²⁰⁴

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ In 2013 the Queensland Government announced that it would withhold some of the Councils funding if they did not collect water and waste charges from residents. This was justified as making Councils more self-sufficient (Liam Parsons, 'Councils Split on Charges', *The Cairns Post*, (Cairns), 31 May 2013, 7).

¹⁹⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987*, above n 160, 9.

¹⁹⁹ Australian Broadcasting Corporation, 'Six Pack Politics', above n 150.

²⁰⁰ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987*, above n 159, 1.

²⁰¹ Ibid 6.

²⁰² Ibid 9.

²⁰³ The canteen was open four evenings a week, from Tuesday to Friday between 4:30 pm to 7:00 pm and on Saturdays for take-away bottle sales.

²⁰⁴ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of Inquiry into the Death of The Young Man Who Died at Aurukun on 11 April 1987*, above n 159, 8.

The Queensland government legislated AMPs in 19 discrete Aboriginal communities,²⁰⁵ responding to the recommendations in the CYJS regarding excessive alcohol consumption and violence. An AMP commenced on 1 January 2003,²⁰⁶ prohibiting people from bringing alcohol into the community – except by the holder of the liquor license – and making home brew. Many of the promised services for rehabilitation, treatment and support were not implemented.²⁰⁷ The canteen closed in 2008 when the *Liquor Act 1992* (Qld) was amended to prohibit Councils holding liquor licences.²⁰⁸ Aurukun thus became a dry community.

B Hope Vale

Hope Vale is on the eastern side of Cape York, approximately 46 kilometres north-west of Cooktown and approximately 331 kilometres north of Cairns. The population was estimated at 1,071 people in the 2011 Census with 94 percent of the population being Aboriginal and/or Torres Strait Islander. Most people are Guugu Yimithirr speakers, with thirteen clan groups.²⁰⁹ Heavy rain in the wet season can flood parts of the road between Cairns and Hope Vale making it impassable for short periods.

In the 1880s, the Queensland Government established Hope Vale (then known as Cape Belford) as a temporary reserve for Aboriginal people. In 1885, the Lutheran Church agreed to manage the reserve. As time went on most residents became practising Christians. Hope Vale began as a small community of 40 Aboriginal residents with 17 to 20 people visiting at times, growing to a population of 71 by 1950. In 1939 – apparently due to the war and threat of attack – residents were moved south to the central Queensland

²⁰⁵ See, eg, *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; Office of Liquor and Gaming, Government of Queensland, *Alcohol Restrictions* <<http://www.olgr.qld.gov.au/liquor/indigenous/restrictions/index.shtml>>.

²⁰⁶ *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [28] (McMurdo P).

²⁰⁷ Fitzgerald, above n 1, 61.

²⁰⁸ *Liquor Act 1992* (Qld) s 106(4).

²⁰⁹ Binthi, Buurngu, Dharrpa, Dinggaal, Gamaay, Gulaal, Nhaatha, Nguymbaarr, Nguuruumungu, Nugal, Thanil, Thithaar and Thuubi. From Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Annual Highlights Report for Queensland's Discrete Indigenous Communities* (July 2010–June 2011) 57 <<http://www.datsima.qld.gov.au/resources/atsis/government/programs-initiatives/hope-vale.pdf>>.

Aboriginal reserve of Woorabinda.²¹⁰ However, another version suggests that mission residents were moved to Palm Island and Woorabinda in 1942 possibly due to increasing hostility from the white community of Cooktown towards the mission staff and Missionary Schwarz, a German in charge of the mission. Many of those moved were said to not understand the reasons. Twenty-eight people died travelling to Woorabinda and thirty-five during their time there.²¹¹

The surviving former residents of Hope Vale stayed in Woorabinda until 1949, when they were able to return home.²¹² This return increased Hope Vale's population to 247 people in 1951.²¹³ By 1962 the population was 385.²¹⁴ The mission was at times moved within short distances of where it exists today.²¹⁵ For some years a boys' dormitory was at Eight Mile with the mission headquarters, while married couples and a girls' dormitory were at Spring Hill. After completing their education, boys could choose to work on the mission boat or in the pastoral or stock industry. Girls could leave the dormitory when they married. Many traditional cultural practices were prohibited on the mission. For example, corroboree was viewed as sinful.²¹⁶

The land at Hope Vale was declared a reserve under the *Aborigines Act 1971* (Qld) (*1971 Act*). This legislation was replaced in 1984 and the land became trust area under the *Community Services Aborigines Act 1984* (Qld) (*1984 Act*), placing control of Aboriginal communities in the hands of Aboriginal Councils.

In July 1986, 110,000 hectares at Cape Belford, including the mission, was granted by the Queensland government to the Hope Vale Aboriginal Council by Deed of Grant in Trust (DOGIT).²¹⁷ The beneficiaries of the transferred DOGIT land included both Traditional Owners and other Aboriginal people²¹⁸ residing

²¹⁰ Woorabinda is west of Rockhampton.

²¹¹ Fiona Terwiel-Powell, *Developments in the Kinship System of the Hope Vale Aborigines: An Analysis of Change in the Kinship Nomenclature and Social Structures of the Kuuku-Yimityirr Aborigines* (PhD Thesis, The University of Queensland, 1975), 33.

²¹² *Baird v Queensland* [2005] FCA 495, [15]-[16], [18], [20]-[21] (Dowsett J).

²¹³ *Ibid.*

²¹⁴ Terwiel-Powell, above n 211, 47.

²¹⁵ *Baird v Queensland* [2005] FCA 495, [15]-[16], [18], [20]-[21] (Dowsett J).

²¹⁶ Terwiel-Powell, above n 211, 32, 38, 42.

²¹⁷ *Baird v Queensland* [2005] FCA 495, [29] (Dowsett J).

²¹⁸ Many of these people have been placed in Hope Vale and its related missions by the Government against their will.

on the DOGIT land, with the Council as trustee.²¹⁹ Many of the non-traditional beneficiaries had been placed in Hope Vale and related missions by the government against their will. In 1992, as the trustee of the land, the Hope Vale Council negotiated an agreement with the Cape Flattery Silica Mine. Promises of employment, cultural heritage protection, environmental protection and payment of royalties to the community as a whole, were included in the agreement.²²⁰

In May 2011, the Minister for Natural Resources and Water notified an intention²²¹ to appoint the Hope Vale Congress Aboriginal Corporation ('the Congress') as the new trustee for a significant area of the DOGIT.²²² The Congress is the prescribed Native Title Body Corporate (NTBC) for eleven of the thirteen clans from the Hope Vale area.²²³ The *Native Title Act 1993* (Cth) requires a traditional owner group to establish a NTBC when native title is determined to represent them and their interests and to hold native title. The Council disagreed with the Minister's decision that the Congress be the trustee²²⁴ because the Congress consisted of Traditional Owners only and therefore the DOGIT beneficiaries would be restricted to Traditional Owners.

The Council was unsuccessful in a court action to restrain the Minister from granting the DOGIT to the Congress.²²⁵ The township area of 63.2 hectares remained with the Council, and the remainder, including the mine and the road to the mine, was granted to the Congress. This decision also resulted in compensation under the above agreement being transferred to the Congress rather than the Council.²²⁶

²¹⁹ *Hope Vale Aboriginal Shire Council v The Minister for Natural Resources and Water* [2011] QSC 272, [9]-[10] (Jones J).

²²⁰ Hope Vale Aboriginal Council and Cape Flattery Silica Mines A & B, *Deeds of Compensation* <<http://www.atns.net.au/agreement.asp?EntityID=1492>>.

²²¹ This was enabled by amendments on 20 September 2010 to the *Aboriginal Land Act 1991* (Qld) whereby the Minister for Natural Resources and Water could appoint a new trustee.

²²² *Hope Vale Aboriginal Shire Council v The Minister for Natural Resources and Water* [2011] QSC 272 [2], [4] (Jones J).

²²³ *Cape Flattery Silica Mines Pty Ltd v Hope Vale Aboriginal Shire Council* [2012] QSC 381.

²²⁴ In 2011 the Council through Court action attempted to restrain the Minister from granting the DOGIT to the Congress. See *Hope Vale Aboriginal Shire Council v The Minister for Natural Resources and Water* [2011] QSC 272 [5].

²²⁵ *Ibid.*

²²⁶ *Cape Flattery Silica Mines Pty Ltd v Hope Vale Aboriginal Shire Council* [2012] QSC 381.

Mayor McLean implicated Noel Pearson's involvement as central to the decision made by government. McLean viewed the Council as the correct body to manage the mining payments because it is elected by the people, accountable to them and required to spend the money for the community's benefit under the previous agreement. One of the issues Mayor McLean raised is that the Congress only includes Traditional Owners, and does not cover Aboriginal people forcibly moved to Hope Vale in the mission days.²²⁷

An Alcohol Management Plan was imposed on Hope Vale in 2004, and restrictions on sales increased in January 2009.²²⁸ The Hope Vale community objected to this; however, the government said it was justified based on the level of hospitalisations for assaults being twenty-four times the average rate for Queensland.²²⁹ Similar to Aurukun, recommendations in the CYJS report for an action plan were not developed with the community, and the residential and non-residential facilities and services including treatment, rehabilitation and support for individuals and family units have still not been implemented, despite being deemed 'essential' in the CYJS.²³⁰

C Coen

Coen is 576 kilometres north-west of Cairns. Unlike the other four CYWR communities, Coen is not a discrete Aboriginal community. The population was estimated at 308 in the 2011 Census with 84 percent of the population being Aboriginal and/or Torres Strait Islander.²³¹ A gold reef was discovered 30km

²²⁷ See, eg, Sarah Elks, 'Court decision pending on Cape York's Hope Vale mining royalty dispute', *The Australian* (online), 14 December 2011 <<http://www.theaustralian.com.au/news/nation/court-decision-pending-on-cape-yorks-hopevale-mining-royalty-dispute/story-e6frg6nf-1226221898640>>; Australian Broadcasting Commission, 'Fight on to stop indigenous land hand-back', *News*, 14 December 2011 (Brad Ryan) <<http://www.abc.net.au/news/2011-12-14/fight-on-to-stop-indigenous-land-hand-back/3730620>>; Greg McLean, 'Mayor of Hope Vale, Chats about: Making Hope Vale economically self-sufficient', *National Indigenous Times* (online), 9 December 2011 <<http://www.nit.com.au/component/content/archive.html?year=2011&month=12>>.

²²⁸ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Queensland Government, *Hope Vale Alcohol Limits* <<http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/alcohol-reforms/community-alcohol-limits/hope-vale-alcohol-limits>>.

²²⁹ Explanatory Notes, *Liquor Amendment Regulation (No. 3) 2008* (Qld) 4.

²³⁰ Fitzgerald, above n 1, 61.

²³¹ Family Responsibilities Commission, *Community Engagement Guidelines: Coen*, 5 <<http://www.frcq.org.au/sites/default/files/Community%20Engagement%20Guidelines%20-%20Coen.pdf>>.

south of the town in 1892, attracting Europeans and Chinese to the area.²³² However, in 1944 a small area of 5.7 hectares at Coen was gazetted as an Aboriginal reserve.²³³ Following a number of land transfers and purchases through State and National Parks, from the 1980s homelands and land parcels have been returned to most Coen language groups.²³⁴

Historically, Coen was a meeting place for Wik and Kaanju speaking peoples, as well as other regional Aboriginal people working on stations.²³⁵ Today most people speak English along with their own language, which may include Lama, Wik Mungkan, Guugu Yimithirr, Ayapathu, Kaanju, and Olkala. Many of the different groups lived, and presently live, in separate areas in Coen²³⁶ based on their language groups.²³⁷

Coen is on the Coen River, west of the Great Dividing Range. Much of the road to Coen is unsealed and is often closed for several months in the wet season.²³⁸ Coen was founded in 1876 as a log fort. After the 'gold rush', the cattle industry prevailed until the market crashed. It was then decided by the Queensland government to move Aboriginal people into Coen town from the old reserve areas.²³⁹ Despite this, a number of people – in particular the Lama Lama of Port Stewart – remained on their country living a traditional life until 1961. Even

²³² Nicky Horsfall and Michael Morrison, *Cape York Peninsula Cultural Story Non-Indigenous and Shared History* 9, 16

<https://www.researchgate.net/publication/266074027_Cape_York_Peninsula_Cultural_Story_Non-Indigenous_and_Shared_History>.

²³³ Queensland Government, *Community Histories: Coen*

<<https://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-coen/>>.

²³⁴ Cape York Australian Aboriginal Academy, *Coen Community*

<<http://cyaaa.eq.edu.au/campuses/coen/community/>>.

²³⁵ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, above n 209, *Annual Highlights Report for Queensland's Discrete Indigenous Communities* (July 2010 – June 2011) 47.

²³⁶ *Ibid* 38.

²³⁷ Queensland Health, Government of Queensland, *Coen: Living in Coen*

<http://www.health.qld.gov.au/workforus/profiles/CapeYork/CY_Coen.asp>.

²³⁸ Family Responsibilities Commission, *Community Engagement Guidelines: Coen*, above n 231.

²³⁹ Queensland Police Service, Queensland Government, *Coen Station Profile* <<https://www.police.qld.gov.au/rti/published/about/orgStrct/Documents/Coen%20Station%20Profile.pdf>>.

when removed to Lockhart River mission, people found their way back by foot.²⁴⁰

From 1955 to 1959 a cattle station (Silver Plains Station) made formal complaints to the Director of Native Affairs requesting the removal of three Lama Lama families from Port Stewart. Initially the complaints were based on accusations that the families and their dogs were disturbing and killing cattle. In 1955, the Protector refuted these complaints saying that three men from the families worked for the former owner of Silver Plains Station usually with an agreement or payment. The Protector added that one of the men refused to work for the current owner for 10 pounds and keep for a year, resulting in the owner threatening to have him and others sent to Lockhart River mission if he did not work for him. Later complaints included allegations that old men at Port Stewart were trading their adult daughters to stockmen and crew from boats.²⁴¹

In 1960, the Inspector of Police at Cairns decided it was in the best interests of the Port Stewart Lama Lama to be moved due to the lack of control and supervision over them in the wet season and the lack of facilities in the area, including educational facilities for children. Perceiving the Lama Lama in this way and removing their autonomy once again reflects deficit discourse, in which the government assumed that Aboriginal people living traditionally were inferior, childlike and needed to be controlled. Given the ability of the Lama Lama to live independently and be self-sufficient, this control was more about being able to monitor the Lama Lama than their welfare. Because the Lama Lama did not want to be moved, they were told that they were being taken for medical checks and would return. In 1961, they were permanently moved to Bamaga at the top of Cape York,²⁴² approximately 460 kilometres away.²⁴³

²⁴⁰ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 2, *Report of Inquiry into the Death of Charlie Kulla Kulla*, 5-8.

²⁴¹ Ibid.

²⁴² Ibid 9-10.

²⁴³ Queensland Health, *Coen: Living in Coen*, above n 237.

Coen has one hotel and no alcohol restrictions.²⁴⁴ However, residents can apply for a Dry Place Declaration at the Magistrates Court.²⁴⁵ If the declaration is granted it becomes an offence for any person to possess or consume alcohol at the declared house.²⁴⁶

D Mossman Gorge

Mossman Gorge is a small Aboriginal community 80 kilometres north of Cairns and 4 kilometres west of Mossman.²⁴⁷ Initially, the Mossman Gorge landscape was cleared and sugar cane harvested. In 1915, unconditional leases were obtained by the Chief Protector of Aborigines over the current Mossman Gorge community, and 26 hectares at Mossman Gorge were gazetted as Aboriginal Reserve in 1916.²⁴⁸ In the 1920s, a Lutheran Church mission was established in Mossman Gorge on the Aboriginal Reserve. As a result of various government policies and economic changes, Kuku Yalanji people were forcibly gradually moved to the Mossman Gorge Reserve from their traditional camps at nearby sites. When the Daintree Mission was closed in the 1960s, people also moved to Mossman Gorge.²⁴⁹ In the 1970s, 90 people lived at Mossman Gorge in 13 dwellings, referred to by Nettheim as run down shacks.²⁵⁰ The Queensland government refused to repair the shacks in an attempt to force people to move into Mossman. In 1975, an Aboriginal housing organisation attempted to buy private land adjoining the reserve; however, the Queensland government compulsorily acquired the land,²⁵¹ which now comprises 3,887

²⁴⁴ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Annual Highlights Report for Queensland's Discrete Indigenous Communities*, above n 209, 47.

²⁴⁵ *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) s 28.

²⁴⁶ *Ibid* s 34.

²⁴⁷ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Annual Highlights Report for Queensland's Discrete Indigenous Communities*, above n 209, 117.

²⁴⁸ Bamanga Bubu Ngadimunku inc. *Mossman Gorge – Kuku Yalanji Community* <<http://www.yalanji.com.au/community/index.html>>.

²⁴⁹ Migration Plus, *Cape York Welfare Reform Evaluation Consultation Paper Regarding Desk Top Research and Qualitative Analysis of Service Delivery Trends Apparent from the CYWR Initiatives: Focus Area, Aurukun*, October 2012, 10 <https://www.dss.gov.au/sites/default/files/files/our-responsibility/families-and-children/Consultation_Paper_by_Migration_Plus.pdf>.

²⁵⁰ See, eg, Garth Nettheim, 'Prospect for Queensland's Aboriginal and Torres Strait Islanders' (1978) 2(4) *University of New South Wales Law Journal* 314, 321.

²⁵¹ *Ibid*.

hectares of Aboriginal reserve held by the Douglas Shire Council.²⁵² Mossman Gorge's population was estimated at 100 people in the 2011 Census with 100% being Aboriginal and/or Torres Strait Islander. Most people are Kuku Yalanji, the Traditional Owners of the area.²⁵³

Close to the community is the Mossman Gorge Centre, an Aboriginal ecotourism development initiative. It includes a walking tour, a cafe and restaurant, an art gallery and a gift shop. There is also a training centre in tourism and hospitality for Aboriginal and Torres Strait Islander peoples.²⁵⁴ There are no alcohol restrictions for the community.²⁵⁵

All of the services available in a reasonable-sized town are available at nearby Mossman, which has a population of 27,453.²⁵⁶

E Doomadgee

The FRC was implemented in Doomadgee in December 2014. However, income management did not commence there until 11 April 2016.²⁵⁷ The introduction of the FRC in Doomadgee occurred due to its low school attendance rate of 48.3%. Statistically significant improvements in school attendance in Aurukun and Mossman Gorge had been recorded since the introduction of the FRC in those communities, and the FRC was therefore seen as likely to also benefit Doomadgee.²⁵⁸

²⁵² Family Responsibilities Commission, *Community Engagement Guidelines: Mossman Gorge*, 5
<<http://frcq.org.au/sites/default/files/Community%20Engagement%20Guidelines%20-%20Mossman%20Gorge.pdf>>.

²⁵³ Ibid.

²⁵⁴ Mossman Gorge Centre Voyages, *The Mossman Gorge Centre*
<<http://www.mossmangorge.com.au/The-Centre/The-Centre>>.
<http://www.voyages.com.au/locations/mossman-gorge-centre>

²⁵⁵ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Annual Highlights Report for Queensland's Discrete Indigenous Communities*, above n 209, 120.

²⁵⁶ Australian Bureau of Statistics, Government of Australia, *2011 Census QuickStats*
<http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/LGA15350>.

²⁵⁷ See, eg, Family Responsibilities Commission, *Quarterly Report 24 April 2014 to June 2014*, 8

<<http://www.frcq.org.au/sites/default/files/Final%20FRC%20Quarterly%20Report%20No%202022.pdf>>; *Family Responsibilities Commission Amendment Regulations 2014* (No 1) (Qld) reg 1; Department of Human Services, Government of Australia, *Income Management*
<<https://www.humanservices.gov.au/customer/services/centrelink/income-management>>.

²⁵⁸ *Family Responsibilities Commission Amendment Regulations 2014* (No. 1) reg 1.

Doomadgee is located on the Nicholson River in the lower Gulf of Carpentaria, 130 kilometres from the Northern Territory border.²⁵⁹ It has a population of approximately 1,395 people, 92% of whom are Aboriginal and/or Torres Strait Islander.²⁶⁰ Doomadgee was originally established in 1931 as a mission on the coast, 100 kilometres north of the existing community, by a non-Aboriginal family, assisted by the Christian Brethren Assemblies and Chief Protector of Aboriginals. In its early days, 20 children from a mission for Aboriginal Children at Burketown, 93 kilometres away, were sent to Doomadgee. These children were unofficially taken from their families, and their removals not recorded. After a cyclone, the mission moved to the present location in 1936. Approximately 50 children and 20 adults were relocated with the mission. Between 1935 and 1957 more than 80 people were officially removed from pastoral stations in the area and placed at Doomadgee.²⁶¹

All children over six years old were required to live in dormitories. Boys left when they were around 14 to work on cattle stations, while girls were trained in domestic roles, leaving when they married.²⁶² Many of Doomadgee's residents moved to the Mornington Island mission by the late 1950s, where children were not separated in dormitories from their parents. Doomadgee's residents were recorded as describing conditions as harsh. During the 1960s, older, unmarried girls began returning to their parents.²⁶³ The dormitories closed in the late 1960s.²⁶⁴ Doomadgee Inc, the successor of the Aborigines Inland Mission at Doomadgee, was quoted in the *Bringing Them Home* report as stating in its submission:

²⁵⁹ Doomadgee Aboriginal Shire Council, *Our Shire* <<http://doomadgee.qld.gov.au/the-shire/>>.

²⁶⁰ Department of Education and Training, Government of Queensland, *Doomadgee Shire Statistical Snapshot* 2 July 2015 1 <<http://www.sitlinknq.com/assets/files/Regional%20Profiles/Publication-Appendix-4-Doomadgee-Shire-LGA-Snapshot.pdf>>.

²⁶¹ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, Government of Queensland, *Aboriginal and Torres Strait Islander Community Profiles: A Resource for the Courts, Doomadgee* October 2014 2 <<https://www.datsip.qld.gov.au/resources/datsima/publications/justice-resources/doomadgee.pdf>>.

²⁶² *Ibid* 2.

²⁶³ David Trigger, *Whitefella Comin: Aboriginal Responses to Colonialism in Northern Australia* (Cambridge University Press, 1992) 19.

²⁶⁴ *Ibid* 71.

we are sensitive to the perception of some Doomadgee Aborigines that missionaries were sometimes too firm in their administration of discipline, or too assertive in their presentation of the Christian gospel. To these Aborigines we express our sincere apologies. The desire of all the missionaries was to achieve the very best outcomes for Aborigines and anything perceived by them to fall short of this is a matter of deep regret to us (Doomadgee (Inc) submission 78 page 8).²⁶⁵

The Queensland government became trustee of Doomadgee in 1969, while the Christian Brethren Assemblies continued its administrative role until 1983, when the Queensland government took over due to continued criticism about the conditions at Doomadgee.²⁶⁶ The last of the mission workers left in 1988.²⁶⁷ As with Hope Vale, in 1985 Doomadgee became DOGIT land and was transferred to the Doomadgee Council in 1987. Doomadgee DOGIT includes 186,300 hectares.²⁶⁸ Waanyi, Gangalidda and Garawa are the Traditional Owners for the areas around Doomadgee.²⁶⁹ Waanyi, Gangalidda, Mingginda, Lardil and Garawa languages are spoken in Doomadgee.²⁷⁰

Today, Doomadgee has an AMP which prohibits all alcohol except light or mid-strength beer, with two cartons of 30 cans allowed per vehicle or person on foot. The only exception to this is if a person is travelling through the restricted area: they can have any type of alcohol and amount.²⁷¹

VI CONCLUSION

Legislation examined in this chapter, while purported to protect Aboriginal people, in fact benefited non-Aboriginal people in gaining land and cheap labour. It is unlikely that Aboriginal people experienced any aspects of the

²⁶⁵ Australian Human Rights and Equal Opportunity Commission, above n 36.

²⁶⁶ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, above n 261, 3.

²⁶⁷ Doomadgee Aboriginal Shire Council, *Doomadgee Shire* 36 Ch 4 <<http://www.gulf-savannah.com.au/pdf/4.DoomadgeeShire13.pdf>>.

²⁶⁸ Ibid.

²⁶⁹ See, eg, *Lardil Peoples v Queensland* [2004] FCA 298; *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v Queensland* [2008] FCA 1855; *Gangalidda and Garawa People v Queensland* [2010] FCA 646; Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Aboriginal and Torres Strait Islander Community Profiles: A Resource for the Courts, Doomadgee* October 2014, above n 261.

²⁷⁰ Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Aboriginal and Torres Strait Islander Community Profiles: A Resource for the Courts, Doomadgee* October 2014, above n 261, 5.

²⁷¹ Ibid 7.

legislation as beneficial. The apology by Doomadgee Inc quoted above fails to acknowledge the detrimental effects of mission management of Aboriginal people. It simply refers to Aboriginal people's perceptions of missionaries being too firm with discipline, or too strong in their pushing of Christianity. Paternalism itself, supposedly exercised with best intentions for the benefit of others, appears to have been advocated to excuse measures which have caused long-term harm. These past laws, policies and practices, and the damage caused by them, highlight the importance of detailed analysis of potentially harmful measures and their impact on Aboriginal communities. As is shown throughout this thesis, the new paternalism continues to have a range of detrimental consequences upon Aboriginal people, and as such any analysis should focus on potential detrimental consequences, rather than simply the possible benefits.

Parallels may be drawn between the aims of the CYWR – especially through the FRC and its power to exercise control over important aspects of people's lives – and previous legislation controlling Aboriginal people's money, property and movement, which also manipulated their culture. These aims have been said to be for the protection of vulnerable community members and to assist those on social security payments to gain employment. However, the aims of the FRC are in fact derived from a deficit perspective, acting as a punitive overlay to the usual mechanisms people face if they fail to meet their social responsibilities, providing 'solutions' which incorporate forms of blame which can often punish people twice for the same behaviour.

The difference between the FRC and past detrimental policies which attempted to break down Aboriginal culture is that the FRC was designed by an Aboriginal organisation – the CYI – and promotes Aboriginal leadership through the instatement and guidance of Aboriginal FRC commissioners. The role of FRC commissioners is similar to that of Police Liaison Officers and Community Justice Groups, because they are intended to assist Queensland government agencies in conducting their functions within Aboriginal and Torres Strait Islander communities.

This chapter illustrates an historical pattern of Aboriginal people in general and the five CYWR communities in particular being treated differently to the mainstream population. Policies and legislation have continued to focus on assimilation; legislation and organisations focused on the protection and control of Aboriginal people have remained in force. There has been a failure throughout the history of governments (both Commonwealth and Queensland) to acknowledge the true extent of the effects of colonisation, dispossession of land, forced removals of children, assimilation, forced relocations, social and physical control through missions and reserves, prohibition of cultural practices and speaking of local languages, and underpayment and non-payment for work. Each of the CYWR communities shares a common experience regarding these factors, despite each community being unique in many respects (size, location, population, ethnicity, culture, linguistics and custom). These intrusions into Aboriginal culture and land have never been reconciled. Nor is there any indication that they will be. The legitimacy of Aboriginal culture, its strengths and Aboriginal people's rights to practise their culture and transmit it to their children has not been acknowledged by any of the organisations or individuals developing income management legislation and policy.

While four of the CYWR communities are relatively isolated, they have developed in a manner consistent with forced assimilation. In some instances, people who did not belong to the areas covered by reserves and missions were placed there, while others from around the area were forced to live there. From being tightly controlled from their inception, the control was suddenly released in the 1980s when power was handed to Aboriginal Councils, at least in the case of Hope Vale, Aurukun and Doomadgee. While these communities were relieved from external control, their Councils were not given support and training to conduct their functions.

Later, Aboriginal Councils were required to comply with the same legislative requirements as mainstream Councils, despite Aboriginal Councils being responsible for more tasks and owing greater responsibility to their communities through the delivery of social services. Recently, the aim has been to remove these tasks from Councils to bring them into line with other Councils. While this originally occurred due to a lack of capacity of other organisations and because

of the importance of Councils in these communities, little has been provided in the way of capacity building to help the Councils cope with these tasks.²⁷²

There was a short period of self-determination for Aboriginal peoples in the 1980s. However, possibilities for continued self-determination have been overridden by control and protection policy, which is prevalent today in the form of income management and alcohol restrictions. Control and protection policy and legislation affecting Aboriginal peoples is intertwined with racism. It has resurfaced despite legislation enacted to combat it.²⁷³

While the CYWR is said to be aimed at addressing 'dysfunction', many aspects of it reflect past policies of managing Aboriginal people's money and controlling what they can purchase. Part of the policy agenda includes increasing rents to market rent rates and reforming CDEP. In the CYJS, Fitzgerald pointed to increased rents and high levels of unemployment as exacerbating dysfunction and reducing morale.²⁷⁴ However, the CYI viewed CDEP as a form of passive welfare needing reform. Reforms offered included the government setting work hours for CDEP and payments (excluding top up payments), and CDEP participants being required to sign into Job Network and accept a job that matches their skills. If they didn't, they were to be excluded from CDEP for 12 months and required to look for work anyway.²⁷⁵

The Commonwealth government identified the importance of CDEP jobs, being converted into 'real jobs' as part of the CYWR, because employment was seen as part of the process of acquiring mainstream social norms.²⁷⁶ Jobs in government service delivery were created to replace CDEP positions. The government recognised that any participants of the CDEP undertaking work should be remunerated in the same way as any other form of employment; ie, under 'normal employment conditions.'²⁷⁷ It was unrealistic to think that each

²⁷² Limerick, above n 34, 6.

²⁷³ See, eg, *Racial Discrimination Act 1975* (Cth); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth).

²⁷⁴ Fitzgerald, above n 1, 36.

²⁷⁵ Cape York Institute for Policy and Leadership, above n 117, 11-12.

²⁷⁶ Department of Social Services, Families and Children, Government of Australia, *Economic Opportunity – Employment* <<http://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/economic-opportunity-employment>>.

²⁷⁷ *Ibid.*

CDEP position could be transformed into employment in these communities, unless industries commenced catering for participants' skills or requisite training was provided. There is no such component in the CYWR; rather, the focus is on people moving away from the community for employment.

CDEP was embraced by Aboriginal communities and had a place where funds did not exist to pay workers at full rates.²⁷⁸ The other view held, by Pearson, was that CDEP was 'sit down' money; however, this usually applied where CDEP projects were not well defined and people were receiving their money without being required to contribute to a project.²⁷⁹

As described in Chapter 1, the focus of the CYWR is on the requirement of Aboriginal community members to meet their social responsibilities.²⁸⁰ Focusing blame on people for breaching these social responsibilities diverts attention away from the fact that it is the government's responsibility to properly support and fund these communities, as occurs in non-Aboriginal communities. Though Aboriginal communities require more funding from governments than non-Aboriginal communities because they cannot charge land rates, this does not necessarily occur.

While the CYWR has brought additional services such as wellbeing centres to each community, it has not adequately addressed other issues within its scope, including housing, education, employment, infrastructure and transport issues. Each of these – and most importantly, support for Aboriginal people's self-determination – are required for the CYWR to achieve its aims.

One of the most unique and perplexing aspects of the CYWR, as mentioned above, is that it has been designed and presented to the Queensland and Commonwealth governments by an Aboriginal organisation. It is

²⁷⁸ Brian Butler, 'Welfare and Social Justice for Indigenous Australians' in Frances Morphy and Will Sanders (eds), *The Indigenous Welfare Economy and the CDEP Scheme* (The Australian National University e-press, 2001) 7.

²⁷⁹ Sara Hudson, *Help or Hindrance? The Community Employment Development Program and its Impact on Indigenous Australians* (Centre for Independent Studies Press (online), 2008) 1 <<http://www.cis.org.au/images/stories/policy-monographs/pm-86.pdf>>.

²⁸⁰ These social responsibilities are defined as adequately sending children to school, enrolling children in school, not being convicted of a criminal offence, not being a respondent on a domestic and family violence protection order, not coming to the attention of the Department of Communities, Child Safety and Disability Services and/or breaching their tenancy agreement.

unprecedented in Australia for governments to fund and support external Aboriginal organisations to design social policy and legislation to this extent. However, given the similarities between the CYWR and previous government policy and legislation, it is unsurprising that the governments are supportive. The CYWR clearly represents the governments' own views that Aboriginal people need to be managed and controlled, based on the assumption that they are somehow 'deficient'. It is also unprecedented for Aboriginal organisations in Australia to design programs such as income management, which can have such a harsh, punitive effect on Aboriginal people.

The inclusion of an Aboriginal organisation as a central decision-maker within the CYWR has not made income management any more acceptable to Aboriginal communities. Today, as in the past, Aboriginal people have questioned and resisted the imposition of forms of control that are based upon racial discrimination. This was seen when Aboriginal peoples challenged wage rates, access to land tenure and in relation to the CYWR, particularly by Hope Vale's Council.

CHAPTER 4: HISTORY OF AUSTRALIAN AND INTERNATIONAL ANTI-DISCRIMINATION LAWS AND THEIR APPLICABILITY TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

I INTRODUCTION

Racially discriminatory legislation against Aboriginal and Torres Strait Islander peoples commenced in Queensland with *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld). In Queensland today, current legislation of a similar nature extends from the initial Federation document – the *Commonwealth of Australia's Constitution Act 1900* (Cth) (*Constitution*) – to legislation which includes income management provisions in federal social security legislation and the *Family Responsibilities Commission Act 2008* (Qld) (*FRC Act*). While legislative protection of Aboriginal and Torres Strait Islander peoples' human rights is most appropriate for protection in a permanent document such as the *Constitution*, this chapter shows that any protection under the *Constitution* is limited. Of importance is s 51(xxvi), which has been interpreted not only to enact beneficial legislation for Aboriginal and Torres Strait Islander peoples, but to enact legislation that works to their detriment. This is of importance to this thesis, as Commonwealth legislative provisions on the income management of social security – which may detrimentally affect the rights of Aboriginal and Torres Strait Islander peoples living in the Cape York Welfare Reform (CYWR) communities – could be held valid under this provision.

The lack of legislative protection against racial discrimination at a national level in Australia was discussed and debated at the Commonwealth level in the 1970s. The *Racial Discrimination Act 1975* (Cth) (*RDA*) was enacted in 1975 under the Whitlam Labor government. The Whitlam government also enacted the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) (*Queensland Discriminatory Laws Act*), the aim of which was to prohibit specific acts of racial discrimination in Queensland, including the

management of an Aboriginal person's property without their consent.¹ Queensland's *Anti-Discrimination Act 1991* (Qld) was not enacted until almost two decades later. The battles that occurred between the Commonwealth and Queensland governments regarding racially discriminatory legislation exemplifies the range of viewpoints about the appropriate treatment of Aboriginal peoples within governments, as well as the Queensland government's reluctance to change.² The *Queensland Discriminatory Laws Act* was quietly repealed on 6 May 2016.³ The reasoning behind the repeal was that the legislation was directed at past legal provisions, which have now been repealed, which discriminated against Aboriginal and Torres Strait Islander peoples living on reserves. The *RDA* was referred to as protecting Aboriginal and Torres Strait Islander peoples in Queensland from racial discrimination, with the inference that the *Queensland Discriminatory Laws Act* was superfluous.⁴ However, when the Commonwealth government suspended Part II of the *RDA*,⁵ s 5 of the *Queensland Discriminatory Laws Act* could have been used to argue that the property (social security payments) of people being income managed under the CYWR was being managed without their consent and was therefore discriminatory.⁶

This chapter examines Commonwealth and Queensland anti-racial discrimination legislation and anti-discrimination legislation, its relevance, and its limitations within the Cape York Welfare Reform (CYWR). A clear understanding of s 10 *RDA* is of great importance because it enables differential treatment of racial groups and individuals through legislative provisions in order to achieve equality before the law. However, where racially discriminatory legislative provisions are deemed special measures, s 10 and the other *RDA* provisions prohibiting racial discrimination do not apply. In Chapters 6 and 7 I examine legislation which appears to be discriminatory against Aboriginal and

¹ *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) s 5.

² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

³ *Omnibus Repeal Day (Autumn 2015) Act 2016* (Cth) sch 4 pt 1.

⁴ Australian Government, *Annual Red Tape Reduction Report 2015*, Prime Minister and Cabinet App B 16 2, March 2015 <<https://www.cuttingredtape.gov.au/annual-red-tape-reduction-report-2015>>.

⁵ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4-5.

⁶ Fiona Campbell, 'The Cape York Welfare Reform – Continuing Acts of Paternalism', (2015) 15(1) *QUT Law Review* 114, 115.

Torres Strait Islander peoples, but is said to be saved by s 8 *RDA*, the special measures provision. The *RDA* is also limited by the fact that it is an ordinary Act of the federal parliament and can be repealed or suspended, as occurred when legislation was enacted in 2007 to implement income management in Cape York and the Northern Territory. Income management is discussed in detail in Chapter 2.

International human rights instruments which Australia has signed or ratified are important in the context of this thesis, especially because the *Constitution* does not provide Aboriginal peoples with protection against racial discrimination. In this chapter, I examine the international treaty framework, including how international treaties are entered into, how they are incorporated into domestic law, and how individuals and groups can access recourse for violations. I will also examine any weaknesses associated with these processes.

The *International Convention on the Elimination of All Forms of Racial Discrimination*⁷ (*ICERD*) is significant in Australia because it is now part of domestic law having been incorporated into the *RDA* as a Schedule. *ICERD* also identifies other important human rights treaties that Australia has entered into, along with relevant rights that are likely to be affected by provisions of the *FRC Act* and the broader *CYWR*. Potentially, treaty rights can be used both to provide arguments for income management and against it. It is therefore important to understand their judicial interpretation domestically and internationally. The arguments presented in this Chapter form the basis of later discussion in Chapters 6 and 7.

While not an international treaty, the importance and relevance of the *United Nations Declaration on the Rights of Indigenous Peoples*⁸ (*UNDRIP*) is explained in this chapter, and analysed in the context of the *CYWR*. *UNDRIP*

⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). Australia provided its formal support for the United Nations Declaration on the Rights of Indigenous Peoples on 3 April 2009. *UNDRIP* was adopted by the General Assembly on Thursday, 13 September 2007.

is of particular importance to Aboriginal and Torres Strait Islander peoples as indigenous peoples were involved in its drafting. It took 30 years to develop, and despite overwhelming support of *UNDRIP*'s adoption in September 2007 by 143 nations, 11 abstained and four opposed its adoption, being the US, Canada, Australia and New Zealand all prior colonies of England with histories of seizing indigenous peoples' lands and attempts at eradicating their cultures. However, *UNDRIP* was later adopted by Australia and New Zealand in 2009 and by the US and Canada in 2010.⁹ *UNDRIP* promotes self-determination and provides support for Aboriginal and Torres Strait Islander peoples to have a say over their own lives and their own organisations, and encourages participation in politics and government. However, while to date there has been some limited judicial support for it, the Commonwealth and Queensland governments have not implemented its provisions.

II THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900 (CTH) – ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' CONSTITUTIONAL POSITION IN AUSTRALIA

Aboriginal and Torres Strait Islander peoples did not gain any protections or any rights under the *Commonwealth of Australia's Constitution Act 1900* (Cth) (*Constitution*). When it was drafted, Aboriginal people lacked political power and governments presumed they would die out and that therefore their only duty was to 'smooth the dying pillow'.¹⁰ A further reason why the drafters of the *Constitution* did not grant the Commonwealth detailed powers over Aboriginal peoples was that the former colonies wanted to retain jurisdiction over most policy areas.¹¹

The lack of protection of Aboriginal and Torres Strait Islander peoples was identified by special interest groups such as the Australian Board of Missions in 1910, the Australian Association for the Advancement of Science in 1913 and

⁹ Legal Review Native American Rights Fund, *United States Finally Endorses Historic United Nation's Declaration on the Rights of Indigenous Peoples* <<http://www.narf.org/nill/documents/nlr/nlr36-1.pdf>>.

¹⁰ Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 1.

¹¹ *Ibid* 2.

the Royal Commission on the Constitution in 1928.¹² These groups requested that both State and Commonwealth governments agree upon a system where the Commonwealth would assume all responsibility to safeguard human and civil rights of Aboriginal peoples.¹³ However, this did not occur and the only response was legislation enacted at the Commonwealth and State/Territory levels, prohibiting discrimination, and that was only from 1975. Most governments have failed to acknowledge that simply prohibiting racial discrimination is not enough to achieve substantive equality.

Two jurisdictions have enacted laws which could be used to promote and protect indigenous human rights: the Australian Capital Territory has a Bill of Rights in its *Human Rights Act 2004* (ACT) and Victoria has the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, other jurisdictions have openly resisted implementing similar legislation. For instance, in November 1988 the Queensland Legislative Assembly's Legal, Constitutional and Administrative Review Committee recommended against a Bill of Rights in Queensland.¹⁴ Presently there is a Parliamentary Committee inquiry in regard to a Human Rights Act for Queensland. In the context of Queensland's history of legislation enacted to restrict Aboriginal and Torres Strait Islanders peoples' rights, an acknowledgement in domestic legislation of indigenous peoples as Queensland's first peoples and of their unique rights is essential to promote equal enjoyment of rights for Aboriginal peoples. Unfortunately, any such acknowledgement is lacking.

The *Constitution* initially referred to Aboriginal peoples in two provisions. Section 51(xxvi), drafted with the intention of making laws for immigrants, specifically excluded them. Rather, it provided Parliament with the power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.¹⁵

¹² See, eg, Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003).

¹³ See, eg, Attwood and Markus, above n 10, 5; Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2(17) *Federal Law Review* 17, 24-25.

¹⁴ Gary Fenlon, Queensland Government, Legislative Assembly, *Australasian Study of Parliament Group (Queensland Chapter), A Bill of Rights for Queensland* (12 July 1999) 8 <<http://www.parliament.qld.gov.au/aspg/papers/990712.pdf>>.

¹⁵ Attwood and Markus, above n 10, 1-2.

The second provision, s 127 stated: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.' Attwood and Markus argue that excluding Aboriginal peoples reflected an assumption that Aboriginal people were not capable of exercising their civic responsibilities.¹⁶

Section 127 displayed a direct form of racial discrimination as it treated Aboriginal and Torres Strait Islander peoples less favourably than people from other races. Attwood and Markus state that the real purpose of s 127 was not the national census, but rather a formula for calculating the distribution of funds and appointment of parliamentary seats based on the size of populations.¹⁷ However, the context in which the *Constitution* was drafted reflected entrenched racial discrimination within the government as it failed to acknowledge Aboriginal and Torres Strait Islander peoples as Australia's first peoples.¹⁸ The general view of the colonial governments was that Aboriginal and Torres Strait Islander peoples were inferior and therefore in need of protecting and managing, a function 'more appropriate' for the newly formed States.¹⁹ This racist and paternalistic attitude has continued to the present day, perhaps with the exception of the Commonwealth government in the early to mid 1970s when it instigated anti-racial discrimination legislation for the nation and also targeted racist Queensland legislation.

Between 1959 and 1967, different Commonwealth governments discussed repealing s 127 and amending s 51(xxvi) to remove its specific exclusion of Aboriginal people.²⁰ The wording in s 51(xxvi) was thought to protect Aboriginal people from discrimination; therefore, the removal of reference to Aboriginal

¹⁶ Ibid 3.

¹⁷ Ibid.

¹⁸ George Williams, 'The Races Power and the 1967 Australian Referendum' (2007) 11 (Special Edition) *Australian Indigenous Law Review* 1.

¹⁹ Ibid.

²⁰ See, eg, Sawyer, above n 13, 35; Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' (2011) 15(2) *Australian Indigenous Law Review* 48; Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1902-05 (Arthur Calwell, Opposition Leader); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, 123-124 (William Wentworth).

people raised concern of potential discrimination and measures promoting human rights.²¹

In 1967, Prime Minister Harold Holt introduced the Constitutions Alteration (Aborigines) Bill 1967 (Cth), proposing deletion of the words 'other than the aboriginal race in any State' in s 51(xxvi), and the repeal of s 127.²² The Bill was supported by all in Parliament. A referendum was held later that year and an overwhelming number of Australians (approximately 90%) voted yes to both changes. This is significant because of the 44 referenda held since Federation, only eight – including this particular one – have been successful in gaining 'yes' votes.²³ While the amendment was positive, the changes were not supplanted by provisions supportive of Aboriginal and Torres Strait Islander peoples and their rights. Also, although not intended to be the case, s 51(xxvi) was now capable of being interpreted as providing the Commonwealth with the power to pass both beneficial, and detrimental, laws for Aboriginal and Torres Strait Islander peoples.²⁴

III CAN s 51(XXVI) CONSTITUTION BE USED TO MAKE LAWS TO THE DETRIMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, AS WELL AS FOR THEIR BENEFIT?

Section 51(xxvi) now states that the federal parliament has power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race for whom it is deemed necessary to make special laws. A series of High Court cases interpreting s 51(xxvi) can be used to better understand judicial attitudes towards the role of the Parliament and the courts

²¹ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1906-07 (Billy Sneddon, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1965, 2638-39 (Robert Menzies, Prime Minister).

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, 263 (Harold Holt, Prime Minister).

²³ Scott Bennett, 'The Politics of Constitutional Amendment', (Research Paper no.1, Parliamentary Library, Parliament of Australia, 2002-03) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11>..

²⁴ Williams, above n 18, 9.

in applying legislation and uncovering its intent.²⁵ While these cases have not been judicially used to assist in determining whether a measure is a special measure, they do reflect the attitude of the court as to its role when Parliament makes particular laws affecting Aboriginal peoples. This is relevant in regard to income management, as it is arguable that s 51(xxvi) was the source of power for provisions within the *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* (Cth), which implemented income management in the CYWR and the Northern Territory.

In *Koowarta v Bjelke-Petersen*,²⁶ a majority of the High Court (Stephen, and Aickin JJ agreeing with Gibbs CJ), and Wilson and Brennan JJ, in obiter remarks, stated that s 51(xxvi) supported laws both discriminating against and in favour of people of a particular race.²⁷ Justice Murphy briefly stated that s 51(xxvi) could only be used for the benefit of peoples of a particular race. He also found that the word “for” in s 51(xxvi) means “for the benefit of” and if the section were intended to apply to adverse laws, then the words ‘with respect to’ would have been used.²⁸

In the following year, the High Court in *Commonwealth v Tasmania*²⁹ examined provisions of the *World Heritage Properties Conservation Act 1983* (Cth) which declared it necessary to enact special laws for the people of the Aboriginal race to protect Aboriginal cultural heritage sites. A majority of the High Court (Mason, Murphy, Brennan and Deane, JJ) held the provisions to be within the power of s 51(xxvi). Murphy and Brennan JJ stated that s 51(xxvi) could only support laws benefiting people of a particular race to whom the laws were related.³⁰ The overwhelming support by the nation regarding the 1967 amendment was important to both judges in their interpretations. Justice Deane also referred to the 1967 amendment:

²⁵ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

²⁶ (1982) 153 CLR 168.

²⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 186 [14] (Gibbs, CJ), 243 [1] (Aickin J), 209 [6] (Stephen J), 244 [1], 244 [2] (Wilson J), 262 [18] Brennan J).

²⁸ *Ibid* 242 [14] (Murphy J).

²⁹ (1983) 158 CLR 1.

³⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1, [70] (Murphy J), [77]-[78] (Brennan J).

[t]he power conferred by s 51(xxvi) remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race.³¹

Justice Mason held that the terms of s 51(xxvi):

are wide enough to enable the Parliament (a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and (b) to protect the people of a race in the event that there is a need to protect them. Indeed, it is not denied that the power extends to a law protecting them, for example, a law protecting the people of that race from racial discrimination ...³²

This view was confirmed in 1995 in *Western Australia v Commonwealth*³³ where the majority of the High Court in a joint judgement, but excluding Dawson J, concluded the following in regard to s 51(xxvi), referring to it as the 'race power':

- It is for the Parliament not the Court to decide if a law is 'necessary' for the people of a race.³⁴
- The question remains open as to whether the 'Court retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power.'³⁵
- ... 'the special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race' ... 'not by reference to the circumstances which led the Parliament to deem it necessary to enact the law.'³⁶
- 'A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race. The law may be special even when it confers a benefit

³¹ Ibid [47] (Deane J).

³² Ibid [115] (Mason J).

³³ (1995) 183 CLR 373, [97]-[98] (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh, JJ).

³⁴ Ibid [97] (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh, JJ).

³⁵ Ibid.

³⁶ Ibid [98] (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh, JJ).

generally, provided the benefit is of special significance or importance to the people of a particular race.³⁷

The first two points are of importance to judicial interpretation of special measures. These points provide a strong indication of the court's unwillingness to involve itself in matters which it deems the responsibility of the parliament. I explore these points further in Chapters 6 and 7 where I analyse special measures cases. However, it is clear the court retains power to examine the effect of its differential operation on persons of a particular race.

In *Kartinyeri v Commonwealth*,³⁸ s 51(xxvi) was examined by four of the six High Court judges to determine whether it could be used to discriminate against Aboriginal peoples. Justice Kirby expressed his view that the provision did not enable laws that were detrimental or discriminatory to be enacted against the people of any race, including Aboriginal peoples.³⁹ He referred to the context of the amendment to the provision, saying it did not simply place Aboriginal peoples in with other races to be treated detrimentally or discriminated against, but that the amendment was a reflection of parliament's clear intention – supported by the people – for s 51(xxvi) to be significantly altered to enable special laws for the benefit of Aboriginal peoples.⁴⁰

Justice Gaudron concluded that, prima facie, only laws directed at eradicating Aboriginal peoples' disadvantage 'could reasonably be viewed as appropriate and adapted to their different circumstances.'⁴¹ While for Gaudron J the scope of s 51(xxvi) varies depending on the circumstances, she stated that it was difficult to conceive a situation in which a law operating to the disadvantage of a minority group would be valid.⁴²

Justices Gummow and Hayne held that s 51(xxvi) could be used to withdraw legislation which previously benefitted Aboriginal peoples, even if to do so was to cause disadvantage, confirming their view that the parliament's will is

³⁷ Ibid.

³⁸ Ibid.

³⁹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [152] (Kirby J).

⁴⁰ Ibid [157] (Kirby J).

⁴¹ Ibid [44] (Gaudron J).

⁴² Ibid [44] (Gaudron J).

supreme. While the act of withdrawing legislation is not captured by s 51(xxvi), Gummow and Hayne JJ viewed the power as enabling laws which benefit or confer rights on some people, while disadvantaging or imposing obligations on others.⁴³

Lack of consensus by the High Court on the interpretation and application of s 51(xxvi) highlights the importance of the *RDA*, particularly s 10, which applies when legislation restricts human rights based on race, colour, national or ethnic origin. Section 10 is intended to ensure that those adversely affected by the legislation enjoy human rights to the same extent as others.

Even if s 51(xxvi) limited parliament to enacting beneficial legislation, it does not compel parliament to do so, despite Aboriginal and Torres Strait Islander peoples suffering extreme disadvantage. Chapters 6 and 7 identify legislation which can be interpreted as having both beneficial and detrimental effects on Aboriginal and Torres Strait Islander peoples.

IV VULNERABILITY OF PROTECTIONS AGAINST RACIAL DISCRIMINATION IN AUSTRALIA

In 1985, then Prime Minister Bob Hawke established a Constitutional Commission to review the *Constitution*. In 1988, the Commission recommended deleting the content of s 51(xxvi) and inserting a new paragraph to give the Commonwealth Parliament express power to make laws with respect to 'Aborigines and Torres Strait Islanders'.⁴⁴ The Commission stated that this change 'would retain the spirit, and make explicit the meaning, of the alteration made in 1967'.⁴⁵ However, this wording failed to clarify whether only beneficial laws could be made for Aboriginal and Torres Strait Islander peoples.

The Commission also recommended the insertion of s 124G, which provides everyone with the right to freedom from discrimination on the ground of race, while excluding 'measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or

⁴³ Ibid [65], [86] (Gummow and Hayne JJ).

⁴⁴ Constitutional Commission, *Final Report of the Constitutional Commission Summary*, (Australian Government Publishing Service, 1988) 54.

⁴⁵ Ibid 55.

ethical belief.’⁴⁶ The Commission proposed constitutional support for an agreement between the Commonwealth and representatives of Aboriginal and Torres Strait Islander peoples.⁴⁷ In 1998 a referendum was held for people to decide whether to amend the *Constitution* in order to reduce parliamentary terms; enshrine that one vote has one value; recognise local government; and include civil rights including freedom of religion, rights in relation to trials, and rights regarding the compulsory acquisition of property. However, none of the Constitutional Commission’s recommendations relating to Aboriginal and Torres Strait Islander peoples were included in the four questions posed. In 2003, Noel Pearson commented that constitutional protection against racial discrimination is required, despite what he argued was the ‘great protection of Aboriginal rights’ provided by the *Racial Discrimination Act 1975 (Cth) (RDA)*. He expressed concern that the Commonwealth government could introduce legislation at any time to override the *RDA*.⁴⁸

In 2007, the Commonwealth government suspended Part II *RDA*,⁴⁹ which includes the provisions prohibiting racial discrimination. This was to prevent legal challenge against the legislation which enabled income management of Aboriginal peoples’ social security payments, including those people covered by the CYWR. Part II *RDA* was reinstated in 2010⁵⁰ following constant pressure on, and criticism of, the Commonwealth government. Amendments were made so that income management applied more broadly in the Northern Territory⁵¹ and in other States, however the CYWR remained the same. Despite the general application of income management in the five CYWR communities,

⁴⁶ Constitutional Commission, above n 44, [10.372], [9.438].

⁴⁷ Ibid [10.459].

⁴⁸ Noel Pearson, ‘Racism: The Current Australian Experience’ (1995) 8 *Without Prejudice* (Melbourne, Australian Institute of Jewish Affairs) 10.

⁴⁹ See, eg, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* s 4; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* s 4.

⁵⁰ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth)*.

⁵¹ Luke Buckmaster, Diane Spooner and Kirsty Magarey, ‘Income Management and the Racial Discrimination Act’ (Background Note, Parliamentary Library, Parliament of Australia, 2011-12, 28 May 2012) 1-2
<http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1511200/upload_binary/1511200.pdf;fileType=application/pdf>.

Aboriginal peoples are still disproportionately affected because of their high numbers in these communities.

It has been argued that s 51(xxvi) should be repealed to remove its negative discriminatory power.⁵² However, because current beneficial legislation for Aboriginal and Torres Strait Islander peoples has been enacted under this power (e.g. the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), *Native Title Act 1993* (Cth) and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth))⁵³, it is important to replace it with a provision which supports these Acts and future beneficial legislation. In any case, a referendum is required to amend the *Constitution*, and in Australia referenda are mostly unsuccessful.⁵⁴

V CONFLICT BETWEEN THE QUEENSLAND AND COMMONWEALTH GOVERNMENTS ASSOCIATED WITH THE PASSING OF THE *RACIAL DISCRIMINATION ACT 1973* (CTH)

The *Racial Discrimination Act 1975* (Cth) (*RDA*) was a progressive piece of legislation for Australia at the time of its enactment. To ensure that the *RDA*, if challenged, would be found to rest on the external affairs power (s 51(xxix)), some of its provisions were taken directly from the *International Convention on the Elimination of all Forms of Racial Discrimination* (*ICERD*). These include special measures as set out in Arts 1(4) and 2(2). Because of the broad language of *ICERD*, the *RDA* has not been particularly practical as functioning legislation.⁵⁵ Nevertheless, the *RDA* is important because there are no common law remedies for racial discrimination and the *Constitution* offers no specific rights or protections for Aboriginal peoples.

During the second reading of the *Racial Discrimination Bill 1973* (Cth), Senator Lionel Murphy reflected that the most obvious racial discrimination in Australia

⁵² Pritchard, above n 20.

⁵³ *Ibid* 49.

⁵⁴ Bennett, above n 23..

⁵⁵ Simon Rice, Human Rights Law Centre, Equality Law Reform Project *Reflection on Reforming Discrimination Laws in Australia* (29 April 2011) <<http://www.equalitylaw.org.au/elrp-guest-blogs/reflections-on-reforming-discrimination-laws-in-australia>>.

was against Aboriginal peoples. He referred to lingering paternalistic legislative provisions which imply white superiority and assume inability of Aboriginal peoples to manage their own affairs or property.⁵⁶ He stated that clause 9 (now s 10(3) *RDA*) would override the provisions in Queensland's legislation authorising the management of Aboriginal and Torres Strait Islander people's property (including earnings) without their consent.⁵⁷

The Bill was drafted and debated at the same time as the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill 1974 (Cth) (Queensland Discriminatory Laws Bill). While the two overlapped in some respects, the latter Bill was to address provisions in the Queensland *Aborigines Act 1971* (Qld) and *Aborigines Regulation of 1972* (Qld) described in Chapter 3. Also at issue were the laws imposing a different regime on Aboriginal and Torres Strait Islander reserves to those which applied to other people living in Queensland.⁵⁸

In the early 1970s, Prime Minister McMahon corresponded with Queensland Premier Joh Bjelke-Petersen regarding Queensland's discriminatory legislation. This failed to gain any traction with the Queensland government at the time.⁵⁹ Apparently it was agreed between McMahon and Bjelke-Petersen that, in special cases, it was a state government responsibility to protect Aboriginal people from exploitation and therefore some of Queensland's laws in this regard were not discriminatory.⁶⁰

These discussions were referred to by Senator Cavanagh in the second reading speech of the Queensland Discriminatory Laws Bill. On 1 November 1974 the Premier advised that amendments had been enacted to remove restrictions on the right of Aboriginal or Torres Strait Islander peoples to control their own property. The amendments enabled an Aboriginal or Torres Strait Islander person to terminate management of their property by providing notice in writing witnessed by a Justice of the Peace.⁶¹ However, this amendment failed to

⁵⁶ Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1976 (Lionel Murphy).

⁵⁷ *Ibid* 1977.

⁵⁸ Commonwealth, *Parliamentary Debates*, Senate, 27 November 1974, 2833 (James Cavanagh).

⁵⁹ *Ibid* 2834-2835.

⁶⁰ *Ibid* 2834.

⁶¹ *ibid* 2835.

address provisions which authorised continued management of property without consent under existing legislation. Also, other discriminatory legislation remained in force, still necessitating Aboriginal people to require a permit to enter and stay on a reserve, and to take enforced leave from a reserve if their conduct was deemed 'unreasonable'; enabling police to enter houses on reserves without a search warrant; providing Aboriginal and Torres Strait Islander peoples with no entitlement to legal representation in Aboriginal or Torres Strait Islander Courts, and no right to appeal a decision of these courts to a superior court; requiring Aboriginal people living on reserves to comply with work directions; and providing no challenge to the fact that Aboriginal people were employed with less favourable conditions to others in similar employment. The Queensland Discriminatory Laws Bill 1974 (Cth) included a number of provisions to overcome these issues.⁶² Senator Cavanagh said that although the Queensland government asserted that Aboriginal and Torres Strait Islander peoples did not want further amendments, he did 'not believe that any group of Australian citizens should be subject to laws that are inconsistent with fundamental rights.'⁶³

In the same debate, Manfred Cross – then Federal member for Brisbane – compared the Queensland legislation to the role of the Queensland Public Curator's Office in managing peoples' property if they were unable to do so for reasons including disability, imprisonment, illness, or senility, to illustrate the overt discriminatory nature of managing Aboriginal and Torres Strait Islander peoples' property.⁶⁴

Senator Shiel supported management of Aboriginal peoples' property and explained that each provision of the Queensland legislation was adapted to the 'simple lifestyle' of Aboriginal peoples.⁶⁵ He explained that the 'training allowance' paid to Aboriginal workers on reserves was a special measure under

⁶² Ibid 2835-2836.

⁶³ Ibid 2835.

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1424 (Manfred Cross).

⁶⁵ Commonwealth, *Parliamentary Debates*, Senate, 5 December 1974, 3208 (Glen Shiel).

Art 1(4) *ICERD*.⁶⁶ This argument was later unsuccessful when made by the Queensland government in *Bligh v Queensland*⁶⁷ (*Bligh*).

While the Racial Discrimination Bill did not proceed in 1973, it was re-introduced in 1975 in identical form. In commencing the debate on the Bill in 1975, Liberal Senator James Killen stated that while the Senate supported condemnation of acts of racial discrimination, the Bill required substantial amendment.⁶⁸ This set the tone for each clause of the Bill to be discussed and debated through its Second Reading. While the Labor government had the numbers in the House of Representatives, in the Senate the Opposition held a majority and were therefore able to change some clauses.⁶⁹ The House of Representatives accepted these amendments in early June 1975. They included removal of:

- the powers of the Commissioner of Community Relations to commence legal proceedings where settlement by conciliation has not occurred; and to apply to a judge to obtain evidence to assist the conciliation process;
- offences relating to incitement and promotion of racial hatred;
- vicarious liability for employers of their employees' actions; and
- vesting jurisdiction of proceedings under the legislation in a Superior Court and the Industrial Court.⁷⁰

Despite the above, the Attorney-General announced that he was proud of the initiative represented by the legislation and that it was 'a significant step forward in the development of policies for the promotion of human rights in Australia.'⁷¹ The *RDA* was assented to on 11 June 1975,⁷² and the *Aboriginal and Torres*

⁶⁶ Ibid.

⁶⁷ [1996] HREOC 28.

⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1220 (James Killen).

⁶⁹ Zita Antonios, Race Discrimination Commissioner, *Battles Small and Great: The First Twenty Years of the Racial Discrimination Act* (Australian Government Publishing Service, 1995) 8.

⁷⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1975, 3249 (Kep Enderby).

⁷¹ Ibid.

⁷² Antonios, above n 69, 10.

Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) (*Queensland Discriminatory Laws Act*), eight days later.

Similar to the passage of the Racial Discrimination Bill 1975, Labor was required to compromise on amendments to the Queensland Discriminatory Laws Bill. The amended clauses did not change the requirement for Aboriginal or Torres Strait Islander people to have a permit to enter a reserve; however, not having a permit did not prevent or make it unlawful for an Aboriginal or Torres Strait Islander person from entering, residing on or visiting a reserve without a permit. Against Labor's preference, a clause was inserted enabling a person to be punished or ejected from a reserve for unreasonable behaviour.⁷³

While the *RDA* seemed to positively influence policy and legislation in other States and Territories, Queensland lagged. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) gave Aboriginal peoples powers of self-governance over Aboriginal land. The Northern Land Council in Darwin and the Central Land Council in Alice Springs became statutory bodies. These are two powerful Northern Territory Aboriginal community organisations which have been important both politically and legally in having land rights recognised, land returned to traditional owners, and influencing Territory and Commonwealth governments.⁷⁴ In South Australia the State government enacted the *Pitjantjatjara Land Rights Act 1981* (SA), vesting a large amount of land and powers regarding that land in the Pitjantjatjara people. These powers were the subject of *Gerhardy v Brown*,⁷⁵ analysed in Chapter 5.

In 1982 in *Koowarta v Bjelke-Petersen*⁷⁶ (discussed in Chapter 3) the Queensland government challenged the validity of the *RDA*, arguing that there was no explicit power in the Federal Parliament to legislate on matters of racial discrimination. The High Court held that the *RDA* was valid, based on the

⁷³ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 29 May 1975, 2042 (James Cavanagh); Commonwealth, *Votes and Proceedings*, House of Representatives, 2 June 1975, 80 759-60 (Message from the Senate).

⁷⁴ Antonios, 766, 17.

⁷⁵ (1985) 159 CLR 70.

⁷⁶ (1982) 153 CLR 168.

external affairs power and Australia's ratification of *ICERD*.⁷⁷ The same year, Eddie Mabo, David Passi and James Rice – Meriam people from the Torres Strait – commenced legal proceedings to have their native title rights to the Murray Islands recognised. The action was in response to the *Queensland Amendment Act 1982* (Qld), which established a system for making land grants to be held by the State government on trust for Aboriginal and Torres Strait Islander peoples. While the proceedings were under way, the Queensland government enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) to frustrate the Mabo action and render it redundant. The legislation declared that in 1879, on annexation of the Murray Islands, their title was vested in the state of Queensland, free from all other rights and interests. The High Court held that the Queensland legislation was inconsistent with the *RDA* and therefore invalid under s 109 *Constitution*.⁷⁸ The plaintiffs continued their action to have their native title rights recognised in *Mabo v Queensland (No 2)*.⁷⁹ A relevant aspect of this decision was that after 1975 (the enactment of the *RDA*) compensation became available where arbitrary deprivation of these proprietary rights has occurred.⁸⁰

In 1978, Senator Cavanagh raised the issue of the Queensland government's continued discrimination against Aboriginal and Torres Strait Islander peoples, despite the enactment of the *Queensland Discriminatory Laws Act*. He referred to Aboriginal employees from Yarrabah walking off their jobs in disgust when they were told that the Queensland Department of Aboriginal and Islander Advancement (DAIA) would not pay them the correct wage. When they applied to the Commonwealth Department of Social Security for unemployment benefits they were penalised for 'voluntarily' leaving their jobs by having to wait 6 weeks before being paid unemployment benefits.⁸¹

⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1221 (James Killen).

⁷⁸ *Mabo v Queensland* [1988] HCA 69; 166 CLR 186.

⁷⁹ [1992] HCA 23; (1992) 175 CLR 1.

⁸⁰ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

⁸¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 944-5 (James Killen).

These and other cases discussed in Chapter 3 – such as *Bligh* and *Baird v Queensland*,⁸² which relate to the discriminatory treatment of Aboriginal peoples on Palm Island and Wujal Wujal – best depict the lack of implementation of the *Queensland Discriminatory Laws Act* and the *RDA* in Queensland.

The Queensland government's contempt for the *Queensland Discriminatory Laws Act*, its lack of penalty clauses and procedure for prosecutions reduced its practical effectiveness. However, the legislation is symbolically important because it showed that Australia, at a national level at least, was conscious of racial discrimination and state governments' treatment of Aboriginal people.

VI RELEVANT PROVISIONS OF COMMONWEALTH AND QUEENSLAND ANTI-DISCRIMINATION LEGISLATION

Sections 8 and 10 *RDA* are the provisions most relevant to this thesis. I briefly summarise these provisions here, with further analysis in Chapter 6.

Section 8(1) *RDA* provides that special measures are not prohibited from being racially discriminatory. That is, if a measure is found to be a special measure it is protected from any challenge that it is discriminatory. Because special measures are usually beneficial, challenges are likely to be made by those outside the racial or ethnic group to which it applies.⁸³ In *Bruch v Commonwealth of Australia*,⁸⁴ a non-indigenous person challenged a decision to not grant him the study assistance scheme Abstudy, on the basis that it was racially discriminatory. However, in the case of income management, which may be viewed as punitive, a challenge is likely to be made by those to whom it applies. This occurred in regard to alcohol restrictions in *Morton v Queensland Police Service*⁸⁵ and *Maloney v The Queen*⁸⁶ (*Maloney*). As discussed in Chapter 1, s 8(1) *RDA* refers to Art 1(4) *ICERD* where the purpose of special measures are explained. Art 2(2) *ICERD*, also set out in Chapter 1,

⁸² [2005] FCA 495.

⁸³ Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *American Journal of International Law* 283, 305.

⁸⁴ [2002] FMCA 29.

⁸⁵ (2010) 271 ALR 112.

⁸⁶ (2013) 252 CLR 168.

requires State Parties to take special measures in certain circumstances. Applying it in Australia, Art 2(2) requires the Australian government to necessitate compliance by State and Territory governments. In Chapter 1 it was explained that a number of Australian judges have interpreted Arts 1(4) and 2(2) *ICERD* by reading them together.⁸⁷

Special measures were incorporated into the *RDA* as an appropriate response to the disadvantage suffered by Aboriginal and Torres Strait Islander peoples due to racial discrimination. They are required to address the long-term inequality inflicted upon Aboriginal and Torres Strait Islander peoples, to ensure their adequate development and to guarantee equal enjoyment of human rights and fundamental freedoms.⁸⁸

Section 6A *RDA*⁸⁹ makes clear that the *RDA* was never intended to prevent or inhibit states and territories legislating in relation to *ICERD* and should not affect compatible legislation.

Subsections 9(1) and 9(1A) *RDA* prohibit both direct and indirect racially discriminatory acts carried out by a natural, legal, or corporate person. Subsection (1A) was inserted into s 9 *RDA* by s 49 *Law and Justice Legislation Amendment Act 1990* (Cth) to make it clear that the *RDA* covered indirect discrimination.

Section 18 *RDA* was amended to ensure that when a reason for conducting a racially discriminatory act is just one among many, it is not necessary to establish that it is the dominant reason for the act.⁹⁰ This is crucial due to the difficulty a person would experience in attempting to prove different reasoning for the actions of another and then proving which is the dominant reason.⁹¹

⁸⁷ *Gerhardy v Brown* (1985) 159 CLR 70, [9] (Wilson J), [32] (Brennan J), [9] (Deane J); *Maloney v The Queen* (2013) 252 CLR 168, [13] (French CJ), [88], [91] (Hayne J), [118], [132], [134] (Crennan J), [289], [299], [347], [357] (Gageler J).

⁸⁸ Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1977 (Lionel Murphy).

⁸⁹ Section 6A was inserted by s 5 of the *Racial Discrimination Amendment Act 1983* (Cth).

⁹⁰ *Law and Justice Legislation Amendment Act 1990* (Cth) s 49.

⁹¹ Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1990* (Cth) 48.

Section 10 *RDA* provides for the right to equality before the law. It applies to laws which are discriminatory in their terms or practical effect.⁹² Section 10 differs from s 9(1) and 9(1A) because it is aimed at legislation which prohibits or limits a person's enjoyment of rights based on race, colour or national or ethnic origin as compared with the enjoyment of rights by persons of another race, colour or national or ethnic origin.⁹³ Section 10 *RDA* is therefore important in addressing the effect and implementation of the provisions of the *Family Responsibility Commission Act 2008* (Qld) (*FRC Act*). Section 10 arose from the conflict noted above, where pressure from the Commonwealth failed to influence Queensland to remove discriminatory provisions from its legislation.⁹⁴ However, as discussed further in Chapters 6 and 7, judges see no role for the concept of discrimination in s 10(1).

Section 10(1) *RDA* concerns the enjoyment of a right generally, and therefore it does not require the targeted law to explicitly make a distinction based on race. Rather, it is directed at the 'practical operation and effect' of legislation, not simply its form.⁹⁵ This is important in regard to the *FRC Act*⁹⁶ because it does not specifically focus upon Aboriginal peoples, despite its applicability in predominantly Aboriginal communities.

Section 10(2) *RDA* provides that a right referred to in s 10(1) includes a reference to a right of a kind referred to in Art 5 *ICERD*.⁹⁷ Article 5 *ICERD*

⁹² *Gerhardy v Brown* (1985) 159 CLR 70, [81] (Gibbs CJ), [92]-[93] (Mason J); [119] (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, [198] (Mason CJ), [204] (Wilson J), [216] (Brennan J, Toohey and Gaudron JJ), [242] (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, [103], [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [73] (Ryan, Moore and Tamberlin JJ).

⁹³ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [92] Mason J, [81] (Gibbs CJ); *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558, [12] (Doyle CJ); *Western Australia v Ward* (2002) 213 CLR 1, [97]-[98] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Also, *Sahak v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 215, [35] (Goldberg and Hely JJ).

⁹⁴ Commonwealth, *Parliamentary Debates*, Senate, 27 November 1974, 2834-2836 (James Cavanagh).

⁹⁵ *Western Australia v Ward* (2002) 213 CLR 1 at [115]; *Gerhardy v Brown* (1985) 159 CLR 70, [97], [99] Mason J (dissenting), [216]-[219] (Brennan, Toohey and Gaudron JJ), [231]-[232] (Deane J).

⁹⁶ *Family Responsibility Commission Act 2008* (Qld) s 69(1)(iv).

⁹⁷ Referring to the *International Convention on the Elimination of all Forms of Racial Discrimination* as attached to the *Racial Discrimination Act 1975* (Cth) as sch 1.

makes it clear that the overarching human right is equality before the law and the main obligation on the State is:

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 ...⁹⁸

Article 26 *International Covenant on Civil and Political Rights (ICCPR)* details the right to equality before the law. It has been interpreted by the United Nations Human Rights Committee to apply to legislation, regardless of its subject matter.⁹⁹ However, each of the judges except Gageler J in *Maloney* held that the court is not bound by extrinsic material, including Committee opinions, and, due to a literal interpretative approach, either did not rely on them, or restricted their application.¹⁰⁰ This is further discussed in Chapter 6.

The rights referred to in Art 5 *ICERD* include the enjoyment of the right to property,¹⁰¹ to social security,¹⁰² equal treatment before legal organs,¹⁰³ equal participation in cultural activities,¹⁰⁴ and the right to access services intended for use by the general public.¹⁰⁵ These rights, along with the rights to privacy,¹⁰⁶ self-determination,¹⁰⁷ and to practise traditions, customs and ceremonies,¹⁰⁸ are affected by the *FRC Act* as part of the CYWR. Social security payments

⁹⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.

⁹⁹ Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989), UN Doc HRI/GEN/1/Rev.6 at 146 (2003) [12].

¹⁰⁰ *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ), [61] (Hayne J), [134] (Crennan J), [173], [176] (Kiefel J), [236] (Bell J).

¹⁰¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(v).

¹⁰² *Ibid* art 5(e)(iv).

¹⁰³ *Ibid* art 5(a).

¹⁰⁴ *Ibid* arts 5(e)(vi), 7.

¹⁰⁵ *Ibid* art 5(a).

¹⁰⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

¹⁰⁷ *Ibid* art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

¹⁰⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 12.

are considered by academic writers to be inalienable.¹⁰⁹ Even s 60 *Social Security Administration Act 1999* (Cth) provides that, subject to express legislative provisions, social security payments are absolutely inalienable. However the effect of income management means that those who are income managed are denied the right to their full social security payment.

The CYWR is inextricably linked to the race of the people living in the communities where it applies, and its practical operation – specifically through the *FRC Act* – means that it disproportionately impacts Aboriginal people because it hampers the enjoyment of the abovementioned rights contrary to the dignity, autonomy and equality of Aboriginal peoples in the CYWR communities. In other communities where income management applies, it targets groups with lower socio-economic status, and therefore generally disproportionately affects Aboriginal peoples.

Section 5 *Queensland Discriminatory Laws Act* prohibited the management of property of Aboriginal and Torres Strait Islander peoples in Queensland without their consent. The only way in which an Aboriginal or Torres Strait Islander person's property could be managed was by a law that applied to non-Aboriginal people in the same way, for example under the Public Trustee's provisions.

Section 5 *Queensland Discriminatory Laws Act* and the *RDA* were implemented in response to the Queensland government failing to adequately amend its discriminatory legislation. Section 5 closely replicated s 10(3) *RDA*, and despite being in force until 6 May 2016, it was rarely acknowledged or referred to by government or legal practitioners. It was not mentioned in the Explanatory Notes to the *FRC Bills*¹¹⁰ or the Explanatory Memorandum to the

¹⁰⁹ See, eg, Peter Yeend and Coral Dow, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007*, No 27 Digest of 2007–2008, 13 August 2007 4–5; Jon Altman and Melissa Johns, *Indigenous Welfare Reform in the Northern Territory and Cape York: A Comparative Analysis* (Australian National University Press, 2008) 22.

¹¹⁰ See, eg, Explanatory Notes, *Family Responsibilities Commission Bill 2008* (Qld) 8; Explanatory Notes, *Family Responsibilities Commission and Other Acts Amendment Bill 2011* (Qld) 6; Explanatory Notes, *Family Responsibilities Commission Amendment Bill 2012* (Qld) 3–4; Explanatory Notes, *Family Responsibilities Commission Amendment Bill 2013* (Qld) 3.

Commonwealth Bill,¹¹¹ which implemented income management in the CYWR. It may be the case that the Queensland and Commonwealth governments do not view social security payments as property. This is understandable, given that the right to social security is listed as a separate right to the right to property in a number of international human rights conventions.¹¹² However, social security payments have been held to be property in overseas jurisdictions, including by the European Court of Human Rights.¹¹³

The *Anti-Discrimination Act 1991 (Qld) (ADA)* attempts to cover many types of discrimination, including racial discrimination,¹¹⁴ and applies to a range of specific areas of activity, including the provision of goods and services¹¹⁵ and administration of State laws and programs.¹¹⁶ The *ADA* includes 'welfare measures'¹¹⁷ and 'equal opportunity'¹¹⁸ provisions which are similar to special measures in s 8 *RDA*. A major limitation of the *ADA*, in addition to its application being limited to specified public acts, is that it does not have a provision equivalent to s 10 *RDA*.

¹¹¹ Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth).

¹¹² See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv); *International Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 11(1)(e), 14(2)(c); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 26; *International Convention on the Rights of People with Disability*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 28.

¹¹³ See, eg, *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005); *Abdulaziz v United Kingdom* A94 (1985) 7 Eur Court HR 471; *Ásmundsson v Iceland* (European Court of Human Rights, Chamber, Application No 60669/00 12 October 2004); *Gaygusuz v Austria* [1996] Eur Court HR 36; *Moskal v Poland* (2010) Eur Court HR 22.

¹¹⁴ *Anti-Discrimination Act 1991 (Qld)* s 7(1)(g).

¹¹⁵ *Ibid* s 45-51.

¹¹⁶ *Ibid* s 101.

¹¹⁷ *Ibid* s 104.

¹¹⁸ *Ibid* s 105.

VII INTERNATIONAL HUMAN RIGHTS TREATIES AND AVENUES FOR RECOURSE

International law – including treaties – can influence the development of the common law and also may be used to interpret legislation.¹¹⁹ Section 61 *Constitution* provides the Executive with the power to enter into treaties.¹²⁰ While signing and ratification indicates an intention to comply with the treaties, Australia, unlike some other countries, must incorporate the treaties or their terms into legislation before the treaties are operative in Australia.¹²¹ Incorporation of *ICERD* into the *RDA* is an example. Section 51(xxix) (the external affairs power) *Constitution* provides the Commonwealth Executive with this power to sign and ratify international conventions.

Australia has ratified or consented to a number of major international human rights treaties. Those relevant to this thesis include *ICERD*,¹²² the *Convention on the Rights of the Child (CROC)*,¹²³ the *International Covenant on Civil and Political Rights (ICCPR)*,¹²⁴ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.¹²⁵

In addition to the CYWR income management provisions breaching the right to social security, other potential breaches of human rights include provisions in the *FRC Act* which allow services to share a person's information with the Family Responsibilities Commission (FRC); which compels a person 'agreeing' to, being required to, attend a service or be income managed; requires a person to 'show cause'; and extends the period of income management or the amount income managed.¹²⁶ These provisions arguably breach the right to privacy;¹²⁷

¹¹⁹ Department of Foreign Affairs and Trade, Government of Australia, *Treaty Making Process: Do All Treaties Require Legislation to Operate in Australia?*
<<http://www.dfat.gov.au/treaties/making/>>.

¹²⁰ *Ibid.*

¹²¹ Apart from those treaties terminating a state of war.

¹²² Signed by Australia on 13 October 1966 and ratified on 30 September 1975.

¹²³ Signed by Australia on 22 August 1990 and ratified on 17 December 1990.

¹²⁴ Signed by Australia on 18 December 1972 and ratified on 13 August 1980.

¹²⁵ Signed by Australia on 17 December 1972 and ratified on 10 December 1975.

¹²⁶ *Family Responsibilities Commission Act 2008* (Qld) ss 92-95, 68, 69, 82, 87 and 88.

¹²⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1 7.

the right to equality before the law;¹²⁸ the enjoyment of the right to equality before tribunals and all other organs administering justice;¹²⁹ and to social security.¹³⁰ The breaching of these rights is discussed in Chapter 7. Most other recipients of social security (except in the Northern Territory and other specified locations) are not required to comply with 'extra conditions' in order to access their social security payments. In order for the FRC to be informed of a person's breach of a social responsibility, relevant State and Federal government departments are required to provide the FRC with information on that person. This may include information on a tenancy breach; the person's child not attending school; a criminal conviction; a domestic and family violence protection order; or a notification about their child being harmed or at risk of harm. The person may not know information on the notification regarding their child, and when they are called before the FRC they may have no idea as to the reason why they are required to attend, and are therefore unlikely to be able to adequately engage in or respond to the issue.

A Individual Actions in International Law

Where an individual believes there has been noncompliance with human rights by the Australian or State/Territory governments, there may be recourse for that individual under international law. One option requires the person to first exhaust domestic legal avenues before having recourse to international law.¹³¹ The second option – known as the early warning and urgent action procedure – is discussed below. Article 14 *ICERD* provides a process to complain to the

¹²⁸ See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2(1), *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

¹²⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(a).

¹³⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv), *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9.

¹³¹ Attorney-General's Department, Government of Australia, *Complaints Mechanisms under Human Rights Treaties: Individual Complaints* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Complaintsmechanismsunderhumanrightstreaties.aspx>>.

Committee on the Elimination of Racial Discrimination (CERD). This complaint process is enabled once the State Party by declaration recognises the competence of the CERD to receive communications from groups or individuals. The CERD must inform the party complained of and provide them with the complaint to respond to. The CERD then considers the complaint and response and forwards its decision to the parties.¹³² Australia enabled the complaint process via declaration under CERD on 28 January 1993. Though Australia can withdraw its declaration at any time, once a communication regarding a complaint is received, the CERD must process it.¹³³

While the CERD's decisions are an authoritative interpretation of the treaty, they can only make non-binding recommendations to the State Party. Nevertheless, the CERD has follow-up procedures to monitor the State Party's compliance with the recommendations. This is based on the assumption that, since the State Party accepted the complaints procedure through its declaration, it will also accept the CERD's findings. Part of the process to persuade a State to comply is that a case remains under consideration until it complies, meaning that the State may be caught up within the process interminably. During the follow-up process, the CERD's views and recommendations remain open to the public.¹³⁴

The complaint process is an extremely lengthy one and is not always successful. The time and angst caused by the delayed outcome of recommendations from this process and their non-binding nature is likely to deter most potential applicants. Even the domestic avenues for people affected by racial discrimination are often ineffective. The Australian Human Rights Commission and the Anti-Discrimination Commission Queensland are limited in the matters they receive and outcomes offered. They are both based on a confidential conciliation process, which is limited in its opportunity for achieving

¹³² *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹³³ United Nations Centre for Human Rights, *The First Twenty Years: Progress Report of the Committee on the Elimination of Racial Discrimination*, New York (1991) 6.

¹³⁴ Office of the High Commissioner for Human Rights, United Nations Human Rights, *Procedure for Complaints by Individuals under the Human Rights Treaties: What Happens Once a Committee Decides a Case?*
<<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens>>.

systemic change. Attending court – the alternative usually only accessed after conciliation fails – demands resources and is time consuming.

Stephen Hagan, an Aboriginal man living in Toowoomba complained under Art 8 *ICERD* to the CERD that a stand at a sports ground in Toowoomba was named the 'E.S. 'Nigger' Brown Stand'. It had been named after a well-known non-Indigenous sporting personality who bore this nickname, possibly because he always wore highly polished shoes and used a shade of shoe polish called 'nigger brown'. At first instance in the Federal Court, Drummond J stated that the decision of the sport's ground's trustee to not remove the sign was not 'an act reasonably likely in all the circumstances to offend, insult, humiliate or intimidate an indigenous Australian or indigenous Australians generally',¹³⁵ nor was the decision an act 'done because of the race ... of the people in the group'.¹³⁶ Similarly, the Full Federal Court dismissed the appeal, saying it was unable to find 'a 'distinction' or 'preference' based on race, colour or ethnic origin'¹³⁷ or actions by the trustees of:

treating members of the Aboriginal race differently, let alone less favourably from other members of the community. Nor did the evidence establish that those actions involved a preference given to anyone or to anything.¹³⁸

Mr Hagan applied to the High Court for special leave to appeal; however, his application was dismissed.¹³⁹ The transcript reflects a limited understanding of history or a willingness of the court to be open to a perspective other than that of dominant, mainstream 'white' culture. This is a problem where, in order to make a fair decision, those presiding members of the dominant culture need to appreciate the victim's cultural perspective and their different perspective and experiences.

Mr Hagan then appealed to the CERD. The CERD understood and grasped the issue, finding for Mr Hagan, saying that the use and maintenance of the

¹³⁵ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [31] (Drummond J).

¹³⁶ *Ibid* [32] (Drummond J).

¹³⁷ *Ibid* (Ryan, Dowsett and Hely JJ).

¹³⁸ *Ibid*.

¹³⁹ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2002] HCATrans 132, Gaudron and Hayne JJ.

term 'nigger' at the present time can be considered offensive and insulting, though it may not have been in preceding years.¹⁴⁰ The CERD recommended that the Australian government require removal of the term from the sign and to inform that it had done so.¹⁴¹ The Australian government refused to comply with the recommendation. However, in 2008 the Queensland government gained agreement from the Sports Ground Trust to remove the term on account of it being racist.¹⁴²

*Toonen v Australia*¹⁴³ is an example of a successful complaint to the United Nations (UN) Human Rights Committee. While the Committee process is essential the same as the CERD's, the Commonwealth Parliament responded promptly by enacting legislation to override the breaching provision in state legislation. However, as discussed previously, Australia has often failed to adopt Committee recommendations.¹⁴⁴ Mr Hagan's case is a typical example of the maze of legal proceedings required before a person can complain to a UN Committee, such as the CERD. His case also illustrates the lack of understanding of racial discrimination by domestic courts by denying its existence, which of itself reinforces discrimination.

B Early Warning and Urgent Action Procedure

An exception to the requirement to exhaust domestic legal avenues prior to approaching the CERD is to apply directly to the CERD under its early warning and urgent action procedure. This procedure enables a complaint to be made directly to the CERD by a state party's citizen where there are serious violations

¹⁴⁰ *Stephen Hagan v Australia*, Communication No. 26/2002, U.N. Doc. CERD/C/62/2002 (2003) 7.3.

¹⁴¹ *Ibid* 8.

¹⁴² Tanya Chilcott, 'Toowoomba to Drop "Nigger" Name from Sports Ground', *The Courier-Mail* (online), 28 September 2008 <<http://www.couriermail.com.au/news/queensland/n-word-banned-from-ground/story-e6freoof-1111117585280>>.

¹⁴³ Communication No. 488/1992 (1994).

¹⁴⁴ Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia 2nd ed* (The Federation Press, 2004) 189. For example, in the case of *A v Australia* Communication No. 560/1993 (30 April 1997) the Commonwealth government rejected the Committee recommendation to pay compensation to A.

of the *ICERD* requiring an urgent response. The process can occur despite the state party not having submitted a report to the CERD.¹⁴⁵

The CERD considers a number of specific indicators to assist it in deciding if its early warning and action procedure applies; one that is relevant to income management legislative provisions in Australia, is the adoption of new discriminatory legislation.¹⁴⁶

In deciding if the early warning and urgent action procedure applies, the CERD must consider an array of material from a number of human rights bodies as well as non-government organisations. If the procedure applies, there are a number of options including:

- (a) To request the State party concerned for the urgent submission of information on the situation considered under the early warning and urgent action procedure;
- (b) To request the Secretariat to collect information from field presences of the Office of the High Commissioner of Human Rights and specialized agencies of the United Nations, national human rights institutions, and non-governmental organizations on the situation under consideration;
- (c) Adoption of a decision including the expression of specific concerns, along with recommendations for action, addressed to:
 - (i) The State party concerned;
 - (ii) The Special Rapporteur on contemporary forms of racism, racial discrimination and xenophobia and related intolerance, the Special Rapporteur on the situation of human rights and

¹⁴⁵ Michael O'Flaherty, 'The Committee on the Elimination of Racial Discrimination: Non-government Input and Early Warning and Urgent Action Procedure' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nation and Human Rights* (The Federation Press, 1998) 159.

¹⁴⁶ Committee on the Elimination of Racial Discrimination, *Guidelines for the Early Warning and Urgent Action Procedures, Annual Report A/62/18 Annexes, Chapter III* (August 2007) (Guidelines adopted at the CERD 71st session in August 2007 on the Early Warning and Urgent Action Procedure [12]).

fundamental freedoms of indigenous people, or the independent expert on minority issues;

- (iii) Other relevant human rights bodies or special procedures of the Human Rights Council;
 - (iv) Regional intergovernmental organizations and human rights mechanisms;
 - (v) The Human Rights Council;
 - (vi) The Special Adviser of the Secretary-General on the prevention of genocide;
 - (vii) The Secretary-General through the High Commissioner for Human Rights, together with a recommendation that the matter be brought to the attention of the Security Council.
- (d) To offer to send to the State party concerned one or more of the members of the Committee in order to facilitate the implementation of international standards or the technical assistance to establish a human rights institutional infrastructure;
- (e) Recommendation to the State party concerned to avail itself of the advisory services and technical assistance of the Office of the High Commissioner for Human Rights.¹⁴⁷

Lawyers and academics – on behalf of a number of Aboriginal people affected by the Northern Territory intervention (NTI) from 2007 – submitted a detailed report to the CERD under the early warning and urgent action procedure. As previously mentioned, the NTI included suspension of the *RDA* and blanket income management in a number of Aboriginal communities.¹⁴⁸ The report referred to actions breaching specific *ICERD* Articles and non-compliance with the CERDs' General Recommendation 21 – concerning the right to self-determination, and General Recommendation 23 – regarding rights of indigenous peoples. The report also requested that the CERD adopt a decision

¹⁴⁷ Ibid.

¹⁴⁸ The Authors Legal Representatives, *Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination*, Submission in Relation to the Commonwealth of Australia (28 January 2009) <https://www.uts.edu.au/sites/default/files/RequestforUrgentAction_28Jan09.pdf>.

recommending that the Federal government re-instate the *RDA*; to cease implementing the NTI until the CERD assesses each of its measures as a special measure under *ICERD*; and to direct the Federal government to discuss solutions compliant with *ICERD* and other international obligations with Aboriginal peoples in the Northern Territory.¹⁴⁹

The CERD responded by sending a letter to the Federal government stating that it required further information regarding progress on the drafting of re-designed measures through direct consultation with communities affected by reinstating the *RDA*.¹⁵⁰ After receiving Australia's response, the CERD wrote again noting the Australian government's 'sincere efforts', and referring it to the findings of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in relation to the NTI, in the context of *ICERD*.¹⁵¹

While the early warning and urgent action procedure provides a faster process than requiring an individual to exhaust domestic avenues, the continued existence of income management directed at Aboriginal peoples in the Northern Territory indicates its limited effectiveness. It may have promoted broader application of income management to non-Aboriginal peoples; however, the impact on Aboriginal peoples remains the same.

C State Reporting Requirements

By ratifying treaties, Australia is required to report to the relevant United Nations (UN) committee regarding its compliance with its treaty obligations. Each report is public, tabled in parliament, and Commonwealth government representatives must appear before the relevant UN committee to answer questions in this regard. Shadow reports by non-government organisations may be considered by the committee in this process. Once the committee considers the information, it must issue concluding remarks and observations, and make

¹⁴⁹ Ibid 62.

¹⁵⁰ Fatimata-Binta Victoire Dah, Chairperson of the Committee on the Elimination of Racial Discrimination, Letter to the Government of Australia, 28 September 2009 <<https://wgar.wordpress.com/tag/cerd/>>.

¹⁵¹ Ibid.

recommendations to the UN as to how Australia can improve its compliance with international obligations.¹⁵²

Each treaty committee publishes its interpretation of particular provisions of the relevant human rights treaty in the form of general comments or general recommendations, to provide general guidance to State parties.¹⁵³ Of particular relevance to this thesis is the CERD's *General Recommendation 23: Indigenous Peoples*; *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*; and the Economic and Social Council *General Comment No. 19: The Right to Social Security*. Again, these recommendations and comments are non-binding and, as I will argue in Chapter 6, the most recent High Court decision on special measures did not consider it necessary to refer to extrinsic materials to interpret *ICERD* or the *RDA*.¹⁵⁴ The implementation of legislation including income management provisions directed at Aboriginal people indicates that governments pay little attention and respect to these recommendations.

VIII THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2007

Unlike human rights conventions, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* is essentially an aspirational document of collective rights directed at addressing the issue of self-determination for indigenous peoples. It provides a framework for indigenous peoples and governments to engage in dialogue.¹⁵⁵ Ideally, *UNDRIP* should be used by governments to engage with indigenous peoples when developing and drafting

¹⁵² Attorney-General's Department, Government of Australia, *National Human Rights Consultation Report*, (September 2009) 101-102
<<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>>.

¹⁵³ United Nations Human Rights Office of the High Commissioner, *Human Rights Treaty Bodies – General Comments*
<<http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>>.

¹⁵⁴ *Maloney v The Queen* (2013) 252 CLR 168.

¹⁵⁵ See, eg, Odette Mazel, 'The Evolution of Rights: Indigenous Peoples and International Law' (2009) 13(1) *Australian Indigenous Law Review* (2009) 140, 147; Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 57, 58.

legislation and policy.¹⁵⁶ While its terms are non-binding, *UNDRIP* is important because it establishes a universal framework of minimum standards for indigenous peoples globally,¹⁵⁷ and because it was developed by indigenous people from around the world.

Despite its non-binding nature, Davis argues that *UNDRIP* may contribute to customary international law, which develops through custom or repeated practice by states, making that custom or practice a perceived obligation of states. Customary law includes the prohibition of racial discrimination. Customary international law is binding on all states, regardless of lack of acceptance. However, the status of customary international law is established from uniform and consistent state practice, and the state demonstrating a belief that it is obliged to act in such a way.¹⁵⁸ This differs from treaties that are not customary international law, but have been ratified. The act of ratifying binds the state.¹⁵⁹

In *Morton v Queensland Police Service*,¹⁶⁰ McMurdo P stated that the rights enjoyed under s 10 *RDA* can include human rights in international conventions to which Australia is a party.¹⁶¹ Along with the *International Convention on Economic, Social and Civil Rights (ICESCR)*, and the *International Covenant on Civil and Political Rights (ICCPR)*, McMurdo P referred to *UNDRIP* in her judgment and said that the rights potentially recognised in s 10 *RDA* were not limited to these instruments.¹⁶²

In a joint judgment in *Cheedy on behalf of the Yindjibarndi People v Western Australia*,¹⁶³ North, Mansfield and Gilmour JJ in obiter stated that where legislative provisions are ambiguous, and in particular where they have been enacted after, or in contemplation of, entry into or ratification of an international

¹⁵⁶ Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 11(3) *Australian Indigenous Law Review* 59.

¹⁵⁷ Mazel, above n 155; Ward, above n 155.

¹⁵⁸ Davis, above n 156.

¹⁵⁹ *Ibid.*

¹⁶⁰ [2010] QCA 160.

¹⁶¹ *Morton v Queensland Police Service* [2010] QCA 160, [18] (McMurdo P).

¹⁶² *Morton v Queensland Police Service* [2010] QCA 160, [18] (McMurdo P); *Aurukun Shire Council & Anor v CEO Officer of Liquor and Racing in the Department of Treasury* [2010] QCA 37, [33] (McMurdo P).

¹⁶³ [2011] FCAFC 100.

human rights instrument, 'courts should favour a construction of legislation which conforms with Australia's obligations under a treaty or convention.'¹⁶⁴ The judges referred to *UNDRIP* and the *ICCPR*, expressing that even though these documents had not been incorporated into domestic law it did not mean that they had no relevance in this case.¹⁶⁵ Also, in *Knightley & Brandon*,¹⁶⁶ Harman FM stated that *UNDRIP* and *ICESCR* are relevant to the interpretation of the *Family Law Act 1975* (Cth) (*FLA*), to the extent that the rights under those instruments are broader than those mentioned in the *FLA*.¹⁶⁷

An international example regarding the application of *UNDRIP* principles occurred in Belize, where the Supreme Court used *UNDRIP* as a framework to determine land rights. In that decision, Conteh CJ stated that *UNDRIP* imported significant obligations for Belize in regard to the rights of indigenous peoples to their lands and resources, and that Belize needed to act in a manner consistent with *UNDRIP*.¹⁶⁸

UNDRIP is unique in its recognition of collective rights of indigenous peoples. This contrasts with international conventions where the Western ideology of individual rights prevails. Davis states that, in signing *UNDRIP*, the Australian government's main concern was potential conflict between individual and collective rights.¹⁶⁹ One of the Commonwealth and Queensland governments' arguments in support of income management, despite its broad application, including to single people, was that the individual rights of women and children need to be protected.¹⁷⁰ However, Art 21 *UNDRIP* also provides that

¹⁶⁴ *Cheedy on Behalf of the Yindjibarndi People v Western Australia* [2011] FCAFC 100, [77] (North, Mansfield and Gilmour JJ).

¹⁶⁵ *Ibid* [75]-[77], [109] (North, Mansfield and Gilmour JJ).

¹⁶⁶ [2013] FMCAfam 148.

¹⁶⁷ *Knightley & Brandon* [2013] FMCAfam 148, [117] (Harman FM).

¹⁶⁸ *Aurelio Cal v Attorney-General Of Belize Claim 121/2007* (Supreme Court, Belize, 18 October 2007) [133] (Conteh J).

¹⁶⁹ Davis, above n 156, 58.

¹⁷⁰ See, eg, Explanatory Notes, *Family Responsibilities Commission Bill 2008*, 11. This is also the case in regard to the Northern Territory intervention; Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007), 19-22, 26, 36, 44, 58, 64-67, 71, 79, 98 and 121; Department of Families, Housing, Community Services and Indigenous Affairs, Families and Children, Government of Australia, *What is Welfare Reform?* <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/what-is-welfare-reform>>.

'[i]ndigenous peoples have the right, without discrimination, to ... social security.'

UNDRIP is important in relation to international criticisms of Australia's contravention of human rights. Such criticisms occurred when Australia suspended Part II *RDA* – which prohibits racial discrimination – and implemented the NTI.¹⁷¹ The CYWR also provides a mechanism for discrimination, however it has not received the same level of attention due to the smaller area it covers and its more focused application. This is despite people being income managed under the CYWR at a minimum of 60% and a maximum of 90% of their social security payments, as opposed to people income managed in the Northern Territory generally at a rate of 50%,¹⁷² or 70%¹⁷³ where recognised authorities refer recipients for income management.¹⁷⁴ This generally occurs due to child protection concerns. Another difference relevant to the right to equality before tribunals is that the FRC functions in an extremely private way. People are not represented and decisions are not published; therefore, there is no external scrutiny.

However, the main concern rested with the exclusion of the *jus cogens* rule regarding the prohibition of racial discrimination, when the operation of Part II *RDA* was suspended.¹⁷⁵ Although the *RDA* is now operational, it may be argued that the right to equal treatment under the law, without racial discrimination, is currently being breached by the continuation of the NTI under the present Stronger Futures legislation, and similarly by provisions in the *FRC Act* which continue discrimination against Aboriginal people just as they did when Part II *RDA* was suspended. Further, the Australian government does not respect or comply with Aboriginal people's aspirations and right to self-

¹⁷¹ Davis, above n 156, 61.

¹⁷² *Social Security Administration Act 1999* (Cth) ss 123UCA, 123XJA(1)-(4).

¹⁷³ *Ibid* ss 123UFAA(i), 123UFAA(1)(c)(ii), 123XPAA(3)(a).

¹⁷⁴ 'Vulnerable' people can be referred to a Centrelink social worker for assessment by territory housing authorities, community agencies and others. The person can have 50% of their payment income managed. The Northern Territory Alcohol Mandatory Treatment Tribunal and child protection workers can refer a person for 70% of the payment to be income managed.

¹⁷⁵ Davis, above n 156, 61.

determination.¹⁷⁶ There has been a failure to adequately consult and cooperate with Aboriginal people in designing and implementing the NTI and CYWR, which has served to reinforce prejudice and discrimination. In the case of the NTI, consultations occurred well after its design and implementation. The CYWR was designed by the Cape York Institute for Policy and Development, a non-representative organisation, which stated that it consulted with the CYWR communities during the process of designing and implementing the CYWR. However, as discussed in Chapter 2, CYWR community members had, in fact, little understanding of the CYWR, and the consultation process that supposedly involved them in reality only involved a handful of people.¹⁷⁷ As discussed in Chapter 2, while consultation is an important aspect of self-determination it is not accepted by the High Court as a requirement of a special measure under *ICERD*.

Similar to the special measures provisions in *ICERD*, Art 21(2) *UNDRIP* requires States to take measures, including special measures, to improve social and economic conditions of indigenous peoples. This Article specifies that the focus of such measures should be on the welfare of elders, women, youth, children and people with disabilities. However, this Article could not support the income management schemes under the CYWR or the NTI. The broader context of *UNDRIP* is heavily focused on self-determination,¹⁷⁸ and on indigenous peoples having full enjoyment of all human rights and fundamental freedoms.¹⁷⁹ Further, Art 19 *UNDRIP* requires free, prior and informed consent

¹⁷⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3, 4, 23, 33, 35.

¹⁷⁷ See, eg, Gordon Dean, *Taking Responsibility: Queensland's Family Responsibilities Commission* (Cairns, Queensland, Family Responsibilities Commission Press, 2013) 57-59; Phillip Martin, 'Potemkin in Cape York: The Politics of Misrepresentation in Aurukun's Welfare Reform Trials' (Seminar delivered at Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2 April 2008) <<http://www.anu.edu.au/caepr/events08.php>>; Altman and Johns, above n 109, 11. Consultation is included in arts 15(2), 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

¹⁷⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3, 4, 5, 15(2), 23, 33 and 35.

¹⁷⁹ *Ibid* art 1.

from indigenous peoples before governments can adopt and implement legislative or administrative measures that could affect them.

There is a continued failure by the Commonwealth and Queensland governments to acknowledge and respect the cultures of Aboriginal and Torres Strait Islander peoples and their differences from western cultures. In the CYWR, income management is generally aimed at changing what are viewed as negative behaviours: children not attending school, people committing offences, not paying rent, and not looking after children. Arguably, income management is also directed at changing traditional cultural activities, including kinship responsibilities such as sharing money and resources. An example of a particular cultural activity affected by the CYWR, which is very much focused on children's attendance at school, includes a lack of respect for or understanding of significant factors that are central to children's place within family life, such as their attendance at the funerals of family members which last for more than one day, or their attendance at funerals of people outside the family. A lack of understanding of these activities, which are central to the lives of Aboriginal peoples, is founded upon a number of assumptions made within mainstream Australian culture that do not take into account the very specific cultural practices of Aboriginal peoples. By failing to account for historical issues, the rigidity of mainstream processes and the fact that they are often a bad fit for Aboriginal and Torres Strait Islander peoples, income management processes not only fail to acknowledge or draw upon cultural strengths, but are based on assimilation-style policy. *UNDRIP* takes a clear stance against assimilation in Art 8 and also in each of its Articles which support self-determination. Therefore, it is clear that income management associated with the CYWR is contra to the central position of *UNDRIP*.

Currently, the Australian and Queensland governments do not promote self-determination. Nor are they supportive of non-government legal organisations led by indigenous people that advocate for legislative change.¹⁸⁰ In 2013, the

¹⁸⁰ Shipra Chordia and Andrew Lynch, 'The Many Dilemmas of George Brandis', *The Canberra Times* (online), 4 February 2014
<<http://www.canberratimes.com.au/national/public-service/the-many-dilemmas-of-george-brandis-20140201-31tiq.html>>.

Commonwealth government cut approximately \$13.4 million in funding to legal services for Aboriginal and Torres Strait Islander peoples, that were aimed at law and policy reform and advocacy programs. Similar cuts were made to non-Aboriginal and Torres Strait Islander legal services,¹⁸¹ which often also advocate for change for Aboriginal and Torres Strait Islander peoples, many having advocated against income management. This pattern of funding cuts continued in the government's 2016-17 budget, with a \$6 million cut for Aboriginal and Torres Strait Islander Legal Services and funding stagnating for Community Legal Centres, actualised as a \$34.83 million cut over three years.¹⁸²

The Commonwealth government also cut funding to the National Congress of Australia's First Peoples (Congress),¹⁸³ a non-government advocacy organisation whose board is elected by Aboriginal and Torres Strait Islander peoples and includes a number of individuals, organisations, peak bodies and national organisations.¹⁸⁴ The Congress commenced in April 2010, following the Aboriginal and Torres Strait Islander Social Justice Commissioner convening an Independent Steering Committee in 2008 to research and design a national Aboriginal and Torres Strait Islander representative body.¹⁸⁵ While the Congress previously provided advice to the government, they did so from the perspective of their members. In the 2014-15 budget, its funding was cut

¹⁸¹ SBS World News Australia Radio, 'Indigenous Australians Hit Hard by Legal Aid Cuts: Legal Groups say Confirmed Cuts to Indigenous Legal Aid will Entrench Aboriginal and Torres Strait Islanders as Second-Class Citizens', *World News Australia Radio*, 18 December 2013 (Darren Mara) <<http://www.sbs.com.au/news/article/2013/12/18/indigenous-australians-hit-hard-legal-aid-cuts>>.

¹⁸² National Association of Community Legal Centres, *Budget Cuts to Legal Assistance Services Hit Vulnerable Hardest* (3 May 2016) <http://www.naclc.org.au/cb_pages/files/Media%20Releases/2016/CLA%20Budget%20Night%20MR%20Final.pdf>.

¹⁸³ Dean Harrison, 'Indigenous Organisation to Defy Tony Abbott Funding Cut', *The Sydney Morning Herald* (online), 19 December 2013 <<http://www.smh.com.au/federal-politics/political-news/indigenous-organisation-to-defy-tony-abbott-funding-cut-20131219-2znr4.html>>.

¹⁸⁴ National Congress of Australia's First Peoples, *About Us* <<https://nationalcongress.com.au/about-us/>>.

¹⁸⁵ *Ibid.*

by \$15 million over three years.¹⁸⁶ The Congress has not been funded at all in the 2016-17 budget.¹⁸⁷

The Commonwealth government has now appointed its own Indigenous Advisory Council (IAC), answerable to the Prime Minister.¹⁸⁸ The IAC consists of eight Aboriginal and Torres Strait Islander people and four non-Aboriginal and Torres Strait Islander people, most having a background related to education, the finance sector or economic development.¹⁸⁹ It is up to the IAC appointees to consult with Aboriginal and Torres Strait Islander communities and their organisations and report to the Prime Minister. This is unlikely to comply with a number of *UNDRIP* Articles such as Art 18 which requires representatives to be chosen by Aboriginal and Torres Strait Islander people and to have their own decision-making institutions. It would seem the process of what issues are important to Aboriginal and Torres Strait Islander peoples have already been decided upon, as have the answers.¹⁹⁰

IX CONCLUSION

It has been seen that the *Constitution* fails to provide protections for Aboriginal and Torres Strait Islander peoples. It can, in fact, be used to support the enactment of detrimental legislation. The enactment of the *Racial Discrimination Act 1975 (Cth) (RDA)* partially addressed this issue. However, the vulnerability of the *RDA* needs to be acknowledged. Part II has already been suspended to allow for the implementation of legislation assumed by the Commonwealth government to be discriminatory. It is important that s 10 *RDA* also targets state and federal legislation, because the Queensland *Anti-Discrimination Act 1991 (Qld)* lacks an equivalent provision. Section 8 *RDA* is important as it allows legislation to be drafted which aims to overcome

¹⁸⁶ Reconciliation Australia, *2014-2015 Federal Budget Summary* <<https://www.reconciliation.org.au/news/2014-15-federal-budget-summary/>>.

¹⁸⁷ National Congress of Australia's First Peoples, *The Pain Continues for Aboriginal and Torres Strait Islander Peoples* (7 May 2016) <<http://nationalcongress.com.au/the-pain-continues-for-aboriginal-and-torres-strait-islander-peoples/>>.

¹⁸⁸ Department of the Prime Minister and Cabinet, Government of Australia, The Prime Minister of Australia, *First Meeting of the Prime Minister's Indigenous Advisory Council* (5 December 2013) <<http://webarchive.nla.gov.au/gov/20141219030946/http://www.pm.gov.au/media/2013-12-05/first-meeting-prime-ministers-indigenous-advisory-council>>.

¹⁸⁹ *Ibid.*

¹⁹⁰ This is the opposite to art 18 *UNDRIP*.

disadvantage suffered by Aboriginal and Torres Strait Islander peoples. However, while s 8 relies upon special measures detailed in Art 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, this has not meant that all special measures in Australia are beneficial and do not have some detrimental effect on recipients.

Income management is an example of a special measure which negatively impacts upon many Aboriginal people. In Chapters 6 and 7 I refer to case law to critique the role of governments in enacting special measures legislation and the courts' interpretation of that legislation, in particular ss 8 and 10 *RDA*. Part of this critique includes the court's understanding of its role when interpreting special measures legislation. That role is likely to have an effect on the robustness of ss 8 and 10 *RDA*.

Understanding the Commonwealth and Queensland governments' treatment of Aboriginal and Torres Strait Islander peoples in the past is critical to understanding the present governments' responses to disadvantage suffered by Aboriginal and Torres Strait Islander peoples. Managing them, as well as their property, is a familiar approach by the Queensland government to Aboriginal and Torres Strait Islander peoples. In reflecting on the history of government control of the income and property of Aboriginal and Torres Strait Islander peoples, it is clear that legislation enacted in order to implement this control was racially discriminatory. However, now that the *RDA* has been enacted, income management is rationalised by both governments as a special measure.

As yet, there has been no individual challenge to the racial discrimination inherent in the income management of Aboriginal peoples. I argue in Chapter 7 that if there were, it would likely be unsuccessful in domestic courts. Due to the focus of the United Nations Committees on human rights, it is quite likely that they would arrive at a different outcome. However, to reach the stage of mounting a challenge, an individual must either endure a lengthy and resource intensive process, or apply under the CERD's early warning and urgent action procedure. Even if a favourable conclusion were reached, the outcomes of previous challenges have shown that the Commonwealth government can

essentially ignore or evade the recommendations of the CERD. This approach reinforces the Commonwealth, State and Territory government's insular approach to racial discrimination, which is also reflected in judicial decisions. The present approach adopted by the High Court in interpreting the *RDA* and *ICERD* is analysed in Chapter 6. In Chapter 5 international judicial approaches are examined and compared to Australian courts.

Although it is non-binding and often ignored by the Australian government, the *UNDRIP* is an important declaration for Aboriginal and Torres Strait Islander peoples, reflecting future ambitions and an ideal direction forward. While *UNDRIP* is gaining some traction in domestic case law, its impact in relation to Aboriginal and Torres Strait Islander peoples' lives has so far been limited. However, while inspiring, the rights in *UNDRIP* are not reflected in current Commonwealth and Queensland governments' attitudes.

CHAPTER 5: COMPARATIVE APPROACHES: HOW THE UNITED STATES OF AMERICA, CANADA AND SOUTH AFRICA ADDRESS RACIAL DISCRIMINATION WHEN RIGHTS ARE RESTRICTED

I INTRODUCTION

In this chapter I examine United States of America (US), Canadian and South African judicial approaches and legislation as they apply when people's rights are restricted, especially where restrictions apply because of a person's race. I outline each nation's approach and apply it to income management to determine the outcome if income management was implemented in these jurisdictions.

To understand and critique the judicial approach of different nations – including Australia – in relation to discrimination and special measures, it is important to appreciate the key concepts of discrimination, equality and non-discrimination. The *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)* includes these concepts; discrimination and equality are expressly referred to and non-discrimination applies implicitly. These concepts are variously defined and interpreted in international law and domestic law; therefore, their application may differ between nations.

A formal interpretation of discrimination and equality is premised on everyone being treated the same, despite different needs and different levels of enjoyment of human rights. General international law principles define equality as substantive, and discrimination as including only those distinctions which are arbitrary or unjustified. Substantive equality is based on understanding that different people enjoy human rights to different extents, usually to a lesser extent due to historical forms of discrimination and disadvantage that are the product of colonisation. Substantive equality acknowledges that different treatment is inherent in special measures, to promote enjoyment of human rights, otherwise enjoyed to a lesser extent due to discrimination. Formal equality, on the other hand, assumes that treating different people the same means that they will enjoy human rights to the same extent. It also means that

treating people differently because of their background, including race, even if the aim is to achieve equality, that this distinction is either discrimination, or legally acceptable if it can be characterised as a special measure.

In this chapter and in Chapters 6 and 7 I show that the Australian High Court applies the latter approach of formal equality to racial discrimination cases. This requires Australian courts to except measures based on racial distinctions from being discriminatory by using s 8 *Racial Discrimination Act 1975* (Cth).

Special measures have traditionally been interpreted as providing equal opportunities in areas like education, employment, or promotion, for minority groups who have experienced disadvantage resulting from discrimination. However, in Australia, in recent years, forms of interventionist legislation targeting Aboriginal peoples have been labelled as special measures both by courts and governments.¹ This appears to be unprecedented; I have been unable to locate a counterpart in any other country. I argue that labelling these as 'special measures' offends the principles of equality and non-discrimination, which international law requires for special measures. They are discriminatory in a substantive sense due to their impact upon Aboriginal peoples and their effect of reducing their enjoyment of rights. I argue that rather than being justified as special measures, this legislation restricts rights based on race. The Full Court of the Federal Court in *Bropho v Western Australia*² (*Bropho*) had the opportunity to identify and decide whether legislation which required Aboriginal people to leave their community was racially discriminatory; however, the relevance of race in that case was denied on the basis that the measure targeted dysfunction, rather than Aboriginality. Australia lacks specific legislative provisions to address these types of measures.

Other nations have forms of protection against measures which restrict rights based on attributes such as race. Legal processes and cases in the US, Canada and South Africa show support for this approach, though, the US

¹ See, eg, alcohol restrictions – *Maloney v The Queen* (2013) 252 CLR 168; also, legislation such as the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), enabling indigenous peoples' social security payments to be income managed.

² [2008] FCAFC 100.

continues to apply a formal approach to the concepts of equality and discrimination.

Reference to interpretations of discrimination, equality, non-discrimination and special measures in these countries can assist in gaining a broader understanding of these principles. Each country applies these concepts differently based on a number of factors including their Constitution, history, politics and legislative frameworks, so it is incorrect to simply transplant these approaches to Australia, or use them as an overlay to critique Australian legislation and courts. However, there are similarities between these countries and Australia, including their history of colonisation and displacement of indigenous peoples and the ongoing effects of discrimination.

While there is widespread acknowledgement that rights are not absolute, the US, Canada and South Africa apply tests which only allow the rights of certain people to be restricted in exceptional circumstances. Generally, a form of a proportionality test is applied where the court assesses whether there is a rational connection between the measure and its objective, and that the measure is not arbitrary or unfair. In this chapter I argue that a detailed test in this vein should be required to examine measures that restrict Australian Aboriginal peoples' rights. Given the effects of special measures on Aboriginal peoples' rights, a detailed limitation test, whether in a constitution, in legislation or in judicial reasoning, is critical to assessing the legitimacy of CYWR income management. I see this as not only providing respect for rights as abstract concepts, but also respect for those who are affected. While some elements of these tests are used in Australian judicial reasoning, particularly proportionality, there is no settled test; rather, the approach is to label measures restricting Aboriginal peoples' rights as special measures despite their blatantly discriminatory function.

II EQUALITY AND DISCRIMINATION

Both equality and discrimination are defined in different ways. The way in which equality is understood determines how discrimination is defined. Formal equality requires all people to be treated identically, while substantive equality

requires equal treatment for those who are equal and different treatment for those who are different. Formal equality fails to address structural inequality, and although appearing neutral, can have disparate effects on certain people which can result in entrenched inequality. Substantive equality understands the necessity of treating people differently so that they can access and enjoy rights to the same extent.

In his 1949 Report, the Secretary-General of the United Nations described discrimination as behaviour based on a distinction made on natural or social categories that bear no relation to individual capacities or merits or to the actual behaviour of the individual. The European Court of Human Rights has described discrimination as an unjustified or arbitrary distinction.³ McKean asserts that *ICERD* also refers to discrimination in this way. This is important to recognise, because discrimination of this form enables distinctions regarding the enjoyment of human rights and freedoms to be made without violating the equality principle.⁴

Similarly, the Human Rights Committee – which monitors the implementation of the *International Covenant on Civil and Political Rights (ICCPR)* – stated in General Comment 18 ‘that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the *ICCPR*.⁵ Measures which can reasonably be interpreted as being in the public interest and not arbitrarily singling out individuals or groups for invidious treatment are likely to fulfil these criteria.⁶ However, it must be considered that ‘public interest’ often means dominant interests prevailing over those of minority groups.

³ *Thlimmenos v Greece* (European Court of Human Rights, Grand Chamber, Application No 34369/97, 6 April 2000) [162].

⁴ Warwick McKean, *Equality and Discrimination under International Law*, Oxford University Press, 1985) 286-287.

⁵ Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989), UN Doc HRI/GEN/1/Rev.6 at 146 (2003) [13].

⁶ McKean, above n 4, 287.

Judge Tanaka in *South West Africa*⁷ (Second Phase) held that the principle of equality does not mean absolute equality, but recognises differential treatment based on concrete individual circumstances. Judge Tanaka stated that '[t]o treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.'⁸ As such, differential treatment must be reasonable, not arbitrary or detrimental, or against the will of those it is directed at protecting.⁹ This point is highly relevant to this thesis. Judge Tanaka viewed any distinction based on a racial distinction as contrary to the equality principle. He argued that differential treatment based on linguistic, religious and cultural differences, where reasonable, should be viewed as consistent with the equality principle.¹⁰

Judge Tanaka's opinion regarding racial distinctions is generally contextualised to apply to specific cases based on historical apartheid. McKean disagrees with Judge Tanaka, seeing racial distinctions as justified where, on racial grounds, individuals have suffered significant disadvantage.¹¹ Despite disagreeing on this point, McKean asserts that Judge Tanaka's views on equality, while *obiter dicta* in the South West Africa cases, are authoritative.¹² Judge Tanaka's opinion has been twice referred to by the Australian High Court in cases which involve determining racial discrimination in the context of special measures.¹³ International case law is generally referred to by domestic courts not only for its authoritative value, but also its comparative or persuasive value.¹⁴

While the term 'distinction' is used in *ICERD*, the Committee on the Elimination of Racial Discrimination (CERD) General Recommendation 14 states that

⁷ *South-West Africa Cases (Second Phase) Ethiopia v South Africa; Liberia v South Africa* [1966] ICJ Rep 6.

⁸ *Ibid* 305.

⁹ *Ibid* 313; McKean, above n 4, 263

¹⁰ *South-West Africa Cases (Second Phase) Ethiopia v South Africa; Liberia v South Africa* [1966] ICJ Rep 6, 313.

¹¹ McKean, above n 4, 261.

¹² *Ibid* 260.

¹³ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [26] (Brennan J); *Maloney v The Queen* (2013) 252 CLR 168, [340], [358] (Gageler J).

¹⁴ Jolyon Ford, 'Some Reflections on a Decade of International and Comparative Influence on the Rights Jurisprudence of the Constitutional Court of South Africa' in Max du Plessis and Steve Pete (eds), *Constitutional Democracy in South Africa 1994 – 2004* (Lexis-Nexis Butterworths Press, 2004) 9-10.

differentiation in treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of *ICERD*, are legitimate or fall within the scope of Art 1(4) *ICERD*.¹⁵ In referring to the history of Arts 1(4) and 2(2), McKean¹⁶ highlighted that Poland,¹⁷ Lebanon,¹⁸ the Netherlands and Italy¹⁹ in the International Law Commission proposed amendments to ensure it was understood that measures adopted solely for adequate protection or advancement of racial groups or individuals should not be regarded as preferential or discriminatory.²⁰

McKean explains that discrimination as defined in *ICERD* incorporates special measures as a necessary consequence of equality rather than an exception to it.²¹ In fact, Art 1(4) states that special measures 'shall not be deemed racial discrimination' so long as they don't lead to separate rights maintained or continue after their objectives are achieved.²²

Similarly, Bossuyt states that during the drafting of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *ICCPR*, the prohibition of discrimination and distinctions were generally accepted as including the taking of positive measures for disadvantaged groups.²³ The Committee on Economic, Social and Cultural Rights in General Comment No 13 also asserted that the:

adoption of temporary special measures ... is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and

¹⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination*, 42nd sess, UN Doc A/48/18 at 114 (22 March 1993).

¹⁶ See, eg, McKean, above n 4, 159; Commission on Human Rights, *Report on the Twentieth Session, 17 February – 18 March 1964, Economic and Social Council Official Records: 37th sess, Supplement No. 8, United Nations, UN Doc. E/3873, New York, 1964, [76]-[82]*.

¹⁷ *Ibid* [76].

¹⁸ *Ibid* [77].

¹⁹ *Ibid* [79].

²⁰ *Ibid* [76], [77], [79], [87].

²¹ McKean, above n 4, 159.

²² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

²³ Marc Bossuyt, Special Rapporteur, *Comprehensive Evaluation of Thematic Issues Relating to Racial Discrimination: The Concept and Practise of Affirmative Action, Preliminary Report*, UN Doc E/CN.4/Sub.2/2000/11 (19 June 2000) 5 [18].

provided they are not continued after the objectives for which they were taken have been achieved.²⁴

Article 5 International Labour Organisation *Discrimination (Employment and Occupation) Convention*²⁵ is important, as it was one of the first provisions in an international treaty expressly permitting special measures.²⁶ Article 5 clarifies that special measures ‘in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.’²⁷

Despite these authoritative statements in United Nation conventions, Australian courts have taken a formal approach, defining all distinctions based on race which promote rights as affecting equality. In rationalising its formal approach to the *RDA* the court has ‘excepted’ certain distinctions from the prohibition of racial discrimination in Part II *RDA* on the basis that they are special measures.²⁸ Another approach taken by courts is to define such distinctions as reasonably justified, serving a legitimate public purpose to overcome dysfunction.²⁹ However, while Australian law might accept distinctions based on race, ethnicity or colour as special measures, no onus of proof is required for those who treat people differently based on these characteristics. Therefore, there is no requirement to prove the rationale, reasonableness or lack of arbitrariness of the measure.³⁰ Australia’s approach is based upon a combination of the High Court’s interpretation of ‘discrimination’ and ‘special measures’ in *ICERD*, whereby judges restrict their interpretation to the literal wording of the *RDA* and *ICERD* rather than considering international or overseas judicial opinions.

²⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999).

²⁵ *International Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

²⁶ Bossuyt, above n 23, 5 [21].

²⁷ *International Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 5.

²⁸ *Gerhardy v Brown* (1985) 159 CLR 70; *Maloney v The Queen* (2013) 252 CLR 168.

²⁹ *Bropho v Western Australia* [2008] FCAFC 100.

³⁰ *South-West Africa Cases (Second Phase) Ethiopia v South Africa; Liberia v South Africa* [1966] ICJ Rep 6, 284-316. In Bossuyt, above n 23, 14 [54].

Wall identifies that in *Maloney* – the most recent High Court case discussing special measures – customary international law was overlooked, the majority restricting themselves to extrinsic international materials which would support their interpretation.³¹ The High Court has narrowed the approach that previously existed in Australia. This is further explored in Chapter 6.

III NON-DISCRIMINATION AND EVALUATING MEASURES

The concept of non-discrimination is based on a presumption that the State must not disadvantage an individual or group on an arbitrary basis. It has been explained as a legal technique aimed at counteracting unjustified inequality.³² However, non-discrimination and special measures are capable of clashing if not carefully constructed because the non-discrimination principle removes characteristics such as race, gender and nationality from decision-making processes, while special measures take these characteristics into account to ensure substantive equality. Indeed, in aiming to achieve equality, special measures can sometimes use extreme or irrelevant distinctions to achieve objectives, violating the non-discrimination principle.³³

Special measures require scrutiny to prevent the undermining of the principle of non-discrimination. McGregor argues that distinctions in special measures should be evaluated in the same way as distinctions under non-discrimination clauses of international conventions.³⁴ Bossuyt explains that the *travaux préparatoires*³⁵ of those international instruments containing non-discrimination principles offer guidance on when special measures become discrimination.³⁶ While the intent and aim of special measures is to achieve equality and although they are usually implemented with good intent, evaluation is

³¹ Patrick Wall, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 11.

³² See, eg, Bossuyt, above n 23, 12 [43]; Marie McGregor, 'Affirmative Action and Non-discrimination: South African Law Evaluated against International Law' (November 2006) 39(3) *The Comparative and International Law Journal of Southern Africa* 385-404, 390 [12].

³³ See, eg, Bossuyt, above n 23, 12 [44]; McGregor, above n 32.

³⁴ McGregor, above n 32.

³⁵ These are the preparatory materials used to negotiate the terms of international conventions.

³⁶ Bossuyt, above n 23, 12 [44].

necessary to assess their validity. In the *Belgian Linguistics case* the European Court of Human Rights held that:

...the principle of equality is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.³⁷

To determine whether a distinction is arbitrary, consideration of the ground upon which the distinction is based is important, though it is the relationship or the connection between the ground and the right on which the distinction is made that is decisive, rather than the ground itself. Therefore, even if legislation includes a distinction with a legitimate aim, it may still be discriminatory and violate human rights if the ground on which the distinction is based is not relevant to the specific right in question.³⁸ This connection provides protection to prevent the implementation of discriminatory measures. In terms of income management, there does not appear to be a direct relationship; its aims have not been succinctly articulated so it is difficult to know what rights – except for the right to social security – it is promoting and its relationship with those rights. For example, income management is imposed across the board in the five CYWR communities, yet it is said to also provide access to social security for vulnerable women and children. It is unclear how income managing a single person without children can achieve this aim. This is different from special measures which, for example, promote inclusion in employment and education. There the relationship is clear. This lack of connection between income management and its purported aims is further discussed in Chapter 7.

³⁷ *Belgian Linguistics case* – ‘In the Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v Belgium’ (European Court of Human Rights, Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 23 July 1968) 34.

³⁸ Bossuyt, above n 23, 14-15 [59].

Two limits are placed on special measures by international law. Firstly they may not lead to discrimination, and secondly, they are temporary.³⁹ Due to the context of apartheid at the time *ICERD* was drafted, both Arts 1(4) and 2(2) required special measures to be temporary, as some representatives were concerned that special measures could be used by governments to perpetuate the separation of groups or rationalise colonialism. However, the intention of special measures was to integrate racial groups into the community, rather than emphasise distinctions.⁴⁰

IV LIMITATIONS – REASONABLE JUSTIFICATION

While Australian courts have preferred the approach of labelling forms of legislation which limit rights as special measures, there has been some acknowledgement and application of a test of reasonable justification. In *Bropho v Western Australia*⁴¹ (*Bropho*), the Full Federal Court rationalised the government's decision to close an Aboriginal community as a 'legitimate and non-discriminatory public goal.'⁴² It was held that the measure was directed at dysfunction, and not Aboriginal peoples, despite their constituting most of the community.⁴³

Most human rights are not absolute and may conflict with each other or government policy or legislation. In certain circumstances, it has been acceptable to place limitations on human rights to achieve legislative, policy or program aims. Limitation clauses exist in international law and domestic legislation to balance restrictions on rights against State aims said to be for public benefit.⁴⁴ These clauses tend to require investigation, balancing and prioritisation before a right is restricted.

³⁹ Ibid 12 [41]; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1(4), 2(2).

⁴⁰ Ibid 7 [26].

⁴¹ [2008] FCAFC 100.

⁴² *Bropho v Western Australia* [2008] FCAFC 100, [82]-[83] (Ryan, Moore and Tamberlin JJ). In this case the Court also differentiated the property right affected as derived from statute and different from a human right.

⁴³ Ibid [71] (Ryan, Moore and Tamberlin JJ).

⁴⁴ Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12(5) *European Journal of International Law* 930.

Article 5(1) *International Convention on Civil and Political Rights (ICCPR)*⁴⁵ places great weight on the non-restriction of rights, while Art 29(3) *Universal Declaration of Human Rights*⁴⁶ (UDHR) acknowledges that, in some circumstances, rights will be limited, so that rights and freedoms of others can be recognised and respected, and morality, public order and general welfare achieved. Article 2 ICCPR and Art 2 UDHR require limitations on rights to respect the right of non-discrimination as a basic principle. In General Recommendation XXXI, the Committee on the Elimination of Racial Discrimination (CERD) states that laws that have a legitimate objective and respect the principle of proportionality will not contravene ICERD.⁴⁷

There are several reasons why Australian courts may not have developed or agreed upon a limitation test or similar approach.⁴⁸ These reasons include a) that there are no Commonwealth or Queensland Bills or Charters of Rights to provide guidance; b) that the favoured approach is to assess restrictive measures as special measures and conduct a proportionality analysis within this assessment; c) applying investigative tests to measures may intrude on parliament's 'domain'; d) the separation of powers doctrine; and e) a lack of evidence to test.⁴⁹ As discussed further in Chapters 6 and 7, Australian judges' literal interpretative approach reinforces their reluctance to look internationally for guidance, restricting reasoning to previous domestic decisions and to legislative wording, including that of international conventions, which by their very nature tend to be loosely worded and open to various interpretations.

⁴⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 art 5(1): 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

⁴⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 29(3): 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

⁴⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI: On the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 66th sess, UN Doc HRI/GEN/REV.8 (2005).

⁴⁸ However, I acknowledge the different approach taken by the Full Court of the Federal Court in *Bropho v Western Australia* [2008] FCAFC 100.

⁴⁹ *Maloney v The Queen* (2013) 252 CLR 168, [137] (Crennan J).

V SPECIAL MEASURES, AS DISTINCT FROM PROTECTION OF MINORITY RIGHTS

Special measures can be distinguished from the other protective measures of 'specific rights' held by minority groups, including maintenance of language, culture and religious practices and the right to establish schools, libraries, churches and other institutions. These rights enable minority groups to enjoy the same rights as the rest of the community. Unlike special measures, 'special rights' can be maintained as long as the group wishes, and they will not be discriminatory.⁵⁰ A number of treaties have been implemented⁵¹ to protect the rights of minority groups; however, these only provide partial protection.⁵² The treaties signed within the framework of the League of Nations⁵³ were aimed at enabling minorities to live alongside the rest of the population equally, while still preserving their characteristics and separate identities.⁵⁴ By acknowledging institutions for minority groups required to practise and maintain their own culture, these treaties were based on substantive equality.⁵⁵ Special measures are different: they are aimed at overcoming barriers which limit equal enjoyment of rights⁵⁶ on the same basis as dominant members of the community.

In the *South West Africa* cases,⁵⁷ Judge Tanaka held that where protection of minority interests, such as religion and education are guaranteed, there must be an opportunity for the minority group to reject them, otherwise it is imposed upon them and the rationale undermined.⁵⁸ This thinking acknowledges

⁵⁰ See, eg, McKean, above n 4, 288; Bossuyt, above n 23, 16 [69].

⁵¹ For example, the Treaty of Paris (Russia and France, Great Britain, Sardinia-Piedmont, and Turkey, signed on 30 March 1856) and the Treaty of Berlin (United Kingdom, Austria-Hungary, France, Germany, Italy, Russia and the Ottoman Empire, signed on 13 July 1878). The framework of the League of Nations established a system of protection.

⁵² Bossuyt, above n 23, 16-17 [70].

⁵³ The League of Nations was an international intergovernmental organisation formed at the Paris Peace Conference in 1920. Its aim was to promote peace and prevent wars through collective security and disarmament. In Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International Press, 1995) 77.

⁵⁴ *Minority Schools in Albania (Advisory Opinion)* [1935] PCIJ (ser A/B) No 64 17 (6 April); Bossuyt, above n 23, 17 [72].

⁵⁵ Jeremie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Press, 2006) 174.

⁵⁶ Bossuyt, above n 23, 16 [67].

⁵⁷ (1st phase) ICJ Rep 1962, 318; (2nd Phase) ICJ Rep 1966, 4.

⁵⁸ McKean, above n 4, 259.

change over time and supports the notion that individuals or groups should have the option of choosing the way they wish to live their lives.

However, there are views held by some, including the International Labour Organisation that special measures should incorporate measures recognising minority groups rights or supporting them.⁵⁹ The basis of this reasoning is that minority groups will be further disadvantaged if they are unable to exercise their specific rights and maintain their cultural practices. While the exercise of these different rights may assist in achieving equality, they are inextricably linked to indigenous people's culture, and are arguably of a permanent nature, unlike special measures. Even if equality is achieved, the exercise of rights of minority groups and different practices should continue as long as the group desire them, because they are part of the group's makeup.

Gilbert draws a distinction between land rights for Aboriginal and Torres Strait Islander peoples and special measures.⁶⁰ He argues that land rights and the customary laws of Aboriginal and Torres Strait Islander peoples are not temporary and should be recognised in the western legal system.⁶¹

This is the issue that challenged the High Court in *Gerhardy v Brown*⁶² (*Gerhardy*). It was also the court's first special measures decision. The *Gerhardy* judgment – which decided that land rights legislation was a special measure – has caused confusion in later cases. While some members of the High Court considered that they may have been looking at traditional property rights under *Gerhardy*, an overly technical and narrow approach was applied, focusing on whether all Pitjantjatjara were traditional owners of the land and whether they had the right to exclude all non-Pitjantjatjara who, by definition, could not be traditional owners. It was decided that the South Australia legislation provided a preference for a racial group, the Pitjantjatjara, and was therefore discriminatory, despite the likelihood of most non-Pitjantjatjara people already enjoying their own right to property, and despite the difficulty the judges experienced in applying the proviso in Arts 1(4) and 2(2) *ICERD*, which requires

⁵⁹ Gilbert, above n 53, 175.

⁶⁰ *Ibid* 190.

⁶¹ *Ibid* 191.

⁶² (1985) 159 CLR 70.

the measure to be temporary.⁶³ The legislation was deemed a special measure as the Pitjantjatjara required 'special protection', therefore exempting the legislation from the prohibition against racial discrimination in the *RDA*.⁶⁴ Justice Mason, while recognising the non-temporary nature of land rights, rationalised them as special measures because of their importance to Pitjantjatjara culture, stating that: '[i]n the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples.'⁶⁵

Special measures generally attempt to provide opportunities for minority individuals to participate in mainstream areas where their inclusion has previously been restricted due to structural discriminatory barriers. Minority rights differ in that they are rights inherent to the group's culture. Minority rights are equally if not more important than special measures as they enable individuals and groups to continue their cultural practices indefinitely.

Special measures are by definition temporary, despite the unlikelihood of equality and inclusion being engendered in a short period unless there is a profound structural change. The mere existence of a special measure that is temporary and focuses on including individuals within existing structures rather than addressing the deeper issues which caused the exclusion, are likely to be ineffective in the long term. They are also only likely to assist those who are offered or accept the opportunities, rather than the wider group. Minority rights differ in their breadth, focusing on the group, rather than individuals. They will generally be shaped by the group, rather than externally by government. Therefore, when governments legislate for minority rights, they must be derived from the relevant group.

VI THE UNITED STATES OF AMERICA, CANADA AND SOUTH AFRICA

I have chosen to examine the approaches taken by the legislature and higher level courts in the US, Canada and South Africa to compare the approach taken

⁶³ *Gerhardy v Brown* (1985) 159 CLR 70, [21] (Gibbs CJ), [47] (Mason J), [5] (Murphy J), [11] (Wilson J), [46] (Brennan J), [19] (Deane J), [23], [24] (Dawson J).

⁶⁴ *Ibid* [20] (Gibbs CJ).

⁶⁵ *Ibid* [47] (Mason J).

in Australia and to identify common themes. While these are all English speaking countries, they differ in their levels and methods of constitutional protection of rights and equality. They all have an extensive history of racial discrimination, but arguably are making attempts to address the resultant inequality.

Canada and South Africa have developed strong proactive approaches to prohibiting racial discrimination and encouraging special measures, whereas the US has taken a formal approach to discrimination, similar in many respects to Australia's, as it limits the potential effects of special measures. While it is acknowledged that these countries' approaches cannot be directly transplanted into an Australian context, they are useful for comparison and understanding the development of law on special measures.

Each country has signed and ratified the *International Convention on Civil and Political Rights (ICCPR)* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*. All but the US have ratified the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*. Only Canada has ratified the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Each jurisdiction requires legislation to bring these conventions into effect, although arguably all have an indirect effect through their existence and government's commitment to upholding them.⁶⁶ In the US, courts rarely give direct effect to treaties, or reference them as secondary material.⁶⁷ The reporting mechanisms attached to conventions require governments to be cognisant of their terms and to respond to Committee questioning when perceived breaches have occurred. Domestic non-government organisations tend to both lobby governments regarding compliance and respond to

⁶⁶ European Network of Legal Experts in the Non-discrimination Field (on the Grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), Sandra Fredman, European Commission Directorate-General for Justice, Luxembourg, *Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India*, 2012 (Office for Official Publications of the European Communities, 2012) 5.

⁶⁷ *Ibid* 28.

government reports to Committees, often providing a different perspective on what comprises compliance along with examples of non-compliance.

Each jurisdiction contains an equality guarantee in their constitution. The US adopted the Fourteenth Amendment in 1870, requiring that all people receive equal protection of the law. A similar clause appears in the *Canadian Charter of Rights and Freedoms Constitution Act 1982* (UK), incorporating the right to equality before and under the law, along with the right to the equal benefit of the law, and expressly permitting affirmative action. The South African *Constitution* includes a Bill of Rights with a general equality guarantee, a specific anti-discrimination provision, and a concept of 'unfair discrimination'. It also expressly permits affirmative action.⁶⁸

Both Canada and South Africa have accepted that affirmative action can be an aspect of equality, rather than breaching the principle of equality or discrimination. However, in the US, recent Supreme Court decisions have held that the standard of strict scrutiny should apply to cases of 'benign' racial classification, so that any differential treatment based on race is suspect.⁶⁹ While this does not mean that affirmative action programs are unlawful in the US, it restricts the breadth of programs, and excludes quota systems.

Canada and South Africa have legislative processes that are similar to the strict scrutiny test in the US. These determine when discrimination can be excused or justified. These approaches generally include proportionality, which involves, firstly, scrutinising the stated aims, and secondly, the extent to which the derogation from equality achieves those aims.⁷⁰

In this chapter, I will apply the approaches taken by each country to the Cape York Welfare Reform (CYWR) income management component in order to identify discrimination and assess whether limitations on rights are justified. This will provide an indication of how income management of Aboriginal people's money would be decided by courts in these countries. In Australia, a limitation test remains underdeveloped. In Chapter 6 I critique Australian

⁶⁸ Ibid 6.

⁶⁹ Ibid 9-10.

⁷⁰ Ibid 72.

special measures cases, including those where rights have been limited, and make a similar assessment in Chapter 7 on how Australian courts are likely to decide income management.

A *The United States of America*

The Equal Protection clause in the *United States Constitution* provides that no State shall deny to any person ‘the equal protection of the laws’.⁷¹ McKean states that this provision does not require the same treatment of all peoples when they endure different circumstances, but prevents differential arbitrary treatment.⁷² However, US courts have moved between formal and substantive approaches to equality.

*Plessy v Ferguson*⁷³ (*Plessy*), decided in 1896, was the first Fourteenth Amendment case. The Supreme Court confirmed the legality of legislation providing for separate railway carriages for the ‘white and colored races’ observing that although the object of the Fourteenth Amendment ‘was undoubtedly to enforce the absolute equality of the two races before the law’, the court held that ‘it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality.’⁷⁴ The court failed to acknowledge the direct link between these distinctions and the resultant inequality underpinning segregation and differential treatment of people based on race. This was addressed in 1954 when *Plessy* was overturned in *Brown v Board of Education*⁷⁵. The US Supreme Court held that separate educational facilities are inherently unequal and deprive those segregated from equal protection of the laws guaranteed by the Fourteenth Amendment.⁷⁶

⁷¹ Section 1 of the Fourteenth Amendment to the *United States Constitution* states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁷² McKean, above n 4, 237.

⁷³ 163 US 537 (1896).

⁷⁴ *Plessy v Ferguson*, 163 US 537 (1896), [544].

⁷⁵ 347 US 483 (1954).

⁷⁶ *Brown v Board of Education*, 347 US 483, [494] (Brown J delivering the opinion of the court) (1954).

While there is some level of understanding in the US that special measures promote equality, courts generally apply a formal approach to equality. There are a number of cases where allocation of places or quota systems for minority group members in educational institutions were deemed unconstitutional due to their 'unequal' treatment. However, measures which include places for minority group members to encourage 'diversity', are held to be acceptable.⁷⁷

For a racial classification to be reasonable, it must be founded upon a real and substantial distinction with a reasonable and just relationship between the classification and the purpose of the distinction. This includes all people who are in a similar position and none who are not. Another element includes an assessment of the purpose or object, and where this is intrinsically bad a classification will not be legitimate. A fair and substantial relationship between the classification and the legislation is required.⁷⁸ This is relevant for laws that classify based on race or colour.⁷⁹ In the US, where a classification is made on one of these grounds, the presumption in favour of legislative bodies acting constitutionally is rebutted and they bear the onus of proving that the need for the classification is based on overriding public interest and that it is not discriminatory.⁸⁰

In 1944, in *Korematsu v United States*⁸¹ – a case on the internment of Japanese American citizens during the Second World War – the court held that '[l]egal restrictions which curtail the civil rights of a single racial group are immediately suspect ... Courts must subject them to the most rigid scrutiny.'⁸² It has been argued that this principle leaves open the justification of classification by race; however, this has not occurred. In practice, courts have applied the strict scrutiny test to strike down detrimental racial classifications.⁸³ This test requires the legislature to show that the challenged classification is necessary to serve a compelling state interest. Therefore the classification must be

⁷⁷ *California v Bakke*, 438 US 265 (1978).

⁷⁸ McKean, above n 4, 238.

⁷⁹ *Ibid* 239.

⁸⁰ *Ibid* 238.

⁸¹ 323 US 214 (1944).

⁸² *Korematsu v United States*, 323 US 214, 323 (Black J delivering the opinion of the court) (1944).

⁸³ Fredman, above n 66, 15.

narrowly tailored with no alternatives available, otherwise the Equal Protection clause of the Fourteenth Amendment is violated.⁸⁴ This test has subsequently been applied to special measures on the basis that everyone must be treated 'equally' in a formal sense.

In *Grutter v Bollinger*,⁸⁵ the Supreme Court reinforced its view that strict scrutiny is required of all government classifications of race, and that not all classifications are invalidated by strict scrutiny. However, the Court held that:

Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest. Context matters when reviewing such action. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context.⁸⁶

In a 2013 case,⁸⁷ Kennedy J of the Supreme Court affirmed the value of diversity in university admission programs and held that the Court would not simply accept the university's assertion that its admissions process uses race in a permissible way.⁸⁸

A similar test is found in Title VII⁸⁹ *Civil Rights Act 1964*, which prohibits discrimination in employment on a number of grounds. However, while that Act does not require proof of a motive to discriminate for it to be unlawful, the Fourteenth Amendment does.⁹⁰

In *Washington v Davis*⁹¹ – a constitutional case – the Court held that laws that have a racially disproportionate impact, but no racially discriminatory purpose, are not unconstitutional. This requirement for laws to include a discriminatory motive has been supported in other cases⁹² making it extremely difficult for

⁸⁴ Ibid 72.

⁸⁵ 539 US 306 (2003).

⁸⁶ *Grutter v Bollinger*, 539 US 306, [308] (O'Connor, Stevens, Souter, Ginsberg and Breyer JJ) (2003).

⁸⁷ *Fisher v University of Texas Austin*, 570 US (2013).

⁸⁸ Ibid 12.

⁸⁹ Title VII was enacted under the Commerce Clause of the *Constitution*.

⁹⁰ *Griggs v Duke Power Co*, 401 US 424 (1971).

⁹¹ 426 US 229, 239 (White J delivering the opinion of the court) (1976).

⁹² See, eg, *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979); *Mobile v Bolden*, 446 US 55 (1980); *McClesky v Kemp*, 481 US 279 (1987).

applicants to prevail in discrimination claims under the *Constitution*. In *Ricci v DeStefano*,⁹³ the court applied a formal approach and held that in taking steps to reduce disparate impact, a breach may occur in relation to the prohibition against disparate treatment.⁹⁴ The issue in this case was that results from an exam used to decide promotion in employment were not relied on by the employer due to concern that they favoured white people over minority groups and this would result in the employer being sued for discrimination. However, those who passed the exam successfully argued that disregarding the results caused discrimination against them based on their race.⁹⁵

The CERD criticised the definitions of racial discrimination in federal and state legislation in the US for not complying with Art 1(1) *ICERD*. The US definition focuses on purpose, rather than effect of legislation, and therefore does not account for apparently neutral provisions, criteria or practices which disadvantage people of particular racial, ethnic or national origins. The CERD recommended that the US 'prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.'⁹⁶

*Parents Involved in Community Schools v Seattle School District No 1*⁹⁷ was a case under the Fourteenth Amendment challenging a policy where children were allocated to public high schools based on their race. The policy was aimed at achieving diversity and avoiding racial isolation through controlling the race of students accepted at the schools. While all judges acknowledged that seeking diversity and avoiding racial isolation are compelling state interests, the Supreme Court struck down the policy for not being sufficiently 'narrowly tailored' to its purpose (achieving diversity and avoiding racial isolation).⁹⁸ It was held that 'narrowly tailored' does not require all race-neutral alternatives to be exhausted. The majority opinion by Roberts CJ held that government should

⁹³ 557 US 557 (2009).

⁹⁴ *Ricci v DeStefano*, 557 US 557 (2009).

⁹⁵ *Ibid.*

⁹⁶ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th sess, CERD/C/USA/CO/6 CERD/C/USA/CO/6 (8 May 2008) [10].

⁹⁷ 551 US 701 (2007).

⁹⁸ *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701 (2007).

not include race in decisions on school allocations. Justice Kennedy stated that a school district may in its discretion and expertise choose to avoid racial isolation as a compelling interest, but that government cannot classify every student on the basis of race and assign each of them schools based on that classification, unless they can prove it is necessary for diversity.⁹⁹

In *Meredith v Jefferson and County Board of Education*¹⁰⁰ – a similar case heard around the same time – Roberts CJ stated simply that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.'¹⁰¹ In that case the Supreme Court distinguished a scheme whereby student enrolment was based on a number of factors that included race, from higher education special measures. The Court held that the scheme did not involve individualised consideration of students, used a very limited notion of diversity ('black and non-black') and lacked narrow tailoring necessary for race-conscious programs. The court criticised the scheme as targeting demographic goals, rather than educational benefit from racial diversity, and held there was no evidence that the objectives could not have been reached by non-race conscious methods.¹⁰²

Decisions such as those in *Parents Involved in Community Schools v Seattle School District No 1*¹⁰³ and *Meredith v Jefferson and County Board of Education*¹⁰⁴ prohibit special measures in educational institutions. Acceptable programs are those beneficial to 'all'. Challenges to such decisions have been successful when it has been alleged that measures favouring minority group members have excluded non-minority potential students from gaining a place at an educational institution. Programs are therefore required to focus upon 'racial diversity' on the basis that it benefits all students and promotes well-roundedness.¹⁰⁵ However, such focus fails to acknowledge the position of

⁹⁹ Ibid (Kennedy J).

¹⁰⁰ 547 US 1178 (2007).

¹⁰¹ *Meredith v Jefferson and County Board of Education*, 547 US 1178 (2007).

¹⁰² Ibid.

¹⁰³ 551 US 701 (2007).

¹⁰⁴ 547 US 1178 (2007).

¹⁰⁵ *Fisher v University of Texas Austin*, No 09-50822 (5th Cir, 2014).

minority groups based on historical and present discrimination, whether direct or institutional.

Special measures in the US have been re-defined as discriminating against those in the dominant group. While extremely diluted, these measures are justified even though they benefit dominant group members at the expense of minority individuals. The CERD expressed its concern that the US has taken a large step backward regarding the aforementioned cases,¹⁰⁶ which prohibit race-based measures in order to promote integration and address de facto segregation, but which in doing so maintain inequality. The CERD recommended that the US further identify underlying causes of de facto racial inequalities and racial segregation in education so as to elaborate strategies to promote desegregation and equal opportunity in education, as well as enacting legislation enabling integration through special measures in line with Art 2(2) *ICERD*.¹⁰⁷

US cases demonstrate that the courts' formal approach when interpreting the Equal Protection Clause intensifies the move away from special measures, as well as from any judicial or legislative acknowledgement that race can be taken into consideration to help minority groups achieve equality. The approach in the US reflects dominant viewpoints, and perpetuates disadvantage experienced by minority groups. However, inclusion of minority group members is now being promoted on the basis that rather than assisting minority groups to attain equality of opportunity, the majority can benefit from their involvement in education.

If the US approach were applied to the CYWR income management regime, an assessment would be necessary to see if it applied only to predominantly Aboriginal communities. If *Korematsu v United States*¹⁰⁸ was applied to CYWR income management, it would be held that because it essentially restricts rights

¹⁰⁶ *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701 (2007); *Meredith v Jefferson and County Board of Education*, 547 US 1178 (2007).

¹⁰⁷ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th sess, CERD/C/USA/CO/6 CERD/C/USA/CO/6 (8 May 2008) [17].

¹⁰⁸ 323 US 214, 323 [216] (Black J delivering the opinion of the court) (1944).

of Aboriginal peoples and not others, it requires a high level of scrutiny by the court.¹⁰⁹

It is difficult to identify the Queensland and Commonwealth governments' 'compelling state interest' in relation to income management. The aims of government-imposed income management are not well articulated in the legislation, and not all of the affected rights are acknowledged.¹¹⁰ The main objects of the *Family Responsibilities Commission Act 2008* (Qld) (*FRC Act*) include people becoming socially responsible, providing support for local authority,¹¹¹ and helping people in the CYWR communities assume responsibility for the wellbeing of their community, individuals and families.¹¹² These objects are said to be achieved through the establishment of the Family Responsibilities Commission (FRC) to hold conferences with individuals required to attend the conferences due to their breach of 'social responsibilities'¹¹³ as defined in the *FRC Act*. The FRC hold the conferences with the aim of encouraging socially responsible behaviour and promoting the rights and interests of children and other vulnerable peoples in the communities.¹¹⁴ One of the ways the *FRC Act* purports to achieve these objects is by income management of those people notified to the FRC. The obverse of the argument is that if a person does not engage in behaviour that results in notifications to the FRC, they will be acting in a socially responsible manner.

The objects of the *FRC Act* are vague, rendering an argument for compelling state interest weak. However, if a court found a compelling interest, the next step would be to assess whether income management – which requires the social security payment to be spent on bills and food – is narrowly tailored to achieve that compelling interest. Due to the vagueness of the objects it would

¹⁰⁹ Also, *Grutter v Bollinger*, 539 US 306 (2003).

¹¹⁰ Explanatory Statement, Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013 (Cth) 6-8.

¹¹¹ *Family Responsibilities Commission Act 2008* (Qld) s 4(1)(a).

¹¹² *Ibid* s 4(1)(b).

¹¹³ The social responsibilities include enrolling children in school and requiring adequate attendance; caring for children and not having child protection notifications or interventions; compliance with tenancy agreements; and not incurring criminal convictions or domestic and family violence protection orders.

¹¹⁴ *Family Responsibilities Commission Act 2008* (Qld) s 4(2).

be difficult for the governments to prove a connection between income management and socially responsible behaviour. Income management is used as punishment rather than being directly linked to positively achieving what is held to be socially responsible behaviour. The governments would also be required to provide evidence that the objectives could not have been reached by non-race conscious methods.¹¹⁵ However, it is clear that income management is not narrowly tailored and would therefore violate the Equal Protection Clause.

B Canada

Canada and Australia have similar histories in the context of a paternalistic assumption that indigenous peoples are unable to defend their own interests, requiring the State to act as their guardian. In a 1950 Canadian Supreme Court case, it was held that the *Indian Act*¹¹⁶ 'embodies the accepted view that these aborigenes (sic) are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.'¹¹⁷ Similar to Australia's policies and legislation of the 1950s, Canada's policies and legislation were aimed at assimilation. In a further similarity to Australia, the rights of Canada's indigenous peoples were not enjoyed equally with other Canadians, with Aboriginal peoples deprived of voting rights in federal elections until 1960.¹¹⁸

Relying on the equality provisions in the *Canadian Bill of Rights 1960*, in *Canada v Lavell*,¹¹⁹ a provision under the *Indian Act 1867* was challenged because it deprived Aboriginal women of their status as Indian when they married non-Aboriginal men. The Supreme Court decided that the provision treated all women in Lavell's situation the same, and that equality means equality in the administration or application of the law. However, in 1981 in *Lovelace v Canada*,¹²⁰ the United Nations Human Rights Committee decided that the same provision contravened Art 27 ICCPR, which provides that people

¹¹⁵ *Meredith v Jefferson and County Board of Education*, 547 US 1178 (2007).

¹¹⁶ RSC 1906, c 81.

¹¹⁷ *St Anne's Shooting and Fishing Club v The King* [1950] SCR 211, 219 (Rand J who also delivered the judgment of Estey J).

¹¹⁸ Fredman, above n 66, 17.

¹¹⁹ [1970] SCR 282.

¹²⁰ Communication No R6/24, UN Doc Supp No 40 (A/36/40) [166] (1981).

from minority groups shall not be denied the right to enjoy their own culture.¹²¹ In 1983, s 35 *Constitution Act 1982* was amended so that the Aboriginal and treaty rights recognised in that provision were guaranteed equally to male and female persons.

However, in the case of *R v Drybones*,¹²² also decided in 1970, the Supreme Court of Canada held 6 to 3 that courts are empowered by the Canadian Bill of Rights¹²³ to strike down federal legislation which offends it. The Court held that a provision in the *Indian Act*,¹²⁴ which prohibited Aboriginal peoples from being intoxicated off a reserve violated s 1(b) *Canadian Bill of Rights*¹²⁵ and was therefore invalid.¹²⁶ In a concurring opinion, Hall J referred to the US case of *Brown v Board of Education*,¹²⁷ which rejected the separate but equal doctrine established in *Plessy v Ferguson*.¹²⁸ Justice Hall held that the *Canadian Bill of Rights* can only be fulfilled by repudiating:

discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.¹²⁹

The references to US case law are important in terms of Canadian judges gaining guidance from other jurisdictions. However, both *Lavell* and *Drybones* were decided in 1970, demonstrating inconsistencies in the Supreme Court's application of the principle of equality.

The *Canadian Charter of Rights and Freedoms* – which forms part of the *Constitution Act 1982* – replaced the *Canadian Bill of Rights*. Section 15(1) states that 'every individual is equal before and under the law and has the right

¹²¹ *Lovelace v Canada*, Communication No R6/24, UN Doc Supp No 40 (A/36/40) [166] (1981).

¹²² [1970] SCR 282.

¹²³ SC 1960, c. 44,

¹²⁴ RSC 1952.

¹²⁵ Section 1(b) provides:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (b) the right of the individual to equality before the law and the protection of the law.

¹²⁶ *R v Drybones* [1970] SCR 282.

¹²⁷ 347 US 483 (1896).

¹²⁸ 163 US 537 (1896).

¹²⁹ *R v Drybones* [1970] SCR 282, 283 (Hall J).

to the equal protection and equal benefit of the law.¹³⁰ The right to equal protection is similar to the Fourteenth Amendment of the US *Constitution*. Inclusion of ‘equal benefit of the law’ goes beyond the requirement of prohibiting discrimination to include measures to enable equality.¹³¹ Supporting this view, s 15(2) states that s 15(1):

does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹³²

Justice Iacobucci stated that it is clear that the words ‘does not preclude’ in s 15(2) of the Charter cannot be understood as a defence or exemption.¹³³ Rather, s 15(2) reinforces an interpretation of inclusion of special measures in s 15(1).¹³⁴

Section 16 *Canadian Human Rights Act 1985* also provides support for this view stating that:

It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.¹³⁵

The Supreme Court has embraced s 16 and moved beyond simply prohibiting discrimination, to ordering affirmative action to eliminate systemic discrimination.¹³⁶

¹³⁰ *Canadian Charter of Rights and Freedoms Constitution Act*, UK 1982, c 11, sch B, cl 15(1).

¹³¹ Fredman, above n 66, 18.

¹³² *Canadian Charter of Rights and Freedoms Constitution Act*, UK 1982, c 11, sch B, cl 15(2).

¹³³ *Lovelace v Ontario* [2000] 1 SCR 950, [105] (Iacobucci J).

¹³⁴ *Ibid.*

¹³⁵ *Human Rights Act*, RSC 1985 s 16.

¹³⁶ *Action Travail des Femmes v Canadian National Railway Company* [1987] 1 SCR 1114.

In *Andrews v Law Society of British Columbia*¹³⁷ (*Andrews*), McIntyre J listed three requirements for a finding of discrimination under s 15:

1. differential treatment;
2. an enumerated or analogous ground (open for interpretation); and
3. if the legislation imposes a disadvantage.

The test to be applied asks if a law creates a distinction based on an enumerated or analogous ground; and, if so, whether the distinction causes disadvantage by perpetuating prejudice or by stereotyping. In finding discrimination, the court then conducts an assessment under s 1, which allows Charter guarantees to be limited – known as the reasonable limits clause. Section 1 states that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹³⁸

The relevant test, developed in *R v Oakes*¹³⁹ (*Oakes*), is discussed below.

In *Law v Canada*,¹⁴⁰ a unanimous Supreme Court developed a more detailed test for s 15 by focusing on its purpose, described thus:

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁴¹

This test required a person claiming discrimination to meet the difficult task of proving that their dignity was undermined.¹⁴² Incorporating dignity into the test

¹³⁷ [1989] 1 SCR 143.

¹³⁸ *Canadian Charter of Rights and Freedoms Constitution Act*, UK 1982, c 11, sch B, cl 1.

¹³⁹ [1986] 1 SCR 103.

¹⁴⁰ [1999] 1 SCR 497, [88] (Iacobucci J).

¹⁴¹ *Law v Canada* [1999] 1 SCR 497.

¹⁴² Peter W. Hogg, *Constitutional Law of Canada* (Carswell Press, Student ed, 2003) 1082-1083.

has been criticised as causing problems due to its vagueness as a concept and its subjective nature.¹⁴³

These difficulties were acknowledged in *R v Kapp*.¹⁴⁴ In this case, the Supreme Court essentially reverted to the test in *Andrews* and also acknowledged that ss 15(1) and 15(2) (special measures) work together to promote substantive equality. The Court held that if it can be demonstrated that a measure complies with s 15(2), an analysis under s 15(1) may be unnecessary. This is because the focus of s 15(1) is on preventing distinctions based on listed or similar grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping, while the focus of s 15(2) is on enabling measures to be implemented to stop discrimination. The s 15 equality guarantee is not violated if it is shown that a measure has a restorative or remedial purpose and targets a disadvantaged group.¹⁴⁵

The *Andrews* test, which asks whether a law creates a distinction on a ground such as race, and where it does, examines whether the distinction causes disadvantage by continuing prejudice or stereotyping, would likely find income management discriminatory. Because special measures are complementary to equality in Canada, rather than an exception, it is likely that income management would fail s 15(1) and the *Andrews* test. Section 15(2) clarifies that special measures are to be included under s 15(1); however, the *Andrews* test indicates that an assessment can occur to measure whether they are in fact special measures or are discriminatory.

When applied to income management, the two *Andrews* test questions are answered in the affirmative. That is, the existence of a race-based distinction is certain when income management is applied in communities with predominantly Aboriginal populations, and further, income management causes disadvantage by perpetuating prejudice, or promoting stereotypes of Aboriginal peoples as not caring for their children, committing violence, and

¹⁴³ Donna Greschner, 'The Purpose of Canadian Equality Rights' (2001–2002) 6 *Review of Constitutional Studies* 291, 316.

¹⁴⁴ [2008] 2 SCR 483, [28] (McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ concurring)).

¹⁴⁵ *Ibid* [37]-[38] (McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ concurring)).

wasting money on alcohol, gambling and drugs. An assessment would then occur under s 1 to decide if the limitation is reasonable.

1 Reasonable Limitations on Rights and Freedoms in Canada

A limitation test applies after discrimination is found under s 15(1). This test is found in *R v Oakes*¹⁴⁶ (*Oakes*), and requires the party seeking to limit a right or freedom to prove the limitation is reasonable and demonstrably justified in a free and democratic society. Charter rights, while guaranteed, are not absolute and can be limited if it is proved that exceptional criteria justify their limitation.¹⁴⁷ Although *Oakes* is a case decided based on limitation of a right, not discrimination or other grounds as understood in Australia, it is relevant because of the rights restricted by the *FRC Act's* income management and information sharing provisions. In *Oakes*, a legislative provision which provided a presumption that a person caught with drugs possessed the drugs for the purpose of trafficking, was challenged. This required the defendant to prove, by reverse onus, that the drugs were not possessed for trafficking. The question asked of the Supreme Court was whether the reverse onus violated the right to the presumption of innocence as protected by the Charter.

The test formulated by the Supreme Court in *Oakes* includes that evidence should be produced which informs of the consequences of the limitation, whether the limitation is imposed or not. To be valid, the objective of the measure must be to serve needs of sufficient importance for it to override a constitutional protected right or freedom. The objective must relate to pressing and substantial concerns. If a significant objective is identified, the court must apply a proportionality test to assess the balancing of interests. This will depend on the circumstances of the case. The court will consider whether the measure is rationally connected to the objective, and is not arbitrary or unfair. Alternative measures available to the legislators when making their decision to implement the objective must be placed before the court. The measure should cause the least impairment to the right or freedom. Another proportionality test

¹⁴⁶ [1986] 1 SCR 103.

¹⁴⁷ *R v Oakes* [1986] 1 SCR 103, [65]-[66] (Dickson CJ).

is applied to assess whether the effects of the measure correlate to the objective of the measure.¹⁴⁸

In *Oakes*, the court said that even if an objective is of significant importance, if the measure has serious adverse effects on individuals or groups, then its objective will not be justified. As the seriousness of the adverse effects of a measure increases, so must the importance of its objective for the measure to be justified.¹⁴⁹

Over time, the *Oakes* test has been adjusted by the Supreme Court of Canada, developing a flexible approach to the 'minimal impairment' requirement resulting in a less stringent s 1 analysis in certain cases. The approach has been applied to cases where legislation violating Charter guarantees has been upheld because it offered protection from harm to vulnerable groups; for example, by prohibiting commercial advertising directed at children¹⁵⁰ and prohibiting importation of 'obscene' literature.¹⁵¹

The Australian government appears to be cognisant of the *Oakes* test, or at least a similar test, having produced guidelines for public sector employees on 'permissible limits' to human rights.¹⁵² While many aspects of the *Oakes* test are mentioned, there is no requirement that the measure be related to a pressing and substantial concern or that its objective is of such significance for it to override a human right.¹⁵³ However these conditions are likely to be inferred from the Australian government guidelines which provide practical 'useful questions to ask when assessing whether a measure limiting a right is reasonable, necessary and proportionate'.¹⁵⁴ These include, whether a limitation will reduce the problem; whether a less restrictive approach exists and if it has been tested; if it is a blanket limitation or can be adapted to treat different cases differently; whether there has been adequate regard to the rights and

¹⁴⁸ *R v Oakes* [1986] 1 SCR 103, [68]-[70] (Dickson CJ).

¹⁴⁹ *Ibid* [71] (Dickson CJ).

¹⁵⁰ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927.

¹⁵¹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120.

¹⁵² Attorney-General's Department, Government of Australia, *Public Sector Guidance Sheets*, 'Permissible Limitations'

<<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>>.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

interests of those affected; if there are safeguards against mistakes or abuse; and whether the limitation destroys the fundamental nature of the right at issue. Further questions assist in assessing whether a measure limiting a right is aimed at a legitimate objective.¹⁵⁵ It is unclear whether the Commonwealth government has applied these guidelines in relation to income management.

The *Oakes* test includes a similar evaluation to the US approach, requiring a compelling interest (needs of sufficient importance), and for the measure's objective to be linked to this, similar to the narrowly tailored assessment. The measure must not be arbitrary or unfair. Therefore under a Canadian test the link between income management and the objectives under the *FRC Act* is unlikely to be found, and income management would therefore be declared arbitrary or unfair. However, if a link were found to exist, and a proportionality analysis conducted balancing interests, it would depend on the circumstances before the court. If a single male was income managed it would be difficult to show the effects of his income management on vulnerable people, such as children or women.

The *Oakes* test would also focus on the effect of income management on the rights of the person being income managed. Aside from the general issues associated with income management, its effects could also be shown to be extremely harsh if the person provided evidence that they lived with others and paid rent to them, supported their family, purchased fresh food from markets or traders, provided money to elders as a kinship obligation to look after them, or paid for family to travel to ceremonies including funerals, and could no longer do this due to the BasicsCard.

The *Oakes* test also requires the government to provide evidence on the consequences of imposing and not imposing income management as a measure. Prior to the implementation of the CYWR there was a lack of any evidence in Australia on income management.¹⁵⁶ Presently two detailed reports exist on the CYWR and while to some extent they are positive about its

¹⁵⁵ Ibid.

¹⁵⁶ *R v Oakes* [1986] 1 SCR 103, [68]-[70] (Dickson CJ).

efforts, they provide little evidence linking income management to the *FRC Act* objectives.¹⁵⁷

It is unlikely that the Queensland government could satisfy the court by providing evidence of alternative measures available to the legislators when deciding upon income management. The only alternative provided in the Explanatory Notes to the Family Responsibilities Commission Bill 2008 (Qld) was the Northern Territory income management scheme, where at the time people were automatically income managed if they lived in a particular community. This approach also targeted Aboriginal peoples. It was stated in the Explanatory Notes that despite the critics and alternative ways of achieving the policy objective,¹⁵⁸ the Cape York Institute for Policy and Leadership (CYI) put time and effort into the proposal for the CYWR. This and future testing as to whether the CYWR has a 'more positive and sustainable outcome' than other past measures were provided as attempts at finding alternative measures.¹⁵⁹ However, such reasoning would unlikely be considered satisfactory by a Canadian court. Despite the onus being on the implementer of the measure, evidence of alternative measures could be provided by other parties. Examples of alternative measures are provided in Chapter 7.

C South Africa

The *Constitution of the Republic of South Africa Act 1996* (South Africa) was drafted in the context of a history of apartheid. A special Constitutional Court was established to enforce the *Constitution*. The South African Human Rights Commission was also created to monitor and investigate violations of the *Constitution*.¹⁶⁰

¹⁵⁷ See, eg, KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, *Implementation of the Family Responsibilities Commission*, Final Report, September 2010; Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Cape York Welfare Reform Evaluation 2012* (2013).

¹⁵⁸ The policy objective is stated as 'to support the restoration of socially responsible standards of behaviour and local authority ... and to help the members ... to resume primary responsibility for the wellbeing of individuals and families ...': Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 2.

¹⁵⁹ *Ibid* 7.

¹⁶⁰ Adrien Katherine Wing, 'The South African Constitution as a Role Model for the United States' (2008) 24 *Harvard Black Letter Law Journal* 73, 73-74.

The South African *Constitution* is progressive, providing for the right to adequate housing¹⁶¹ and the right to health care, food, water and social security.¹⁶² These provisions require the State to take reasonable steps, within available resources, for these rights to be achieved.¹⁶³

Section 1, a founding provision of the *Constitution*, enumerates a number of values including 'human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; and universal adult suffrage.' Chapter 2 (ss 7 to 39) *Constitution* contains a Bill of Rights.

The meaning of human dignity was explained in the South African Constitutional Court by O'Regan J in *S v Makwanyane*,¹⁶⁴ who held that '[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.'¹⁶⁵ Justice O'Regan explained that this right 'is the foundation of many of the other rights that are specifically entrenched in chapter 3.'¹⁶⁶ Justice O'Regan's reference to Chapter 3 recognises principles in the *Constitution* aimed at preventing apartheid.¹⁶⁷

In *National Coalition for Gay and Lesbian Equality v Minister for Justice*,¹⁶⁸ Ackerman J referred to the European Court of Human Rights judgment in *Norris v Ireland*¹⁶⁹ and the Supreme Court of Canada's judgment in *Vriend v Alberta*,¹⁷⁰ both of which held that the criminalisation of sodomy is out of step with societal attitudes, and amounts to discrimination against gay men, causing them psychological harm and affecting their dignity and self-esteem.¹⁷¹ Justice Ackerman also referred to changes to laws regarding sodomy in a number of

¹⁶¹ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 26.

¹⁶² *Ibid* s 27.

¹⁶³ *Ibid* ss 26(2) and 27(2).

¹⁶⁴ 1995 (3) SA 391 (Constitutional Court), [328] (O'Regan J).

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid* [329]-[330] (O'Regan J).

¹⁶⁸ 1991 (1) SA 6 (Constitutional Court).

¹⁶⁹ [1988] European Court HR 22.

¹⁷⁰ [1998] 1 SCR 493.

¹⁷¹ *National Coalition for Gay and Lesbian Equality v Minister for Justice* 1991 (1) SA 6 (Constitutional Court) [23], [40], [42] (Ackerman J).

other nations, including England, Wales, Scotland, Germany, Australia and New Zealand.¹⁷² Justice Ackerman held that the ‘symbolic effect’ of sodomy laws:

... is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.¹⁷³

In *National Coalition for Gay and Lesbian Equality v Minister for Justice*,¹⁷⁴ Sachs J explained that the role of equality jurisprudence is to put an end to the isolation and lesser treatment of people because of their belonging to a particular group. Justice Sachs identified that indignity and a lesser status or powerlessness may flow from exclusion from mainstream society. Justice Sachs stated that penalising ‘people for being what they are, is profoundly disrespectful of the human personality and violatory of equality.’¹⁷⁵

The term ‘dignity’ was argued against in Canada, as the court reasoned that, due to its vagueness, it would place complainants at a disadvantage in arguing their case. However, dignity is embedded in South Africa’s *Constitution*.¹⁷⁶ Section 37 lists the right to dignity in s 10 as a non-derogable right which receives entire protection even in states of emergency. The right to dignity

¹⁷² Ibid [40], [43], [44], [46]-[56] (Ackerman J).

¹⁷³ Ibid [28] (Ackerman J).

¹⁷⁴ 1991 (1) SA 6 (Constitutional Court).

¹⁷⁵ *National Coalition for Gay and Lesbian Equality v Minister for Justice* 1991 (1) SA 6 (Constitutional Court), [129] (Sachs J).

¹⁷⁶ ‘Dignity’ appears in the *Constitution of the Republic of South Africa Act 1996* (South Africa) in ss 1(a), 7(1), 10, 35(2)(e), 36(1), 39(1)(a), 165(1)(4), 181(3), 196(3) and in sch 2.

and acting with dignity in the constitutional context gained its importance from South Africa's history and effects of apartheid.

The *Constitution's* equality provision is more detailed than other countries, and covers the concepts of equal protection, anti-discrimination, special measures, and private action. Section 9 acknowledges past injustices and includes the right to equality before the law,¹⁷⁷ freedom from discrimination on a number of grounds,¹⁷⁸ and special measures for those disadvantaged by 'unfair discrimination'.¹⁷⁹ Section 9 clearly prohibits 'unfair' direct or indirect discrimination on any of the listed grounds, or by disparate impact, and requires legislation to reinforce the prohibition.¹⁸⁰ While 'intention' to discriminate is captured, unlike interpretations of the US *Constitution*, it is not required.¹⁸¹ The onus of proof is on the alleged discriminator; discrimination on a listed ground is presumed unfair, unless proved fair.¹⁸²

Justice Moseneke has stated that a major constitutional objective is the 'creation of a non-racial and non-sexist, egalitarian society, underpinned by human dignity, the rule of law, a democratic ethos and human rights.'¹⁸³ Equality is understood as being substantive, going beyond 'mere formal equality and mere non-discrimination' which requires identical treatment, irrespective of the starting point.¹⁸⁴ The court has referred to the nature of this equality as 'remedial or restitutionary equality'.¹⁸⁵ Special measures are held to be integral to equality, with s 9(1)¹⁸⁶ and (2)¹⁸⁷ being complementary, both

¹⁷⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 9.

¹⁷⁸ *Ibid* s 9(3).

¹⁷⁹ *Ibid* s 9(2).

¹⁸⁰ *Ibid* ss 9(2), 9(3) and 9(4).

¹⁸¹ *Ibid* ss 9(3) and 9(4).

¹⁸² *Ibid* s 9(5).

¹⁸³ *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court), [26] (Moseneke J), (Chaskalson CJ, Langa DCJ, Madala J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concurring).

¹⁸⁴ *Ibid*.

¹⁸⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court), [61] (Ackermann J).

¹⁸⁶ Section 9(1) provides that 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

¹⁸⁷ Section 9(2) provides that '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

contributing to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'.¹⁸⁸

Justice Moseneke held that 'differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set in section 9(2).'¹⁸⁹ Therefore, under s 9(2) a measure cannot constitute unfair discrimination. However, where a measure falls outside s 9(2) and it constitutes discrimination on a prohibited ground, a test referred to as the *Harksen* test¹⁹⁰ must be applied to assess whether the measure is discriminatory under s 9(3).¹⁹¹ Under the *Harksen* test, the court looks at whether the impugned law differentiates between people or categories of people and if so, whether the differentiation has a rational connection to a legitimate governmental purpose. In deciding this, the court first looks at whether the complainant is a member of a group that has been historically disadvantaged, whether the differentiation occurs to achieve an important societal goal, and the extent to which fundamental rights are infringed. Second, the court looks at whether the differentiation is on a prohibited ground, and if so, this means the differentiation on its face is unfair.¹⁹² Section 9(5) states that discrimination on the listed grounds is unfair unless established as fair.¹⁹³ The onus is on the government to show that it is not unfair.¹⁹⁴ A finding of discrimination will depend on 'whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'¹⁹⁵

¹⁸⁸ *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court), [30] (Moseneke J, Chaskalson CJ, Langa DCJ, Madala J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concurring).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court).

¹⁹¹ Section 9(3) provides that 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

¹⁹² *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court).

¹⁹³ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 9(5).

¹⁹⁴ Fredman, above n 66, 53.

¹⁹⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court), [50] (Goldstone J).

Section 9(2) measures require that ‘an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion.’¹⁹⁶ The measure must also be designed to protect or advance those disadvantaged by unfair discrimination. Justice Moseneke stated that despite difficulties in predicting the future, measures ‘must be reasonably capable of attaining the desired outcome.’¹⁹⁷ Arbitrary or unpredictable measures are unlikely to be found to advance or benefit the interests of those who have been disadvantaged by unfair discrimination, and are therefore unlikely to satisfy s 9(2).¹⁹⁸ The impact of the discrimination is the determining factor on its unfairness.¹⁹⁹

The use of the term ‘unfair’ in the South African approach differs significantly from Canada and the US, based as it is on an assumption that the government may attempt to implement discriminatory measures cloaked as special measures. This is a conscious acknowledgement of South Africa’s history and an active attempt to prevent the recurrence of apartheid. The concern in the US is the effect of measures on people who do not benefit from them due to affirmative action. Due to the formal approach of the US, special measures are discriminatory and even the privileged can be discriminated against if they are ‘disadvantaged’ because of the measure. An example of this is a person from a non-minority group missing out on a university place because the place is allocated to a minority group member. To resolve such issues, courts in the US explain special measures in such a way as to make them appear to benefit both minority and non-minority groups. Therefore, a special measure in the US could involve establishing diversity programs for education placements.

Where discrimination is established as unfair, the South African limitations approach may be justified under s 36 of the South African *Constitution*:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an

¹⁹⁶ *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court), [40] (Moseneke J), (Chaskalson CJ, Langa DCJ, Madala J, O’Regan J, Sachs J, Van der Westhuizen J and Yacoob J concurring).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Hoffmann v South African Airways* 2001 (1) SA 1 (Constitutional Court), [27] (Ngcobo J).

open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The Court has held that s 36 requires the weighing of competing values and making an assessment based on proportionality for a law to limit any right in the Bill of Rights.²⁰⁰ The flexible test in South Africa involves a balancing exercise and a global judgment on proportionality,²⁰¹ rather than a clear test as outlined in *Oakes*.²⁰² While principles can be established, there is no absolute standard for determining reasonableness and necessity: principles are established and applied to the circumstances of each case. The balancing process requires consideration of:

the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means, less damaging to the right in question.²⁰³

Like the *Oakes* test, as the impact of a measure on a right increases, the level of persuasiveness needed for its justification also increases.²⁰⁴

South Africa has two pieces of legislation enacted under s 9(4) *Constitution* which promote equality and affirmative action. The *Employment Equity Act*

²⁰⁰ *National Council for Gay and Lesbian Equality v Minister of Justice* 1998 (1) SA 6 (Constitutional Court), [33]-[35] (Ackermann J).

²⁰¹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (Constitutional Court), [29]-[31], [33]-[34] (Sachs J (Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J and Cameron AJ concurring)).

²⁰² *R v Oakes* [1986] 1 SCR 103.

²⁰³ *S v Makwanyane* 1995 (3) SA 391 (Constitutional Court), [104] (Chaskalson P).

²⁰⁴ *S v Manamela* 2000 (3) SA 1 (Constitutional Court), [32] (Madala, Sachs, Yacoob JJ).

1998 (South Africa) requires designated employers to implement special measures to promote employment of qualified people from particular disadvantaged groups. Its approach is based on equal opportunity²⁰⁵ and aims to eliminate unfair discrimination. The *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) (*PEPUDA*) covers all other areas outside of employment and special Equality Courts were established to enforce it.²⁰⁶

Section 14 *PEPUDA* states that 'measures designed to protect or advance persons ... disadvantaged by unfair discrimination' are not unfair. Section 14(3) is based on the *Harksen* test and is similar to s 36 *Constitution*, but includes broader factors such as whether the discrimination impairs or is likely to impair human dignity;²⁰⁷ the impact or likely impact of the discrimination on the complainant;²⁰⁸ the position of the complainant in society; whether he or she suffers from patterns of disadvantage; or whether he or she belongs to a group that suffers from such patterns of disadvantage.²⁰⁹

It has been noted that this list may include a broader range of factors than the s 9 *Constitution* fairness test; however, s 14 must be interpreted consistently with the *Constitution*. Where s 14(3)(f),²¹⁰ (g)²¹¹ and (h)²¹² are part of the s 36 *Constitution* analysis,²¹³ s 14 has been described as not being a model of clarity, or 'particularly helpful to a court faced with the determination of what constitutes fairness.'²¹⁴ The test is extremely subjective requiring detailed evidence on the complaint, including effects on dignity. These issues raise questions as to whether s 14 is constitutional, however it has not been challenged.

²⁰⁵ *Employment Equity Act 1998* (South Africa) s 15(1).

²⁰⁶ Wing, above n 160, 78.

²⁰⁷ *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 14(3)(a).

²⁰⁸ *Ibid* s 14(3)(b).

²⁰⁹ *Ibid* s 14(3)(c).

²¹⁰ '[W]hether the discrimination has a legitimate purpose.'

²¹¹ '[W]hether and to what extent the discrimination achieves its purpose.'

²¹² '[W]hether there are less restrictive and less disadvantageous means to achieve the purpose.'

²¹³ *MEC for Education Kwazulu-Natal v Pilly* 2008 (1) SA 474 (Constitutional Court), [168] (O'Regan J).

²¹⁴ *Ibid* [70] (Langa CJ).

Section 39 *Constitution*, 'Interpretation of Bill of Rights', states that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.²¹⁵

However, it has been suggested that if s 39 did not exist, South African courts would still refer to international law and comparative external law in providing meaning to rights provisions and concepts.²¹⁶ South African courts have interpreted 'international law' broadly, and have considered Convention Committee interpretations of convention provisions.²¹⁷ International conventions have been referred to by courts for guidance on general principles rather than for detailed rules of international law.²¹⁸ Similarly, judges have viewed external law as assisting in developing rights,²¹⁹ but have been cautious that the *Constitution* must be interpreted in the context of its language, history and South Africa's legal system.²²⁰

Due to its disproportionate application to Aboriginal people, if income management existed, and was challenged in South Africa it would likely be declared unfair discrimination under s 9(3) *Constitution*. The *Harksen* test requires a similar connection to that in the US and Canada; however, it also requires a connection between a law that differentiates between people based on race and a legitimate governmental purpose.²²¹ Similar issues identified within the US and Canadian approaches have arisen in relation to the

²¹⁵ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 39.

²¹⁶ Ford, above n 14, 4.

²¹⁷ *Government Republic of South Africa v Grootboom* 2001 (1) SA 46 (Constitutional Court), [29]-[31], [45] (Yacoob J (Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ).

²¹⁸ *Mohamed v President, RSA* 2001 (3) SA 893 (Constitutional Court); *S v Williams* 1995 (3) SA 632 (Constitutional Court).

²¹⁹ *S v Makwanyane* 1995 (3) SA 391 (Constitutional Court), [302] (Mokgoro J).

²²⁰ *S v Makwanyane* 1995 (3) SA 391 (Constitutional Court), [37] (Chaskalson P); *Sanderson v AG Eastern Cape* 1998 (2) SA 38 (Constitutional Court), [26] (Kriegler J); *S v Mamabolo* 2001 (3) SA 409 (Constitutional Court), [40] (Kriegler).

²²¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court).

objectives being legitimate and the need to apply based on race. The South African court would assess an Aboriginal complainant from one of the CYWR communities as being a person from a historically disadvantaged group due to the detrimental effects of colonisation and paternalistic legislation and policy. Measures under s 9(2) *Constitution*, as in the US and Canada, must be reasonably capable of achieving their objective. For the same reasons provided above, this is unlikely due to the vagueness of the objectives.

The court also assesses the extent to which fundamental rights are infringed. Rights infringed could include equality before the law and freedom from discrimination;²²² human dignity;²²³ privacy;²²⁴ freedom of movement;²²⁵ property;²²⁶ and social assistance.²²⁷ Again, as in the US and Canada, government is required to prove that the discrimination is fair. While income management's effect on the rights mentioned will be assessed, if objectively it has the potential to impair human dignity or has similar adverse effects, it will be held discriminatory.

However, even if held to be unfair, it could be argued that income management may be justified under s 36 as a law of general application. The *Constitution* has been drafted with South Africa's history of apartheid in mind, and while Australia's history is different, differential treatment through legislation with disparate effects is likely to be identified as failing s 36(1) as it requires the relevant law to be of general application, and income management applies to predominantly Aboriginal communities.

If income management were accepted as a law of general application, the s 36(1) test would incorporate an assessment similar to those in s 9(2) and (3) of the South African *Constitution* and to the US and Canada law which requires examination of the importance of income management, its purpose relationship to that purpose, and less restrictive measures that could achieve it. Examples

²²² *Constitution of the Republic of South Africa Act 1996* (South Africa) s 9.

²²³ *Ibid* s 10.

²²⁴ *Ibid* s 14.

²²⁵ *Ibid* s 21. It could be argued that an income managed person is restricted to living in the vicinity of shops that cater for basics cards.

²²⁶ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 25.

²²⁷ *Ibid* s 27.

of alternative measures – which I outline in Chapter 7 – are likely to indicate the inappropriateness of income management and its punitive nature. This last factor is narrower than the US and Canadian approaches, which simply requires evidence of alternative measures, given that alternatives, especially as presented by a government, could be more restrictive than the measure in question. Under s 36, a court must also consider the nature of the right or rights limited. Given the number and nature of rights affected, the vague relationship between income management and its objectives and less restrictive measures available in other communities, a South African court is unlikely to hold income management to be a valid measure.

VII CONCLUSION

The meaning ascribed to the concepts of equality, discrimination and non-discrimination are integral to understanding different countries' positions on discrimination and special measures. Whether the courts of a country interpret 'equality' as formal equality or substantive equality will affect how they define discrimination. Distinctions based on race – even where they are special measures – are defined as discriminatory if a formal approach is used, as in Australia and the US. This approach fails to fully appreciate the disadvantage caused by racial discrimination.

Terminology used within international conventions – including *ICERD*'s use of the term 'distinction' – has caused confusion, especially for Australian courts. In Australia, special measures are rationalised as exceptions to the prohibition against racial discrimination, based on their beneficial nature as a special measure. Similar to the US, Canada and South Africa a connection is required between the measure and its objectives. However, Australian courts are reluctant to examine this connection, preferring to rely on Parliament's judgment. This reticence fails to acknowledge Australia's historical treatment of Aboriginal and Torres Strait Islander peoples and the reasons for the enactment of the *Racial Discrimination Act 1975* (Cth) and the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth). This issue is further explored in Chapter 7.

Due to the Australian approach of defining any distinction as discriminatory, measures supporting Aboriginal and Torres Strait Islander people's inherent rights are likely to be held discriminatory. However, the judgment in *Gerhardy v Brown*²²⁸ indicates that while measures supporting these rights may be found discriminatory, they will be excepted from the prohibition against racial discrimination, as special measures. I argue that inherent rights have a role in gaining substantive equality and while they require recognition and protection, they are not special measures. This is important to note, because special measures are implemented by governments or private companies, generally with the aim of assimilating Aboriginal and Torres Strait Islander peoples into mainstream culture. On the other hand, inherent rights are integral to Aboriginal and Torres Strait Islander peoples' cultures and assist in preserving cultures and identities.

The constitutions of the US, Canada and South Africa include protections for equality. In deciding cases, Canadian and South African courts follow guidance from other countries and from international law. Each country implements special measures to assist individuals and groups who have been discriminated against. However, they do not appear to include measures equivalent to income management that restrict the enjoyment of rights. In fact, when rights are restricted by a measure targeting a group or specific individuals of a group based on a ground such as race, the measure will be prohibited on the basis of being discriminatory.

Like Australia, the US takes a formal approach to equality. The concern in the US has been that, by providing special measures for minority groups, they are being treated differently, perhaps in a way that benefits them more than non-minority groups. As such, these special measures promote inequality. This has meant that some special measures in the US are required to be beneficial to all, rather than only to those most in need.

A major difference between the approaches in Australia and those adopted by the US, Canada and South Africa is that the latter countries are unlikely to consider income management – or, other measures which severely restrict

²²⁸ *Gerhardy v Brown* (1985) 159 CLR 70.

rights – as special measures. In these jurisdictions, measures which restrict rights are tested to determine their legitimacy and proportionality, and assessing the measure’s ability to achieve its aims is considered essential.

While the tests in Canada and South Africa are more detailed than those of the US, each test requires measures to have a narrow focus and not be unfair or arbitrary. A connection between the measure and its purpose or objective requires investigation and prediction of the measure’s ability to achieve its aim. Income management was implemented under the CYWR in July 2008. There is data from two evaluations and quarterly reports that could be scrutinised to assess the existence of a link between income management and its objective of social responsibility. However to be measurable this would require data which can link items a person can spend their money on and compliance with their social responsibilities. The most likely method would be to examine the number of breaches of social responsibilities and the way money has been spent since July 2008 when the program was introduced into the CYWR.

The objectives of supporting the restoration of socially responsible behaviour, supporting local authority and assisting people resume responsibility for themselves, their family and community²²⁹ are vague and indeterminable concepts, very different from the general understanding of special measures as necessary for people who have suffered, and continue to suffer, great disadvantage, and are excluded from opportunities available to other community members. The CYWR fails to acknowledge past discrimination.

Income management is premised on individual blame; rather than promoting inclusion and opportunity, it seeks to punish. Undoubtedly, special measures should apply to Aboriginal peoples in the CYWR communities due to their past treatment, including the discriminatory actions of governments, which have enacted paternalistic legislation, policies and practices. Importantly, as recipients of special measures, Aboriginal peoples should be the ones who determine the measures’ design and implementation. Unfortunately, this is not the case in Australia.

²²⁹ *Family Responsibility Commission Act 2008* (Qld) s 4.

Income management in Australia would be recognised as discriminatory in the US, Canada and South Africa. Being based on race, and perpetuating prejudice and stereotypes, the effect of income management on human dignity would raise concern in these countries. The importance of rights and their protection is acknowledged by limitation tests, which differentiate these countries from Australia and show the problematic nature of income management.

Alternative approaches are an important part of these limitation tests. The strict scrutiny test in the US requires non-race conscious measures to be explored; the *Oakes* test in Canada requires the legislator to place alternatives before the court; and in South Africa it must be shown that the relevant measure is the least restrictive approach. In each country the onus is on the implementer of the measure – usually the government – to prove its necessity and reasonableness. Canada also requires contemplation of the consequences of whether a measure is imposed or not imposed.

Each country derives its protective mechanisms from its history of discrimination, and although different, each approach is forward-looking, its aim to prevent disadvantage and discrimination, both current and future. The tests place a great deal of power in the hands of the judiciary, recognising past injustices inflicted by governments and a requirement for accountability. In making decisions, those courts have referred to past inequalities in their countries; however, in Canada and South Africa, the courts have also drawn on international law and foreign judicial decisions to gain guidance and support in deciding the reasonableness or otherwise of legislation.

Recognising the difference in approaches in the US, Canada and South Africa is important to understanding how income management would be assessed if implemented in those countries, and to compare and critique the approach likely to be taken by an Australian court. Income management is unlikely to be accepted as a special measure in these countries, or as a reasonable limitation on indigenous peoples' rights. The interpretation methods used by the Australian High Court is examined in the next chapter.

CHAPTER 6: CONTEMPORARY AUSTRALIAN LEGAL UNDERSTANDING OF SPECIAL MEASURES AS MEASURES THAT DISCRIMINATE

I INTRODUCTION

In this chapter I critically analyse reasoning and interpretative methods in order to understand how judges might decide a challenge to imposed income management on the grounds that it is racially discriminatory. I compare judicial interpretation of ‘discrimination’ and ‘equality’ in racial discrimination cases and constitutional cases where the same terms are used, but are interpreted differently. The racial discrimination cases are published cases in which a party argued that a measure is a special measure, and therefore may be of precedent value to my analysis. These cases can be located by searching legal research databases including the Australasian Legal Information Institute and Judgments and Decisions Enhanced. My searches included reference to both the *Racial Discrimination Act 1975* (Cth) and special measures. I have read each of the cases arising from this search, however I mention only those cases which have precedent value for a challenge to income management, or are notable due to their legal argument or judicial reasoning.

Conducting an examination of rules governing legislative interpretation and how judges apply these rules is important in predicting the outcome to a legal challenge to income management. In Chapter 7, I apply judicial reasoning to understand how the High Court would decide a discrimination challenge to the Cape York Welfare Reform (CYWR) income management measure.

I have previously argued that, despite special measures theoretically being implemented to promote equality, governments often label paternalistic, discriminatory forms of legislation as special measures. Judicial reasoning sustains this problematic interpretation through a combination of factors, including a literal interpretation of the *Racial Discrimination Act 1975* (Cth) (*RDA*), and judges applying a formal rather than substantive construction to the terms ‘equality’ and ‘discrimination’. The principle of formal equality – which

promotes the same treatment for all – is based on whatever treatment best suits the dominant culture and the political status quo. As such, the formal approach taken by judges is not always capable of achieving justice for people and groups outside the dominant culture.

In this chapter, I raise the issue of justice in terms of fairness of applying laws made by and for the dominant culture to Aboriginal and Torres Strait Islander peoples with the expectation that they will achieve the same result. To do so ignores the profound differences between them. Aboriginal and Torres Strait Islander peoples do not have the same culture, history and experiences as the dominant group, and therefore justice and fairness require not only acknowledgement of their different cultures, languages and experiences, but also laws and policies appropriate to their needs, must be included in the design process. Justice and fairness in this vein would support self-determination for Aboriginal and Torres Strait Islander peoples on their terms, and would also acknowledge Australia's historical treatment of them, including the current effects of legislation, policy and practices on their lives.

The legal factors behind judicial decision-making are extremely important, as are the non-legal factors which influence these decisions. Understanding how and why judges decide particular matters requires an understanding of their backgrounds, including their culture, education and experiences. Most Australian judges come from privileged western backgrounds, and while they may be unaware of prejudices that influence their decision-making, these prejudices can directly affect Aboriginal peoples' lives to a significant extent.¹

Judicial decisions in special measures cases involving Aboriginal peoples have included measures which restrict rights.² These tend to be presented by the legislature and accepted by judges as acts of benevolence in response to 'dysfunction', despite their detrimental effects on Aboriginal peoples in terms of

¹ Sol Bellear, 'Why I Won't Celebrate the William Bugmy Decision', *The Drum* (online), 10 Oct 2013 <<http://www.abc.net.au/news/2013-10-10/bellear-aboriginal-disadvantage-and-the-law/5011950>>.

² See, eg, *Maloney v The Queen* (2013) 252 CLR 168; *R v Maloney* [2012] QCA 105; *Morton v Queensland Police Service* [2010] QCA 160; *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Bropho v Western Australia* [2008] FCAFC 100.

discrimination, loss of dignity, stereotyping and disempowerment. There is also a failure to understand Aboriginal peoples and their communities in the context of the violent and discriminatory colonial history within which they exist.³ This history has caused social problems, poverty, disruption to culture, dislocation, and dispossession of land and children. Parliaments have not addressed these as reasons why Aboriginal and Torres Strait Islander people do not experience a number of rights equally to others. Furthermore, Aboriginal and Torres Strait Islander people and their communities are held responsible for these outcomes of socio-economic disadvantage.⁴

I will show that recent measures are based on a paternalistic racially discriminatory approach similar to that which existed in Queensland prior to the enactment of the *RDA* in 1975. Bielefeld asserts that current government attitudes reflect previous assumptions about Aboriginal peoples, made by members of the mainstream culture who are influenced by modes of thought developed as a product of Australia's colonial history. This has assigned negative stereotypes to Aboriginal peoples, and has supported the deficit discourse in which Aboriginal peoples are viewed as less competent than people from the mainstream culture.⁵ The similarity between past and present legislation, policy and practice is documented in Chapter 3, showing this continuum.

Watson referred to Queensland's imposed alcohol restrictions from 2002 as a return to paternalism.⁶ Similarly, Calladine identified the alcohol restrictions in Western Australia as paternalistic because:

... imposed by unilateral state action, [they] are an affront to Indigenous self-determination. Without underlying community support, such measures present, at best, an overly simplistic solution to a complex problem; at worst they are a

³ Shelley Bielefeld, 'The Intervention Legislation – "Just" Terms or "Reasonable" Injustice? – *Wurridjal v Commonwealth of Australia*' (2010) 14(2) *Australian Indigenous Law Review* 2, 4.

⁴ Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 97 and 104.

⁵ Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522, 522.

⁶ Nicole Watson, 'Regulating Alcohol: One Step Forward, Two Steps Back?' (2009) 7(11) *Indigenous Law Bulletin* 27, 28, 30.

troubling throwback to WA's paternalistic, protectionist past.⁷

The same can be said in regard to income management in Cape York, which is based on restricting the rights of Aboriginal peoples to enforce social and cultural change, and which become punitive when there is non-compliance. Income management is thereby an extension of paternalistic policy and legislation usually used to protect communities, such as laws prohibiting the sale and consumption of particular drugs. However, income management differs to these forms of legislation because it targets people based on their race. As discussed in Chapter 5, measures restricting rights in the US, Canada and South Africa generally cannot apply based on racial distinctions.

In conducting my analysis I am conscious that courts are institutions dominated by western culture and concepts, engendering processes which normalise practices which are seen as neutral, but which are in fact exclusionary and discriminatory.⁸ In this chapter I examine how judges' literal and formal approaches to statutory interpretation, the influence of their western cultural views that are shared with parliament, and their deference to the legislature reduce the likelihood of judicial critique of measures affecting Aboriginal and Torres Strait Islander peoples. I compare domestic and international rules of statutory interpretation and critique the court's preference in applying a narrow literal interpretation of legislation in special measures cases. In this approach, judges do not examine the ability of a measure to achieve its stated aims, or, where a measure causes detriment, the level and extent of damage to the community. The Australian Human Rights Commission referred to *Bropho v Western Australia*,⁹ and decisions by the Queensland Court of Appeal,¹⁰ to identify an absence of analysis of whether a measure is proportionate to its purpose and does not unduly impair rights.¹¹ It will be seen that there is a trend

⁷ Kayla Calladine, 'Liquor Restrictions in Western Australia' 7(11) (2009) *Indigenous Law Bulletin* 23, 23.

⁸ Bielefeld, 'The Intervention Legislation – "Just" Terms or "Reasonable" Injustice? – *Wurridjal v Commonwealth of Australia*', above n 3, 3.

⁹ [2008] FCAFC 100.

¹⁰ These were *R v Maloney* [2012] QCA 105; *Morton v Queensland Police Service* [2010] QCA 160; *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37.

¹¹ Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Joan Monica Maloney v The Queen*, B57 of 2012, 23 November 2012, [52]-[60].

for judges to uncritically accept evidence of ‘dysfunction’ in Aboriginal communities, resulting in a conflation of Aboriginality with dysfunction.¹² This deficit discourse presents Aboriginal people as deficient and disadvantaged in nearly every facet of life, and is used to support legislation and policy focusing on Aboriginal people as the problem.¹³ This is a broadly held view,¹⁴ also promoted by some Aboriginal people including Noel Pearson,¹⁵ whose Cape York Institute designed the CYWR.

I argue that judges defer to the legislature. This may be because the judges’ and the legislators’ ideologies are the same. It may also be because judges narrowly define the scope of their roles and defer to parliament and the legislature on a broad range of matters that may be defined as political. For instance, in *Gerhardy v Brown*¹⁶ (*Gerhardy*), Brennan J stated that a domestic court is limited to assessing whether parliament has acted reasonably when characterising a special measure, rather than whether parliament’s decision was correct.¹⁷

The term ‘deference’, as used in this thesis, relates to the act of judges referring directly to the legislature as authority without question, but can also refer to inaction by judges. Deference also applies where judges do not, for example, assess a measure’s ability to achieve its stated aims; or question whether the measure will overcome discrimination by advancing the rights of those it is aimed at; or ask whether the measure causes further disadvantage by discriminating against some or all of those it is supposed to be assisting. Each of these elements forms part of systemic racial discrimination, a form of discrimination not immediately visible to most, including judges and politicians,

¹² See, eg, *Maloney v The Queen* (2013) 252 CLR 168; *R v Maloney* [2012] QCA 105; *Morton v Queensland Police Service* [2010] QCA 160; *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Bropho v Western Australia* [2007] FCA 519.

¹³ Cressida Fforde, Lawrence Bamblett, Ray Lovett, Scott Gorringe and Bill Fogarty, ‘Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia’ (2013) 149 (November) *Media International Australia, Incorporating Culture and Policy* 162.

¹⁴ See, eg, Marcia Langton, ‘Trapped in the Aboriginal Reality Show’ (2008) 19 *Griffith Review* 145–162; Peter Sutton, ‘The Politics of Suffering: Indigenous Policy in Australia since the 1970s’ (2001) 11(2) *Anthropological Forum* 125.

¹⁵ Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson and Associates, 2000).

¹⁶ (1985) 159 CLR 70.

¹⁷ *Gerhardy v Brown* (1985) 159 CLR 70, [42] (Brennan J).

but which has serious consequences for the people being discriminated against.

In Chapter 5, I explained that the US, Canada and South Africa take an investigative approach to implementing special measures, and have developed tests to assess whether a measure perpetuates disadvantage or prejudice. In the US, the court applies the strict scrutiny test to laws based on racial classifications. Rather than deferring to the legislature, the court requires it to prove that the racial classification is required. In Canada, the court developed the *Andrews*¹⁸ and *Oakes*¹⁹ tests which apply to measures which limit rights. In South Africa, the court relies on s 36 of the *Constitution* to assess the validity of a measure, and has developed the *Harksen*²⁰ test to assess if the state is unfairly discriminatory on the basis of race and other grounds.

The combination of factors used in the Australian judicial approach described above justifies the very laws that the *RDA* and *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) were enacted to prohibit. By using the special measures provision (s 8 *RDA*), the legislature continues to enact paternalistic, racially discriminatory legislation.

II INTERPRETATION OF DISCRIMINATION AND EQUALITY IN THE *RACIAL DISCRIMINATION ACT 1975* (CTH) AND THE *INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*

The concepts of discrimination and equality are important in any assessment of whether a measure is a special measure. However, these concepts are not uniformly interpreted and applied. The different effects of interpreting these concepts in a formal rather than substantive manner were briefly discussed in Chapter 5. The effects are extremely important to the question of whether a measure is a special measure, given the requirement that a special measure aims to achieve equality. A lack of guidance in the words of the *International Convention on the Elimination of all Forms of Racial Discrimination* (*ICERD*)

¹⁸ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

¹⁹ *R v Oakes* [1986] 1 SCR 103.

²⁰ *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court).

and the *RDA* has enabled a conservative literal interpretation. This works in opposition to the purpose of *ICERD* and the *RDA* – to end racial discrimination. Rather, this approach only serves to reinforce inequality.

Merón states that *ICERD* ‘drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black and other non-white persons.’²¹ However, he asserts that *ICERD*’s goal is de facto equality and that this is supported by *ICERD*’s Preamble, which refers to enjoyment of rights ‘without distinction of any kind’.²² Art 1(1), which refers to rights being enjoyed ‘on an equal footing’, plus the exception in Art 1(4), allows distinctions based on race to be made for special measures in Art 2(2) ‘for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.’²³ Merón argues that this shows the explicit aim of *ICERD* is to promote equality, rather than simply being based on race-neutral values.²⁴

The *RDA* relies upon *ICERD* for a definition of racial discrimination, incorporating Art 1(1) *ICERD* into s 9 *RDA*. However, while *ICERD* includes provision for substantive equality in Arts 1(4) and 2(2) (recognised also in s 8 *RDA*), s 10 *RDA* provides an equality provision not reflected specifically in *ICERD*. Section 10(1) *RDA* requires that where a Commonwealth or state or territory law restricts enjoyment of a right based on race, colour, nationality or ethnicity, those who enjoy the right to a lesser extent because of the law, shall enjoy that right to the same extent as others. Some judges interpret s 10 as implementing Art 2(1)(c) which requires governments to eliminate racial discrimination.²⁵

²¹ Theodor Merón, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985, April) 79(2) *The American Journal of International Law* 284.

²² *International Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

²³ *Ibid* arts 1(4) and 2(2).

²⁴ Merón, above n 21.

²⁵ See, eg, *Maloney v The Queen* (2013) 252 CLR 168, [10] (French CJ), [161] (Kiefel J), [201] (Bell J); [299], [303], [325]-[326] (Gageler J); *Viskauskas v Niland* (1983) 153 CLR 280, [9] (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).

In *Gerhardy*, Brennan J acknowledged that '[f]ormal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities'.²⁶ As was explained in Chapters 1 and 5, formal equality can entrench inequality as it involves treating people the same even when they are different. On the other hand, substantive equality involves treating people differently based on various factors such as race, and doing so in a way that, rather than enforce inequality, allows them to enjoy rights under the law to the same extent as others from different backgrounds and in different circumstances. Despite Brennan J's understanding of this crucial difference between formal and substantive equality, he and the other judges in *Gerhardy*, and subsequent special measures cases, have, however, interpreted s 10 in a literal and formal way.

A The Special Case of s 10 of the *Racial Discrimination Act 1975* (Cth)

The general understanding of s 10 RDA was explained by Mason J in *Gerhardy*:²⁷

- where the State law omits to make enjoyment of the right universal, or fails to confer it on persons of a particular race, s 10(1) extends the operation of the State law so that it is enjoyed by all, but without necessarily raising any issue of inconsistency under s 109 of the *Constitution*. The right conferred is complementary to the right created by the State law, therefore inconsistency does not arise;²⁸ and
- where the State law imposes a discriminatory burden or prohibition (i.e. where a prohibition in a State law is directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race) the State law will be inoperative to the extent that it is inconsistent with s 10 RDA, under s 109 of the *Constitution*.²⁹

²⁶ *Gerhardy v Brown* (1985) 159 CLR 70, [26] (Brennan J).

²⁷ This reasoning has been followed in subsequent cases, see, eg, *Western Australia v Ward* (2002) 213 CLR 1, [99]-[109] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney v The Queen* (2013) 252 CLR 168, [10] French CJ, [64]-[66] (Hayne J), [149] (Kiefel J), [200] (Bell J), [303] (Gageler J).

²⁸ *Gerhardy v Brown* (1985) 159 CLR 70, [26] (Mason J).

²⁹ *Ibid* [27] (Mason J).

Justice Mason's distinction between these two applications has been relied upon in subsequent cases.³⁰ While in most cases one approach will be relevant, both applied in *Gerhardy*, the measure both conferred a right on the Pitjantjatjara to land, and imposed a discriminatory prohibition on non-Pitjantjatjara access to that land. While not relevant in *Gerhardy*, s 10 also applies to Commonwealth legislation. However, different rules apply to Commonwealth legislation, in particular legislation enacted after the *RDA* which may alter the application of s 10. These rules are further discussed in Chapter 7.

Justice Mason referred to those who were conferred a benefit (the special measure) from legislation as the 'privileged race' (the Pitjantjatjara);³¹ Brennan J called them the 'advantaged' racial group because of the right conferred on them, while referring to non-Pitjantjatjara as the 'disadvantaged' racial group.³² Both imply that the people were being given something special (a statutory right to exclude non-Pitjantjatjara from their land) that other races did not enjoy. Justice Brennan stated that under s 10 *RDA*, 'every disadvantaged racial group enjoys the same right to the same extent as enjoyed by the advantaged racial group.'³³ This ignores the fact that the Pitjantjatjara are 'beneficiaries' of special measures because they do not enjoy particular human rights and fundamental freedoms to the same extent as others and are not 'privileged' or 'advantaged' simply because of a special measure.³⁴ This reasoning appears to imply that Pitjantjatjara and non-Pitjantjatjara enjoy the right to the same extent to begin with and the Pitjantjatjara receive an extra benefit through the special measure. It also fails to acknowledge that Aboriginal and Torres Strait Islander peoples may enjoy different sorts of rights, derived from their own laws and customs. These rights include, for instance, land rights, which should receive permanent

³⁰ See, eg, *Western Australian v Commonwealth* (1995) 183 CLR 373, [43] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh, JJ); *Western Australia v Ward* (2002) 213 CLR 1 99-101, [106]-[109] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney v The Queen* (2013) 252 CLR 168, [66] (Hayne J), [303] (Gageler J).

³¹ *Gerhardy v Brown* (1985) 159 CLR 70, [27] (Mason J).

³² *Ibid* [15], [16], [41] (Brennan J).

³³ *Ibid* [15] (Brennan J).

³⁴ *Ibid* [27] and [31] (Mason J), [15] (Brennan J).

recognition, rather than temporary promotion or acknowledgement through special measures.

Despite the High Court judges acknowledging the disadvantage suffered by Pitjantjatjara people, thus justifying the special measure, this disadvantaged position was ignored in the judges' analysis. The special measure was held to provide the Pitjantjatjara with something extra: a right to exclusive possession of a large area of land which deprived non-Pitjantjatjara of access to land. This is despite exclusive possession being a common element of most forms of land title in Australia. The terms 'advantaged' and 'disadvantaged' were used in the case in a narrow context, purely in relation to the effect of the measure on each group, not their actual level of advantage or disadvantage. The application of these terms and the resulting judgment ignored the social realities of the disadvantaged groups intended to benefit from special measures, as well as the different ways in which different groups enjoy rights. Based on this, Sadurski criticised the High Court in *Gerhardy* for failing to define the elements of discrimination, and to test for legitimate non-discriminatory racial distinctions.³⁵

The literal approach adopted in *Gerhardy* focused on the wording of s 10, rather than considering it within the context of Art 1(1) *ICERD*, which defines racial discrimination, and the purpose and object of *ICERD*, which is directed at prohibiting racial discrimination and achieving substantive equality. Under this approach, any distinction or differentiation in treatment resulting in differential enjoyment of human rights is captured by s 10(1). The distinction is then briefly examined to determine if it can be excepted from the prohibition of racial discrimination in Part II *RDA* as a special measure under s 8(1) *RDA*. The inference is that the distinction is discriminatory despite a lack of analysis of any discriminatory effect. Davis argues against this approach, stating that Art 1(4) *ICERD* does not enable a construction of special measures as justified

³⁵ Wojciech Sadurski, 'Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11 *Sydney Law Review* 2, 15.

racial discrimination, but rather that special measures under Art 1(4) are not deemed racial discrimination.³⁶

Sadurski also agrees that special measures should not be interpreted as exceptions under Art 1(4), and should therefore not justify racial discrimination. For him, a measure is either discriminatory or it is not. Similar to the Canadian and South African approaches, where special measures are held to be integral to equality, Sadurski suggests that the court should equate special measures with the principle of non-discrimination. He argues that special measures are not discriminatory because they do not disadvantage those already excluded from enjoying particular human rights and fundamental freedoms enjoyed by others.³⁷ The literal approach has enabled measures that arguably contribute to disadvantage to be deemed special measures by the court. Sadurski states that:

[i]t is a substantive moral argument about the justness of a particular measure with respect to a *particular* social group in a *particular* historical context which is decisive for our judgments of discrimination, and not the 'special measure' clause.³⁸

Australian judges do not conduct this important assessment. Article 1(4) *ICERD* clarifies that special measures 'should not be deemed racial discrimination'. However, this does not mean that a special measure is racially discriminatory. This is only true under a formal interpretative approach. The United Nations Human Rights Committee stated that in the *International Covenant on Civil and Political Rights* not every differentiation of treatment is discriminatory, so long as the criteria for the differentiation are reasonable and objective and aimed at achieving a legitimate purpose under international human rights standards.³⁹

Because a formal interpretative approach captures all forms of differential treatment, it should include a detailed evaluation of measures to ensure that

³⁶ Megan Davis, 'International Human Law, Women's Rights and the Intervention' (2009) 7(10) *Indigenous Law Bulletin* 11, 13.

³⁷ Sadurski, above n 35, 7-8.

³⁸ *Ibid* 7.

³⁹ Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989), UN Doc HRI/GEN/1/Rev.6 at 146 (2003) [13].

they are not discriminatory in a prohibitive sense. This is not an area into which Australian judges delve or require parties to provide evidence.

There appear to be two ways in which s 8(1) *RDA* could be interpreted. They are:

1. That special measures are beneficial and intended to achieve substantive equality. Therefore they cannot be prohibited because of their application only to certain groups or individuals. This substantive interpretation incorporates the need to address disadvantage, including lack of enjoyment of human rights and fundamental freedoms caused by discrimination; or
2. That special measures, because they treat some people differently, are discriminatory, despite people's unequal enjoyment of rights. This formal approach captures all forms of differential treatment and requires an assessment of the type and level of 'discrimination' and the connection between the measure and its goal of achieving equality (a proportionality analysis as discussed later in this chapter and in Chapter 7). Assessment should also occur of whether the goal is capable of achieving equality.

Despite the narrow approach taken in special measures cases, in other areas of law the High Court has interpreted discrimination and equality in a substantive manner. It is notable that in their examination of the word discrimination in constitutional cases, High Court judges have been willing to refer to international cases and apply a substantive approach. The discrimination referred to in constitutional cases is not racial; rather, it relies on provisions of the *Constitution* and tends to affect the more privileged members of the community. In contrast to the approach taken to the *RDA*, Gaudron J provided a definition of discrimination in the constitutional case of *Street v Queensland Bar Association*⁴⁰ (*Street*). It turned on discrimination based on residence in a particular State, and her Honour referred to and relied upon

⁴⁰ (1989) 168 CLR 461.

cases in international law⁴¹ and domestic cases from other countries.⁴² Justices Gaudron and McHugh reiterated these principles in *Castlemaine Tooheys Ltd v South Australia*.⁴³

A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal - unless, perhaps, there is no practical basis for differentiation.⁴⁴

The above quote includes reference to Tanaka J's definition of discrimination in his dissenting judgment in the *South West Africa Cases (Second Phase)*.⁴⁵ Justice Brennan in *Gerhardy* and Gageler J in *Maloney v The Queen*⁴⁶ (*Maloney*) also referred to Tanaka J's judgment.⁴⁷ In *Leeth v Commonwealth*⁴⁸ there was brief High Court support for the substantive approach to equality in a case in which the non-parole period for a person prosecuted under Commonwealth legislation differed depending on the State where the person was convicted. Deane and Toohey JJ did not find it necessary to refer to international cases to justify their position that:

The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable

⁴¹ Justice Gaudron relied upon reasoning in *South West Africa Cases (Second Phase)* [1966] ICJ Rep 6, [305]-[306] (Tanaka J) and *Re Electric Refrigerators* (1963) 2 CMLR 289, [312].

⁴² Justice Gaudron also relied upon reasoning in the Indian case of *State of West Bengal v Anwar Ali* (1952) 39 AIR(S) 75, 93 (SR Das J), the American case of *Griggs v Duke Power Co*, 401 US 421 (1971) and the Canadian case of *Ontario Human Rights v Simpson-Sears Ltd* (1985) 2 SCR 536.

⁴³ (1990) 169 CLR 436.

⁴⁴ *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, [2] (Gaudron and McHugh JJ).

⁴⁵ *South-West Africa Cases (Second Phase) Ethiopia v South Africa and Liberia v South Africa* [1966] ICJ Rep 6, 305-306.

⁴⁶ (2013) 252 CLR 168.

⁴⁷ *Gerhardy v Brown* (1985) 159 CLR 70, [26] (Brennan J); *Maloney v The Queen* [2013] HCA 28, [340], [358] (Gageler J).

⁴⁸ (1992) 174 CLR 455.

of being seen as providing a rational and relevant basis for the discriminatory treatment.⁴⁹

However, this reasoning ended in *Kruger v The Commonwealth*,⁵⁰ where Dawson J rejected that a doctrine of substantive equality could be found in the *Constitution* or at common law. He stated that:

whilst the rule of law requires the law to be applied to all without reference to rank or status, the plain matter of fact is that the common law has never required as a necessary outcome the equal, or non-discriminatory, operation of laws.⁵¹

It is argued that this substantive approach to assessing whether measures are discriminatory is required to achieve the purposes of the *RDA* and *ICERD*. It requires consideration of wider factors such as context (social, cultural, political, historical, economic) and the effect of a measure on Aboriginal and Torres Strait Islander peoples, not simply reliance upon parliament's stated aim. It will be seen that while judges consider reports which justify the implementation of harsh measures upon Aboriginal and Torres Strait Islander peoples, they do not consider the broader historical and economic factors. In the following sections I show that in special measures cases, judges apply a literal interpretative approach privileging words within legislative provisions over the object and purpose of legislation.

B Domestic Interpretative Legislation

When interpreting *ICERD* provisions incorporated into the *RDA*, judges still refer to the *Acts Interpretation Act 1901* (Cth) (*AIA*) and essentially apply the same interpretative approach as they would for domestic legislation. The rules for domestic statutory interpretation do not apply to international conventions, such as *ICERD*. The main reason for this is that different drafting styles, with broader words and provisions used in conventions and legislation which incorporate them. While the purpose of the *RDA* is clear, some of its provisions,

⁴⁹ *Leeth v Commonwealth* (1992) 174 CLR 455.

⁵⁰ (1997) 190 CLR 1.

⁵¹ *Kruger v The Commonwealth* (1997) 190 CLR 1, [157]-[158] (Dawson J).

including ss 8 and 10, either refer directly to *ICERD* (s 8) or are drafted in broad terms (s 10(1)).

In *Gerhardy*, Brennan J observed that including provisions from international conventions in domestic legislation caused problems of interpretation because the broad terms used made a strict or legalistic interpretation inappropriate.⁵² This suggests that the distinct nature of international instruments requires a different interpretative approach to domestic legislation, rather than being merely an extension of it. The literal interpretative approach used stifles judges' decision-making under the *RDA*, leading to results that could not have been intended by its drafters. I exemplify this further below in section D: 'Interpreting International Conventions Incorporated into Domestic Legislation'.

In this section I contrast the *AIA* and the common law to argue that in deciding challenges to special measures, judges have taken a restrictive literal approach to the *RDA* by using the *AIA*. While the *AIA* generally applies to domestic legislation, the following section will show that an international interpretative approach exists, and its common law approach acknowledges the importance of considering context and therefore the purpose of the legislation. It is therefore more appropriate to apply where international conventions such as *ICERD* are incorporated into domestic legislation (the *RDA*).

When interpreting a domestic legislative provision, s 15AA *AIA* states that an interpretation that best achieves the Act's purpose or object, whether or not expressly stated, should be preferred over other interpretations, such as the literal approach.⁵³ This is otherwise referred to as the mischief rule or purposive approach where the language of legislation is interpreted to give effect to the purpose of the legislation or to overcome the mischief that parliament was intending to rectify by passing the legislation.⁵⁴

The object and purpose of the *RDA* are not explicitly stated; therefore, they need to be construed from the wording of the relevant provisions in the context

⁵² *Ibid* [17] (Brennan J).

⁵³ See, eg, Robert Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2(1) *University of New England Law Journal* 5, 9-10; *Acts Interpretation Act 1901* (Cth) s 15AA.

⁵⁴ *Heydon's Case* (1584) 76 ER 637.

of the entire Act, including the reasons for its enactment.⁵⁵ While Part 6A *RDA*, entitled 'Operation of State and Territory laws', expressly refers to 'the objects of the Convention', there are no express purposes or objects in *ICERD*. However it is clear from *ICERD*'s articles and their incorporation into the *RDA* that its objects and purpose are to eliminate racial discrimination and promote substantive racial equality.

Section 15AB(2) *AIA* lists extrinsic materials that 'may be considered' when interpreting a legislative provision. Section 15AB(3) assists in understanding when these materials can be considered, and such consideration can be used to confirm the 'ordinary meaning' of s 15AB(3); or to determine its meaning where ambiguity or obscurity exists; or to determine its meaning when its ordinary meaning is 'manifestly absurd or unreasonable.'⁵⁶ While extrinsic materials are unlikely to be referred to when the meaning of a legislative provision appears clear, it may be that if they are used, they may raise doubt about ordinary meaning.⁵⁷ In order to prevent this from occurring, Justice Crennan, speaking extra-judicially, warned that a cautious approach is required when using extrinsic materials to aid interpretation, and that the High Court on numerous occasions had held that finding the meaning of legislation begins with interpreting the text of a provision.⁵⁸ Justice Crennan referred to *Northern Territory v Collins*,⁵⁹ where it was said that the clear meaning of a provision's text cannot be displaced by extrinsic material.⁶⁰ In *Re Australian Federation of Construction Contractors; Ex parte Billing*,⁶¹ it was held that the court must not rely on extrinsic material, unless the ordinary meaning is manifestly absurd or unreasonable.⁶² This is consistent with s 15AB(1)(b)(ii) *AIA*.

⁵⁵ Geddes, above n 53, 44-47.

⁵⁶ *Acts Interpretation Act 1901* (Cth) s 15AB(1).

⁵⁷ Matthew Stubbs, 'From Foreign Circumstances to First Instance Considerations' Extrinsic Material and the Law of Statutory Interpretation' (2006) 34(1) *Federal Law Review* 103, 112.

⁵⁸ Justice Susan Crennan, 'Statutes and the Contemporary Search for Meaning', (Speech delivered at Statute Law Society, London, 1 February 2010).

<<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/crennanj/crennanj1feb10.pdf>>.

⁵⁹ (2008) 235 CLR 619, [99] (Crennan J), [16] (Gummow ACJ and Kirby J).

⁶⁰ Crennan, above n 58.

⁶¹ (1986) 68 ALR 416.

⁶² *Ibid* [4] (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

When assessing measures which restrict rights – such as income management – an analysis of extrinsic materials is important to enable an interpretation of the *RDA*, especially because of its incorporation of *ICERD*. Provisions in the *RDA* which include the concepts of ‘special measures’, ‘equality’ and ‘discrimination’ should be understood in the international context in which they have developed. An understanding of cases from other countries, and of the processes used by the specialist Committee on the Elimination of Racial Discrimination (CERD), can assist in analysing the meaning of such measures. However, there has generally been a reluctance by Australian judges in recent special measures cases to place any reliance on Committee recommendations. Some judges in Australian special measures cases do not refer to extrinsic materials at all.

In contrast, the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd*⁶³ (*CIC*) held that extrinsic material can be considered at common law, and can be considered immediately, rather than only after ambiguity is identified.⁶⁴ This enables the court to establish the state of the law prior to the enactment of the legislation. Rather than focusing upon the text only, the court held that:

It is well settled that at common law, apart from any reliance upon s 15AB ... the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.⁶⁵

⁶³ (1997) 187 CLR 384.

⁶⁴ Stubbs, above n 57, 116.

⁶⁵ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, [88] (Brennan CJ, Dawson, Toohey, and Gummow JJ), [108] (Gaudron J agreeing).

In *Project Blue Sky v ABA*⁶⁶ (*Project Blue Sky*), McHugh, Gummow, Kirby and Hayne JJ adopted this approach.⁶⁷ They identified that merely interpreting the text may not correspond with the intent of a provision:

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁶⁸

Despite referring to *CIC* and *Project Blue Sky* in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,⁶⁹ both of which hold that context can be considered in the first instance, French CJ and Crennan J narrowed the approach by insisting that provisions of the *Fair Work Act 2009* (Cth) – which requires Australia’s international labour obligations to be taken into account⁷⁰ – must be first interpreted by considering the text ‘and may require consideration of the context including the general purpose and policy of the provisions.’⁷¹ Despite holding this view, Crennan J, speaking extra-judicially in 2010, while not stating that she would consider context immediately, said:

The impact of principles of statutory interpretation, which privilege object and purpose over other considerations has now been felt to the extent that context is not something to which reference will only be made after other approaches have failed to reveal the meaning of a statute or provision. Context is to be considered much earlier in the process of interpretation.⁷²

However, judges in special measures cases apply a domestic statutory interpretation approach, which, while it includes some consideration of context,

⁶⁶ (1998) 194 CLR 355.

⁶⁷ *Project Blue Sky v ABA* (1998) 194 CLR 355, [69], [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁶⁸ *Ibid* [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁶⁹ (2012) 248 CLR 500.

⁷⁰ Section 3(a) of the *Fair Work Act 2009* (Cth) includes as part of an object, the taking into account of Australia’s international labour obligations. Part 6-4 of the *Fair Work Act 2009* (Cth) states that it contains provisions to give effect to certain international agreements relating to discrimination and termination of employment. Section 791 provides for the object of Division 2, which is to give effect to a number of International Labour Organisation Conventions.

⁷¹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, [41] (French CJ, Crennan J).

⁷² Justice Crennan, above n 58.

places the focus principally on the text of the *RDA*. This focus on text fails to acknowledge the purpose and objects of the *RDA*. International conventions and their concepts – including special measures and equality – should be interpreted in conformity with the dynamic rules of international law.⁷³

Thornton explains the general nature of provisions in anti-discrimination legislation clearly articulate the aims of ‘effecting equality between all persons and eliminating discrimination.’⁷⁴ She acknowledges that these aims are expressed at a high level of abstraction, requiring judges to be creative in order to interpret them in a meaningful way.⁷⁵ Thornton argues that anti-discrimination legislation cannot be interpreted in a literal way, without legislative intent being distorted, because it is an area of law overtly shaped by policy, interests and values.⁷⁶ In *Macedonian Teachers Association of Victoria v Human Rights and Equal Opportunity Commission*,⁷⁷ Weinberg J held that the authorities have established that ‘anti-discrimination legislation should be regarded as beneficial and remedial legislation’ and therefore given a liberal construction.⁷⁸

In the disability discrimination case of *Waters v Public Transport Corporation*,⁷⁹ Mason and Gaudron JJ (Deane J agreeing) stressed the importance of the legislative purpose where human rights are protected or enforced:

... the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such

⁷³ See, eg, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [384] (Gummow and Hayne JJ); *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 1, [31] (Merkel, Finkelstein and Weinberg JJ).

⁷⁴ Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15(1) *Australian Journal of Human Rights* 3.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* 6.

⁷⁷ [1998] FCA 1650.

⁷⁸ See, eg, *Macedonian Teachers Association of Victoria v Human Rights and Equal Opportunity Commission* [1998] FCA 1650, Weinberg J, referring to *IW v City of Perth* (1997) CLR 1 (Brennan CJ and McHugh J).

⁷⁹ (1991) 173 CLR 349.

legislation the courts have a special responsibility to take account of and give effect to the statutory purpose ...⁸⁰

It will be seen that the above approach – while generally not applied in special measures cases – is however consistent with the broader interpretative approach for international conventions which acknowledges that meaning cannot always be accurately derived from words. This is especially relevant for legislation and international conventions on human rights and discrimination which need to apply to a wide range of factual situations.

C International Interpretative Legislation

The *Vienna Convention on the Law of Treaties (1969)*⁸¹ (*Vienna Convention*) applies to international conventions such as *ICERD* even though it has not been incorporated into Australian legislation. Its provisions are considered as codifying customary international law on treaty interpretation⁸² and therefore it provides the most appropriate guidance when interpreting *ICERD* and ss 8 and 10 *RDA*.

Waibel states that the *Vienna Convention's* general principles allows flexibility for distinct and different approaches to interpretation. This is reflected in its Articles, for example, Art 31 uses mandatory language, but does not provide guidance on the weight to be attributed to each of its elements, and Art 32 is broadly worded, providing discretion to the interpreter to use extrinsic materials.⁸³

Article 31(1) *Vienna Convention* requires a convention to be interpreted in good faith, in accordance with the ordinary meaning of its terms and their context and

⁸⁰ *Waters v Public Transport Corporation* (1991) 173 CLR 349, [21] (Mason and Gaudron JJ), with Deane J agreeing.

⁸¹ The *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 155 UNTS 331 (entered into force 27 January 1980). The *Vienna Convention* was ratified by Australia on 13 June 1974.

⁸² See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 472 [77] (Gibbs CJ), 508-509 [60]-[62] (Murphy J), 529 [34] (Brennan J); *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, [8] (Dawson J), [12] (McHugh J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 277 footnote 189 (Gummow J); *Minister for Immigration, Indigenous and Multicultural Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon, Crennan JJ), [74] (Kirby J).

⁸³ Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22(2) *European Journal of International Law* 571, 573-574.

in the light of the covenant's object and purpose. Similarly, s 15AA *Acts Interpretation Act 1901* (Cth) (*AIA*) requires an Act to be interpreted in a way 'that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)'. While Art 31(2) permits reliance upon extrinsic material, it is limited to agreements that were made by all parties to the relevant convention. These must be connected to the convention's conclusion and instruments made by one or more parties in connection with the convention's conclusion, and accepted by the other parties as being an instrument related to the convention.

Article 32 enables resort to extrinsic sources to confirm the meaning in certain circumstances. These sources include 'preparatory work of the treaty and the circumstances of its conclusion' in order to confirm the meaning ascertained from the application of Art 31, or to ascertain meaning when the meaning derived from the application of Art 31 leads to ambiguity or obscurity or a manifestly absurd or unreasonable result.⁸⁴ This approach is broader than that of the *AIA* and is based on States Parties working together to best address what are considered international matters, such as human rights.

The following sections examine approaches taken by Australian judges, particularly when applying the *RDA* and *ICERD* to special measures cases affecting Aboriginal peoples. It will be seen that the general approach to interpreting the *RDA* is insular, with limited reference to international cases or cases from other countries, and even less to United Nations committees. Reasoning in the recent special measures case of *Maloney v The Queen*⁸⁵ limits interpretation of the *Vienna Convention* to one that is consistent with that of domestic interpretation.

D *Interpreting International Conventions Incorporated into Domestic Legislation*

There is a general principle that international conventions to which Australia is a party do not directly apply or provide enforceable rights in Australian law,

⁸⁴ *Povey v QANTAS Airways Limited* (2005) 223 CLR 189, [60] (McHugh).

⁸⁵ (2013) 252 CLR 168.

unless they are incorporated into domestic legislation.⁸⁶ The *RDA* incorporates the *ICERD* into domestic legislation as a schedule to the Act. While the exact *ICERD* provisions are not replicated within the Act itself, s 8 refers to Art 1(4) *ICERD*. The interpretation of that Article and s 10 requires an understanding of *ICERD* and concepts within it, including 'equality', 'racial discrimination' and 'special measures'. Due to the wide drafting of ss 8 and 10, a strictly domestic statutory interpretation approach is unlikely to reveal the meaning and intent of these provisions.

The High Court has generally accepted that the *Vienna Convention*, rather than ordinary rules of statutory interpretation, should be applied to the interpretation of treaties incorporated into domestic law.⁸⁷ Where a provision of an international convention is included in domestic legislation, the High Court has accepted that the domestic provision has the same meaning as that accorded to the convention by an international interpretation.⁸⁸

In *Applicant A v Minister for Immigration and Ethnic Affairs*⁸⁹ (*Applicant A*), Brennan CJ stated that:

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.⁹⁰

However, Australian judges have resisted this approach in special measures cases. Arguably, this has resulted in the court accepting measures directed at

⁸⁶ See eg, *Bradley v Commonwealth* (1973) 128 CLR 557, [26] (Barwick CJ and Gibbs J); *Kioa v West* (1985) 159 CLR 550, [21] (Gibbs CJ); *Dietrich v R* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

⁸⁷ See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 472 [77] (Gibbs CJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [252] (McHugh J). Also, where legislative provisions are enacted or amended to give effect to treaty obligations: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [264]-[265] (Brennan J).

⁸⁸ See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [265] (Brennan J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [230]-[231] (Brennan CJ).

⁸⁹ (1997) 190 CLR 225.

⁹⁰ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [3] Brennan CJ.

restricting rights of Aboriginal peoples, rather than promoting equal enjoyment of rights as required by *ICERD*, as special measures. This approach is distinct from the approaches of other countries and has been commented on by James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples from 2008-2014. Anaya observed that aspects of the Northern Territory intervention (NTI) – especially income management, the imposition of compulsory leases, and bans on alcohol consumption and pornography – overtly discriminate against Aboriginal peoples, infringe upon their right to self-determination and cause further stigmatisation. Anaya disagreed with the Australian government’s opinion that differential treatment restricting the rights of disadvantaged groups could be classified as special measures. Rather, he states his understanding of special measures as forms of preferential treatment.⁹¹

I discuss aspects of income management as a restriction on rights in the next chapter, but here it is sufficient to say that it is likely to be held a special measure in Australia partly because of the court’s conservative, insular literal and formal approach to statutory interpretation and deference to the legislature.

While it occurs domestically, racial discrimination is an international issue. *ICERD* presents an agreed approach to eliminating racial discrimination by nations such as Australia which have agreed to its terms and incorporated it into domestic law. It is therefore important that law develops in an international environment by gaining guidance from other countries and international law where appropriate. Writing extra-judicially, Michael Kirby explained that domestic courts, in deciding cases where international law is relevant, are exercising a kind of international jurisdiction. He states that:

Today we are seeing a broader and deeper movement for the reconciliation of the systems of national and international law, including national constitutional laws. Thus, a municipal tribunal, applying international law, is no longer simply an organ of its own national legal system. Instead ... the national court exercises

⁹¹ James Anaya, Special Rapporteur, *Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, as he concludes his visit to Australia* (27 August 2009) <https://www.humanrights.gov.au/sites/default/files/content/social_justice/PFI18/srip_oz_mission_2009_initial_findings.pdf>.

a kind of 'international jurisdiction'. It becomes, in a sense, an organ of the international judiciary.⁹²

In *Shipping Corporation of India Limited v Gamlen Chemical Company Australasia*,⁹³ the High Court recognised the importance of a broad interpretation of domestic legislation, which, similar to the *RDA*, attached an international convention as a schedule. This was said by Mason and Wilson JJ to be conducive to producing a uniform international interpretation:

It has been recognised that a national court, in the interests of uniformity should construe rules formulated by an international convention ... in a normal manner appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.⁹⁴

In *Queensland v Commonwealth*⁹⁵ – an environmental law case – the full High Court acknowledged that domestic law should be interpreted consistently with international law, so far as its terms allow. The court stated that:

Regard may therefore be had to the terms of the Convention in deciding whether an international duty of protection and conservation exists, but the existence or otherwise of the duty is not necessarily concluded by the municipal court's construction of its terms or by its opinion as to the Convention's operation. The existence of an international duty depends upon the construction which the international community would attribute to the Convention and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can in order to determine the validity of a law of the Commonwealth, conscious of the difference between the inquiry and the more familiar curial function of construing and applying a municipal law.⁹⁶

⁹² Michael Kirby, 'International Law at the Grass Roots: Some Recent Developments' 24 (2005) *Australian Year Book of International Law* 107, 116.

⁹³ (1980) 145 CLR 1721.

⁹⁴ *Shipping Corporation of India Limited v Gamlen Chemical Co Australasia Pty Ltd* (1980) CLR 172, [9]-[10], (Mason and Wilson JJ), with whom Gibbs CJ and Aickin J agreed.

⁹⁵ (1989) 167 CLR 232.

⁹⁶ *Ibid* [9] (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

While this directive that the court must consider the international community's construction of a relevant convention was referred to by Bell J⁹⁷ and Gageler J⁹⁸ in *Maloney*, they and the other judges barely did so, and essentially rejected it. Instead, it can be seen below that they prefer the text of the *RDA* over the *ICERD*.

In *Applicant A*, Brennan CJ agreed with McHugh J that a 'holistic but ordered approach' was required for interpretation. Chief Justice Brennan said a holistic approach:

... may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.⁹⁹

Justice McHugh had referred to the European Court of Human Rights in *Golder v United Kingdom*,¹⁰⁰ saying that Zekia J 'emphasised an ordered yet holistic approach,'¹⁰¹ where '[p]rimacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered.'¹⁰² He also referred to Murphy J's decision in *Commonwealth v Tasmania*¹⁰³ in relation to Art 31(1) *Vienna Convention*, saying that a 'Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose.'¹⁰⁴ In *Applicant A v Minister for Immigration and Ethnic Affairs*,¹⁰⁵ McHugh J held that, while Art

⁹⁷ *Maloney v The Queen* (2013) 252 CLR 168, [236] (Bell J).

⁹⁸ *Ibid* [326] (Gageler J).

⁹⁹ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [4] (Brennan CJ).

¹⁰⁰ (1975) 1 EHRR 524.

¹⁰¹ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [77] (McHugh J).

¹⁰² *Ibid* [77] (McHugh J), [145] (Gummow J).

¹⁰³ [1983] HCA 21.

¹⁰⁴ *Tasmania v Commonwealth* (1983) 158 CLR 1, [61] (Murphy J).

¹⁰⁵ (1997) 190 CLR 225.

31 *Vienna Convention* requires the text of the treaty to be the starting point, Art 31(1) requires 'recourse to the context, object and purpose of the treaty.'¹⁰⁶

On the other hand Ward argues, that McHugh J's emphasis on text as the focus is not supported internationally and misconstrues Zekia J's judgment. Rather, Ward states that at international law, the accepted approach to interpreting treaties is one of a 'single combined operation' including each element of Art 31(1) *Vienna Convention*.¹⁰⁷

In *Applicant A*, Brennan CJ, Dawson, McHugh and Kirby JJ acknowledged the importance of interpreting domestic legislative provisions according to international law; however, Dawson and McHugh JJ counteracted this by placing more weight on the text than the object of the Convention.¹⁰⁸ Chief Justice Brennan, in the minority, referred to the protection of fundamental rights and freedoms as an object of the *Convention Relating to the Status of Refugees*.¹⁰⁹ While that was the overriding consideration for Brennan CJ and Kirby J, the majority focused on a textual interpretation to determine meaning.¹¹⁰ This is despite Dawson J, in the majority, saying:

1. Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear.¹¹¹

Ward states that to focus on the text of the treaty is a misapplication of the words of Art 31 *Vienna Convention* and not in compliance with international law.¹¹² However Article 31 considers the nature of treaties which are based on

¹⁰⁶ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [74] (McHugh J).

¹⁰⁷ Christopher Ward, 'Principles of Interpretation Applicable to Legislation Adopting Treaties' (1998) 26 *Federal Law Review* 213.

¹⁰⁸ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [32] (Dawson J), [78], [79] (McHugh J). Also, the minority judges in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

¹⁰⁹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [6]-[8] (Brennan CJ).

¹¹⁰ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Dawson, McHugh, Gummow JJ).

¹¹¹ *Ibid* [35] (Dawson J).

¹¹² *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331; Christopher Ward, 'Principles of Interpretation Applicable to Legislation Adopting Treaties' (1998) 26 *Federal Law Review* 207, 216.

numerous political interests, and require compromise and broad terms to capture intentions.

Despite the High Court looking beyond a convention's text to international and overseas decisions in *Applicant A* and other cases, there has not always been consistency.¹¹³ For example in *Gerhardy*, Gibbs, Mason, Murphy and Deane JJ did not refer to cases from other countries, international law or the *Vienna Convention* when interpreting the *RDA* and *ICERD*, despite it being the first decision of its kind for the High Court.¹¹⁴ To assist in interpreting *ICERD*, Wilson and Dawson JJ drew on extrinsic material – *ICERD's travaux préparatoires*¹¹⁵ – and Wilson J also referred to two articles¹¹⁶ by Warwick McKean: 'The Meaning of Discrimination in International and Municipal Law'¹¹⁷ and 'Equality and Discrimination Under International Law'.¹¹⁸ Justice Brennan relied on a broad range of sources, including case law from the United Kingdom on the interpretation of international conventions, international books and articles (including Warwick McKean's), international cases, and cases from the US.¹¹⁹

The importance of ascertaining the object and purpose of conventions and relevant legislation in interpreting them is clear. However, even though there is support from the High Court for the Vienna Convention to be applied to international conventions, there is inconsistency in judges' approaches. The general approach continues to elevate the direct meaning of the text above the purpose, object and context of the conventions, and the legislation incorporating them. While the judges' understanding of the international interpretation of conventions is gained from examining and applying extrinsic materials, there are varying levels of reference to and reliance upon these materials in different cases.

¹¹³ Ward, above n 107, 208.

¹¹⁴ *Gerhardy v Brown* (1985) 159 CLR 70.

¹¹⁵ *Ibid* [9], [13] (Wilson J), [9] (Dawson J).

¹¹⁶ *Ibid* [13], [18], [27] (Wilson J).

¹¹⁷ Warwick McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *The British Year Book of International Law* 177.

¹¹⁸ Warwick McKean, *Equality and Discrimination Under International Law* (Clarendon Press, 1983) 286-288.

¹¹⁹ *Gerhardy v Brown* (1985) 159 CLR 70, [17], [18], [19], [20], [24], [25], [26], [27], [28], [37], [42] (Brennan J).

Special measures cases follow a particular approach when judges focus on text above purpose, object and context. This is distinct from the purposive and contextual approach common to judgments in the 1990s. While judges continue to refer to the relevance of purpose and context to interpretation, they do so by noting their secondary role to the text.¹²⁰ High Court judges have recently rejected the concept of ‘legislative intention’, referring to it as a fiction or metaphor.¹²¹ While this is not a new expression, in the past – while referred to as a ‘fiction’ – legislative intention was still held to ‘[serve] a useful purpose’.¹²² Lucy identifies that the important role of the collective purpose or policy of the legislature now has a reduced role in legislative interpretation.¹²³ The result of a textual approach is explained by Lucy as one where:

The court is not engaged in a process of seeking to ascertain the legislature’s actual intention or purpose, and so is less likely to give a meaning to the legislation which approximates the real legislative purpose or policy informing the statute in question.¹²⁴

E *The Primacy of the Text*

Arguably, neither the *Acts Interpretation Act 1901* (Cth) (*AIA*) nor the *Vienna Convention on the Law of Treaties* (1969) (*Vienna Convention*) are strictly complied with in Australian special measures cases pertaining to Aboriginal and Torres Strait Islander people. In this section I focus on the most recent High Court special measures case – *Maloney v The Queen*¹²⁵ (*Maloney*) – to illustrate the restricted interpretation methods used by the judges. It is important to understand their method of interpretation in order to comprehend the outcome of the case, which appears to be at odds with the general understanding that special measures are beneficial. This analysis assists in

¹²⁰ Juliet Lucy, ‘Recent trends in Statutory Interpretation’ (Legalwise Seminar delivered at Statutory Interpretation workshop, University of New South Wales CBD Campus, Sydney, 20 August 2014) 1 <<http://13stjames.net.au/wp-content/uploads/2014/05/Recent-Trends-in-Statutory-Interpretation.pdf>>.

¹²¹ See, eg, *Zheng v Cai* (2009) 239 CLR 436, [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, [146] (Gummow J), [322] (Hayne J).

¹²² *Eastman v The Queen* (2000) 203 CLR 1, [46] (McHugh J).

¹²³ Lucy, above n 120, 5.

¹²⁴ *Ibid* 10.

¹²⁵ (2013) 252 CLR 168.

predicting future decisions of the High Court and in formulating legal argument, particularly in relation to income management.

In *Maloney*, each judge, except Gageler J, gave primacy to the text of *ICERD* over its object and purpose. For example, both French CJ and Kiefel J stated that the court cannot apply any interpretation that would alter the convention text.¹²⁶ However, Kiefel J was willing to consider that extrinsic materials, so long as they were well founded, could both provide meaning to the terms of an international convention, and be used to interpret the relevant domestic legislation.¹²⁷ So for example, when interpreting ‘equality’ in Art 5(a) *ICERD*, Kiefel J referred to Manfred Nowak’s¹²⁸ commentary on the *International Covenant on Civil and Political Rights*,¹²⁹ as did Bell J¹³⁰, to say that tribunals and other organs administering justice must provide procedural equality in applying the law.

The Committee for the Elimination of Racial Discrimination (CERD) had two recommendations on proportionality in the definition of ‘racial discrimination’, both premised on the idea that differentiation within Art 1(4) *ICERD* is not discriminatory in and of itself. The first recommendation notes that differential treatment is discriminatory if the criteria for the differentiation (in light of the objectives and purposes of *ICERD*) are not applied in accordance with a legitimate aim, and are not proportionate to achievement of the aim.¹³¹ Secondly, in determining whether the effect of an action is contrary to *ICERD*, the CERD recommended that the relevant body should examine ‘whether that action has an unjustifiable disparate impact upon a group distinguished by race,

¹²⁶ *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ), [175]-[176] (Kiefel J).

¹²⁷ *Ibid* [175]-[176] (Kiefel J).

¹²⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Angus & Robertson Press, 1993) 238.

¹²⁹ *Maloney v The Queen* (2013) 252 CLR 168, [151] (Kiefel J).

¹³⁰ *Ibid* [215] (Bell J).

¹³¹ Committee on the Elimination of Racial Discrimination, *General Recommendation 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32 [8]; Committee on the Elimination of Racial Discrimination, *General Recommendation XXX on Discrimination against Non-citizens*, 65th sess, CERD/C/GC/30 (1 October 2004).

colour, descent, or national or ethnic origin.¹³² Justice Kiefel rejected both recommendations on the basis that they were an addition to the text of *ICERD* or its interpretation, and not reflected in the agreement by Australia and other State Parties.¹³³

While in *Maloney* Hayne J acknowledged that s 10 *RDA* applies to racially discriminatory laws, he emphasised that its 'large objects' and 'the generality of the words which it uses' intend it to apply more broadly to include differential treatment. Therefore, wherever a law causes a difference in the level of enjoyment of a right between persons of different races, colour or national or ethnic origin, s 10 applies.¹³⁴

This narrow approach has been the traditional interpretation of s 10 in Australian special measures cases. Judges focus on the text of s 10(1) and reject any approach which conducts a detailed assessment of differential treatment to determine if discrimination exists. Section 8(1) is used to except provisions as special measures. Justice Hayne viewed 'discrimination' as bringing with it 'conceptual baggage' developed in other contexts, having no place in the text of s 10.¹³⁵ This is despite s 10 being acknowledged by a majority of the judges in *Maloney* as implementing Art 2(1)(c) *ICERD*, which requires that the government condemn racial discrimination by actively eliminating racially discriminatory laws, regulations and policies.¹³⁶

While stating that the object of the *RDA* makes it appropriate to give weight to the international interpretation of *ICERD*, Bell J, like French CJ, made it clear that to do so is not to alter the meaning of *RDA* provisions.¹³⁷ Nevertheless, she applied a narrow approach which limited reliance on 'international interpretation' to a greater or lesser number of rights than were understood to exist in 1975 when the *RDA* was enacted.¹³⁸ Justice Crennan applied an even

¹³² Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination*, UN Doc A/48/18 (22 March 1993); Committee on the Elimination of Racial Discrimination, *General Recommendation XXX on Discrimination against Non-citizens*, 65th sess, CERD/C/GC/30 (1 October 2004).

¹³³ *Maloney v The Queen* (2013) 252 CLR 168, [173], [176] (Kiefel J).

¹³⁴ *Ibid* [68] (Hayne J), [161] (Kiefel J).

¹³⁵ *Ibid* [68] (Hayne J).

¹³⁶ *Ibid* [10] (French CJ), [161] (Kiefel J), [201] (Bell J), [299], [303], [325]-[326] (Gageler J).

¹³⁷ *Ibid* [15] (French CJ), [236] (Bell J).

¹³⁸ *Ibid* [236] (Bell J).

more restrictive approach, stating that extrinsic materials cannot import further rights or obligations into the *RDA* beyond those that exist in the text of *ICERD*.¹³⁹ However, s 10(2) states that ‘reference in subsection (1) to a right includes reference to a right of a kind referred to in Art 5 of the Convention.’ The rights described in Art 5 are vast, and include civil, personal, social, political, cultural and economic rights. Article 5 therefore enables a broad range of rights to be included if a broad interpretative approach is taken. Depending on the interpretative approach, new rights may be relevant so long as they are of the kind in Art 5. This was acknowledged by Mason J in *Gerhardy*.¹⁴⁰

In *Applicant A v Minister for Immigration and Ethnic Affairs*,¹⁴¹ Kirby J held that the meaning of concepts must accord with modern principles of law, rather than having their meaning confined to those in the minds of the drafters of the Convention.¹⁴² By contrast, Hayne J in *Maloney* stated that the *RDA* is to be interpreted by applying ordinary principles of statutory interpretation, and limited recourse to extrinsic materials in existence at the time of the *RDA*’s enactment. Material created later – including reports of the United Nations Committees – while providing information on how the *RDA* should be interpreted, could not be relied upon to settle its meaning.¹⁴³

In contrast, while acknowledging their non-binding nature, Gageler J relied on the CERD’s recommendations because s 10 *RDA*’s purpose is to give effect to Arts 2(1)(c) and 5 *ICERD*.¹⁴⁴ Justice Gageler held that the obligations required by these Articles are based on the content provided to them by the community of nations.¹⁴⁵ Justice Gageler asserted that the purpose of s 10 *RDA* may not be achieved simply by interpreting its text without consideration of ‘contemporary international understanding.’¹⁴⁶ Despite him being the only judge in *Maloney* to hold this view, Gageler J’s exploration of cases from other

¹³⁹ Ibid [134] (Crennan J).

¹⁴⁰ *Gerhardy v Brown* (1985) 159 CLR 70, [34] (Mason J).

¹⁴¹ (1997) 190 CLR 225.

¹⁴² *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, [196] (Kirby J).

¹⁴³ *Maloney v The Queen* (2013) 252 CLR 168, [61] (Hayne J).

¹⁴⁴ Ibid [325] (Gageler J).

¹⁴⁵ Ibid [326] (Gageler J).

¹⁴⁶ Ibid [328] (Gageler J).

countries or international cases was minimal and he arrived at the same conclusion as the other judges.

The current High Court approach to interpreting *ICERD* as incorporated into the *RDA* is essentially a textual one. It is at odds with the *Vienna Convention*, and appears to be the same approach taken to interpret domestic legislation. Analysing the High Court's statutory interpretation in *Maloney*, Rice stated that:

... the principal lesson from *Maloney* is that statutory interpretation in the High Court is ... a positivist, textual exercise, increasingly removed from international developments, at least when it comes to dealing with human rights and anti-discrimination law.¹⁴⁷

III DEFICIT DISCOURSE: CONFLATION OF DYSFUNCTION AND ABORIGINALITY

Deficit discourse is language that portrays Aboriginal people as inferior to the mainstream culture, often by applying western standards and comparing them to non-Aboriginal people. Jody Broun explains that this is the central premise of the 'Close the Gap' health campaign, the rhetoric of which began with life expectancy, referring to the gap between Aboriginal and non-Aboriginal Australians as a 'national disgrace and embarrassment.'¹⁴⁸ She raises the issue that deficit language, including the use of the term 'gap' is used to explain many elements of Aboriginal and Torres Strait Islander peoples' lives as compared to whites. Close the Gap is therefore premised on the assumption that Aboriginal and Torres Strait Islander peoples should live like white people.¹⁴⁹ As Monture stresses, Aboriginal peoples are measured against the same criteria as the white middle classes, which are often materialistic, and have little relevance to Aboriginal and Torres Strait peoples.¹⁵⁰ Significantly, western cultural values heavily impact on parliament and the court's

¹⁴⁷ Simon Rice, '*Joan Monica Maloney v The Queen* [2013] HCA 28', Case Note (July/August 2013) 8(7) *Indigenous Law Bulletin* 28, 32.

¹⁴⁸ Jody Broun, Co-Chair National Congress of Australia's First Peoples, 'Having a Conversation about Indigenous Excellence' (Keynote Speech, delivered at the Jobs Australia: Indigenous Forces at Work Conference, Darwin, 2 May 2013) 4 <<http://nationalcongress.com.au/wp-content/uploads/2013/05/20130502JobsServicesAustraliaSpeech.pdf>>.

¹⁴⁹ *Ibid.*

¹⁵⁰ Patricia Monture, 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' (1986) 2 *Canadian Journal of Women and the Law* 159, 161-162.

interpretation of reports of 'deficit' outcomes. They nullify culture and the very different lived experiences of Aboriginal peoples and their desire to continue to practise their own cultures. Negative stereotypes of Aboriginal people as inferior and childlike are an integral part of embedding oppressive power relations between parliaments, courts and Aboriginal people.¹⁵¹

Many Aboriginal leaders, including Jody Broun and Mick Gooda, have argued against deficit-based models often prescribed for Aboriginal peoples.¹⁵² Deficit-based approaches are used to justify the introduction of those 'special measures' which manage and punish Aboriginal people and reduce or remove their rights. These measures are based on the assumption that Aboriginal people and their cultures are the cause of various problems such as public disorder, crime, poor parenting and low school attendance. Fogarty and Wilson identify that attributing failure and problems to Aboriginal peoples themselves, rather than acknowledging that they stem from a history of discrimination and disadvantage, adversely affects policy development and results in unintended consequences.¹⁵³ Continued racial discrimination is one of the consequences.

Where legislation limiting rights is enacted under the guise of special measures, government-commissioned reports tend to be relied upon to support the approach. These reports outline what is usually referred to as dysfunctional behaviour, which adversely affects vulnerable members of the community. This then supports what may otherwise be seen as a harsh or even racially discriminatory response by the government. Arguably this was why legislation was challenged in *Bropho v Western Australia*¹⁵⁴ (*Bropho*), *Maloney v The Queen*¹⁵⁵ and *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*.¹⁵⁶ It is also the approach behind income

¹⁵¹ Bielefeld, 'Compulsory Income Management and Indigenous Australians', above n 5, 530.

¹⁵² See, eg, Mick Gooda, Aboriginal and Social Justice Commissioner, 'Social Justice and Aboriginal and Torres Strait Islander Peoples' Access to Services' (Speech delivered at the Queensland Council of Social Service Conference, Cairns, 28 June 2010); Broun, above n 148, 4.

¹⁵³ Bill Fogarty and Benjamin Wilson, Australian National University, *Governments Must Stop Negatively Framing Policies Aimed at Indigenous Australians* (10 June 2016) <<http://www.anu.edu.au/news/all-news/governments-must-stop-negatively-framing-policies-aimed-at-indigenous-australians>>.

¹⁵⁴ [2007] FCA 519; [2008] FCAFC 100.

¹⁵⁵ (2013) 252 CLR 168.

¹⁵⁶ [2010] QCA 37.

management in the CYWR, and the NTI.¹⁵⁷ It blames Aboriginal people, and serves to designate policies aimed at changing values, encouraging assimilation, and promoting individual responsibility as special measures. In describing this process from the past to the present, Bielefeld states that:

The laws of the protectionist era contained elaborate provisions and regulations designed to eliminate the personal autonomy of Indigenous Australians, and force them into a position of 'demoralised dependence'. This was not coincidental, but an integral aspect of the ongoing colonial violence that continued to attempt to break the spirit of Indigenous peoples and shatter their resistance to the imposition of colonial order. This attitude does not seem to have changed in the 21st century. Instead of learning from this experience, the government seems intent to ignore history and continue to develop laws that are antithetical to social justice.¹⁵⁸

In *Bropho*, the rights of Aboriginal people to choose where they live were annulled when they were required to leave their community, supposedly for their own protection.¹⁵⁹ This was characterised as a special measure by the first instance judge.¹⁶⁰ Its assessment as a special measure was not ultimately required by the Full Court of the Federal Court. Legislative amendments had removed control and management of an Aboriginal reserve from an Aboriginal corporation,¹⁶¹ and provided an administrator with the power to order Aboriginal residents to leave their community.¹⁶² Included was a privative clause removing the right of those affected to seek a review of any decision made by the administrator.¹⁶³ These legislative provisions were passed following recommendations made at a coronial inquest into the death of a teenage girl at the reserve. The legislation was also said to be in response to a number of

¹⁵⁷ See, eg, *Bropho v Western Australia* [2008] FCAFC 100; *Maloney v The Queen* (2013) 252 CLR 168; Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007); Northern Territory Government, Rex Wild QC & Patricia Anderson, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007 <http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf>.

¹⁵⁸ Bielefeld, 'Compulsory Income Management and Indigenous Australians', above n 5, 534.

¹⁵⁹ *Bropho v Western Australia* [2007] FCA 519, [580] (Nicholson J).

¹⁶⁰ *Ibid.*

¹⁶¹ The Swan Valley Nyungah Community Aboriginal Corporation.

¹⁶² The *Reserves (Reserve 43131) Act 2003* (WA).

¹⁶³ *Bropho v Western Australia* [2007] FCA 519.

physical and sexual assaults on women and children on the reserve, suicides, and substance abuse over a nine year period. It was alleged that investigations by police and welfare agencies to assist the victims of violence had been resisted and hampered by some of the residents of the reserve. Evidence was provided from government-commissioned inquiries, which found many instances of violence on the reserve, including sexual violence.¹⁶⁴ The measures were accepted by the judges as appropriate because they addressed 'dysfunction' rather than race, despite the community being Aboriginal.¹⁶⁵ The legislation targeting Aboriginal people in *Bropho* is derived from the same deficit approach as alcohol restrictions in Aboriginal communities and income management in Cape York and the Northern Territory.

Judges fail to acknowledge that legislation disproportionately affecting Aboriginal peoples is based on negative stereotypes which portray Aboriginal peoples as being dysfunctional. This stereotyping assigns negative attributes to Aboriginal peoples, positioning them as groups and individuals without self-determination, who need to be controlled by governments via special legislation. This conflation of dysfunction and Aboriginality is intended to justify extreme legislative measures which are racially discriminatory and should therefore be prohibited under the *RDA*.

Justice Nicholson held in *Bropho* that, although far-reaching, the legislation enacted was both reasonable and proportionate.¹⁶⁶ While identifying the measure's unfairness in forcing people to leave, Nicholson J failed to analyse the effects that closing the reserve would have on the Aboriginal people, including discrimination. Nicholson J also failed to analyse whether the measure could achieve its aim, and the likely consequences. The foreseeable effects were obvious: homelessness, forced relocation, and removal from traditional country and kinship structures. These occurred and are

¹⁶⁴ See, eg, Sue Gordon, Kay Hallahan and Darrell Henry, *Putting the Picture Together, an Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (State Law Publisher, 2002); Richard Hooker, 'The Hooker Inquiry', 2003, in *Bropho v Western Australia* [2007] FCA 519, [75], [58], [59], [83] (Nicholson J).

¹⁶⁵ *Bropho v Western Australia* [2008] FCAFC 100, [71]-[72] (Ryan, Moore and Tamberlin JJ).

¹⁶⁶ *Bropho v Western Australia* [2007] FCA 519, [550]-[551] (Nicholson J).

documented.¹⁶⁷ Despite awareness of these negative effects, in 2015 the Western Australian government said that it will close between 100 and 150 communities because it cannot afford to service them.¹⁶⁸ This was met with protests.¹⁶⁹ In furthering their support for closing these communities the Western Australian government argued that 'dysfunction' was common in these communities in the form of child abuse, the reason given for the NT intervention.¹⁷⁰ Aboriginal peoples' enjoyment of rights should not be dependent on political decisions, especially those made with a lack of understanding of the continuing effects of colonisation. The *RDA* and the judicial system provides an opportunity to review and correct these decisions because they are racist and breach human rights.

However, judges in cases where rights of Aboriginal peoples are restricted, including special measures cases, fail to acknowledge, and may not understand, the current effects of historical colonisation and protectionism. Writing extra-judicially, Rothman J highlights how judicial assumptions tend to accept the adverse effects over time of living in an environment of alcohol and abuse more readily than the similar effects of discrimination, exclusion and disempowerment. He acknowledges that the effects of the latter result in 'increased anti-social and criminal behaviour; decreased health by incorrect

¹⁶⁷ See, eg, Stringer, 'Homeless protest at Matagarup – "We Will not be Swept Away"', *The Stringer Independent News* (online), 16 May 2013 <http://thestringer.com.au/homeless-protest-at-matagarup-we-will-not-be-swept-away-2-2832#.VldkgmfX-_l>; RTR FM92.1, 'Swan Valley Noongar Community', 16 April 2014 (Thomas Marcinkowski) <<https://rtrfm.com.au/story/swan-valley-noongar-community/>>; Aleisha Orr, 'Controversial Swan Valley Noongar community buildings torn down', *WA today.com.au* (online) 18 March 2014 <<http://www.watoday.com.au/wa-news/controversial-swan-valley-noongar-community-buildings-torn-down-20140318-34zjg.html>>.

¹⁶⁸ Ginny Stein, 'Indigenous Communities Closure: Western Australian Premier Colin Barnett Says "No Person will be Forced from their Land"', *ABC News* (online), 1 May 2015, <<http://www.abc.net.au/news/2015-05-01/wa-government-softens-language-on-closing-aboriginal-communities/6439138>>.

¹⁶⁹ Melissa Davey, 'Protestors Stage More Rallies over Plans to Close Remote Aboriginal Communities', *The Guardian* (online), 26 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/26/protestors-stage-more-rallies-over-plans-to-close-remote-aboriginal-communities>>.

¹⁷⁰ Myles Morgan, 'WA Govt Won't Name Aboriginal Communities with Alleged Child Sexual Abuse Problems', *National Indigenous Television News* (online), 8 May 2015 <<http://www.sbs.com.au/nitv/nitv-news/article/2015/05/08/wa-govt-wont-name-aboriginal-communities-alleged-child-sexual-abuse-problems>>.

lifestyle choices; and decreased academic and intellectual performance.¹⁷¹ In this sense, Rothman J recognises the effect of discrimination on a person's dignity and the significant consequences of its emotional and psychological impact. In Chapter 5, it was seen that the violation of the 'dignity' of indigenous peoples has been judicially considered in Canada as one such consequence, but deemed difficult to evidence. However it is embedded into the South African *Constitution* as a non-derogable right, reflecting its importance in that country.

IV JUDICIAL DECISION-MAKING: SYSTEMIC DISCRIMINATION

Non-legal factors such as culture, education, gender and class background influence judges in their decision-making. In their approach, judges assume the same ideological view of Aboriginal people as does parliament: a view based on a western cultural perspective. This is understandable given that judges and politicians are unlikely to have more than a limited interaction with Aboriginal and Torres Strait Islander peoples, other than in their work. Like any community member, judges are socially conditioned, and influenced by assumptions and stereotypes when interpreting both facts and law. While some judges are aware of their socialisation, biases, privileged position and its role in their thinking and decision-making, and thus more open to other perspectives, decisions still occur within a western discourse which lacks proper understanding of Aboriginal cultures.¹⁷²

'Whiteness' and its associated privilege are generally invisible to courts, parliaments and white people.¹⁷³ This is because they are a natural part of a white person's life, not consciously thought about. It may be assumed that non-white people, including Aboriginal peoples, can choose to experience the same level of privilege or choose to be different to how they are; that is, more like white people. However, recognising the privilege of being white, and that institutions are constructed based on white privilege, is required to understand

¹⁷¹ Stephen Rothman, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders' (Paper delivered at the Ngara Yura Committee Twilight Seminar, Sydney, 25 February 2014) 11 <<http://www.austlii.edu.au/au/journals/NSWJSchol/2014/6.pdf>>.

¹⁷² Margaret Davies, *Asking the Law Question* (Lawbook Company, 3rd Ed, 2008) 155.

¹⁷³ *Ibid* 310.

the exclusion and different position of Aboriginal peoples in Australian society.¹⁷⁴

White privilege reinforces individual and systemic racial discrimination. Acknowledgement of whiteness and privilege, and accepting difference between Aboriginal peoples and white people, is required in order to decide special measures challenges in a non-discriminatory fashion. In these challenges, judges view certain standards applicable to white people as normative, and Aboriginal culture or 'dysfunction' becomes the issue to be examined against these standards, rather than critiquing the measures challenged or the inaccuracy of applying them to peoples with different standards. This has resulted in judges accepting measures focused on behavioural change as being for the greater good and designed to achieve the normative white standards on which they are based. The unspoken goal is assimilation.¹⁷⁵ This reinforces systemic discrimination.

Davies explains that an understanding of systemic racism includes that 'race' – with its presumptions of inferiority – is entrenched in the Western perspective. While the *RDA* prohibits racial discrimination, Australian law generally reflects the values of the non-indigenous, culturally powerful West.¹⁷⁶

'Colour blindness' is an approach which ignores white privilege and assumes that formal approaches to equality are effective. Sadurski has criticised the court for adopting a colour blind approach, finding all racial distinctions discriminatory, but saving some as special measures when relevant criteria are met. This approach has been attributed to the 'ideological structure of Anglo-Australian law', including the court adhering to dominant values by applying a literal interpretation of legislation and not redistributing power.¹⁷⁷ Similarly, if courts ignore race in order to achieve equality, they fail to recognise the different experiences of people of different races, and the different ways in

¹⁷⁴ Ibid.

¹⁷⁵ Jennifer Nielson, 'Whiteness and Anti-Discrimination Law: It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* (e-journal) 10 <<http://www.acrawsa.org.au/files/ejournalfiles/52NielsenInthedesignFINAL.pdf>>.

¹⁷⁶ Davies, above n 172, 297.

¹⁷⁷ Sadurski, above n 35, 7-8.

which social, political and economic factors will affect the outcomes of judgments. In this regard, Davies states that:

Colour-blindness simply obscures the fact of white supremacy, because it permits officials, decision-makers, and ordinary people to believe in an illusion of equality and to operate in accordance with 'universal' norms which are, in fact, designed for and skewed towards the white majority.¹⁷⁸

For a court to adopt a less racially nuanced interpretation, it needs to identify its place within the system and its role in reinforcing and at times even imposing racial discrimination on Aboriginal people. The court then needs to consider the way it makes decisions and the effect of these decisions on Aboriginal peoples. To date, there has been a lack of analysis of discrimination when assessing measures. An examination of the objectives of *ICERD* and the *RDA* is required and will support this analysis. However, this is incompatible to the formal approach taken by the court. Davies states that the formal approach 'sees law as both self-contained and coherent: law, in other words, is separate from both politics and morality, and is thus seen by some as representing a scientific approach to legal reasoning.'¹⁷⁹ However, the broad wording of anti-discrimination legislation does not make it amenable to a literal and formal approach.¹⁸⁰

V SEPARATION OF POWERS: THE SEPARATE ROLES OF THE COURT AND THE LEGISLATURE

The detrimental impact of legislation, policy and practice on Aboriginal and Torres Strait Islander peoples was the primary reason for the enactment of the *RDA* and the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)* (*Queensland Discriminatory Laws Act*). In most areas of law, judges may not be required to question legislation; however, by their very nature s 10 *RDA* and *ICERD* require judges to undertake an investigative approach to determine whether a law is racially discriminatory.

¹⁷⁸ Davies, above n 172, 317.

¹⁷⁹ Ibid 152.

¹⁸⁰ Thornton, above n 74, 3.

Judges in racial discrimination cases have articulated that it is the executive government's role to decide whether a particular measure is necessary to secure the advancement of Aboriginal peoples. While a separation of roles is important to ensure that each body's powers are not compromised, it is equally important that each performs its designated role. I am focused on the court's approach, and assert that due to a combination of factors, including a literal statutory interpretation approach, judges' western backgrounds and deference to the legislature, Australian courts have accepted measures as special measures unlike those anywhere else.

In *Maloney*, despite recognising that difficult decisions were required to address the problem of alcohol abuse in indigenous communities, French CJ asserted that it was for parliament and the executive government to make these judgments within the boundaries set by the *RDA*.¹⁸¹ There was no critique of the policy approach, nor a comparison with the minimisation of harm approaches applied in non-indigenous communities. Similarly, Bell J referred to Deane J in *Gerhardy* to say that it is not for the court to decide if a measure is appropriate to its purpose.¹⁸² In *Gerhardy*, Brennan J characterised the implementation of a special measure as a political issue: 'a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure has the character of a special measure under the Convention.'¹⁸³ However, his Honour did hold that a court can decide if parliament acted reasonably in its assessment, but not if the assessment was correct.¹⁸⁴ The extent to which a measure can reasonably restrict rights or adversely affect those it targets before judges will intervene is unclear.

Consistent with the High Court's formal interpretative acceptance of legislative intent, judges are relieved from detailed investigation of legislative provisions. There is an assumption by the court that the parliament is proposing to act in the best interests of Aboriginal peoples. In cases challenging special

¹⁸¹ *Maloney v The Queen* (2013) 252 CLR 168, [47] (French CJ).

¹⁸² *Ibid* [244]-[245] (Bell J).

¹⁸³ *Gerhardy v Brown* (1985) 159 CLR 70, [42] (Brennan J).

¹⁸⁴ *Ibid*.

measures, parties are not required to prove that a law is characterised as a special measure.¹⁸⁵ Rather, in *Maloney* – where the measure restricted Aboriginal peoples’ right to property – the evidence relied upon by parliament and accepted by judges was in the nature of ‘proof’ of Aboriginal ‘dysfunction’ requiring extreme responses. The Cape York Justice Study finding of alcohol abuse and alcohol related violence in Cape York Aboriginal communities was relied upon by the state¹⁸⁶ to justify its imposition of alcohol restrictions in Aboriginal communities in Queensland. This was accepted by the court.¹⁸⁷ Evidence of dysfunction is usually derived from government-commissioned reports which focus on the present, and the negative.¹⁸⁸ The concept and outcome of ‘dysfunction’ – rather than the inequality experienced due to colonisation, racially discriminatory legislation, policy and practice – is now the main reason used to justify why Aboriginal people need special measures.

VI CONCLUSION

The High Court, when interpreting both the *RDA* and *ICERD*, applies a literal and formal method of interpretation. This has produced different meanings for important concepts such as equality and discrimination in cases where racial discrimination is alleged, compared to constitutional cases where a substantive interpretation is taken. I have identified this literal and formal method of interpretation and the courts’ deference to the legislature as the reasons for defining paternalistic measures which restrict rights as special measures. In Chapter 7, I show that the court does not analyse the discriminatory elements or effects of these measures.

In both *Gerhardy* and *Maloney*, the High Court asserted that it had a role to play in deciding whether parliament’s assessment of whether a measure could reasonably be considered a special measure; however, the content and

¹⁸⁵ Three judges commented on this specifically in *Maloney: Maloney v The Queen* (2013) 252 CLR 168, [45] (French CJ), [185] (Kiefel), [349]-[355] (Gageler J).

¹⁸⁶ Explanatory Notes, Indigenous Communities Liquor Licences Bill 2002 (Qld).

¹⁸⁷ *Maloney v The Queen* (2013) 252 CLR 168, [46] (French CJ), [248] (Bell J), [370]-[371] (Gageler J).

¹⁸⁸ See, eg, Gordon, et al, above n 164; Hooker, above n 164; Cape York Institute for Policy and Leadership, above n 157; Northern Territory Government, Wild and Anderson, above n 157.

consideration of that law were seen to be matters to be decided by the parliament.¹⁸⁹ This approach places control with parliament, resulting in the perverse outcome that Aboriginal people today are treated much as they were prior to 1975. The court retains a relatively uncritical view of legislation pertaining to Aboriginal people when the legislation is characterised as ‘being for their own good’. This rests on the basis that the legislature is enacting the will of the parliament and the parliament is a democratically elected body. This reliance fails to acknowledge the unheard voices of minorities in a democracy, that not all intentions of the parliament are known to voters at election time, and that a parliament made up of members mainly from the dominant culture may not know what is ‘best’ for a minority group.

By restricting themselves to the text of the *RDA* and *ICERD*, judges limit the definitions of equality and discrimination. At the same time, they are broadening the scope of special measures, possibly well beyond the realms of *ICERD* and what was intended by the legislature in drafting the *RDA*.

In *Mabo v Queensland (No 2)*,¹⁹⁰ Brennan J saw the importance of the law progressing over time to maintain its relevance in a global community. He stated that:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.¹⁹¹

However, due to the court's insular statutory interpretation method, the law on special measures in Australia has developed in a vacuum, with judges reluctant to rely upon extrinsic international sources for guidance. Despite acknowledging *ICERD*'s broad text, judges reject interpretations which may add anything beyond its explicit terms. Further, despite each judge interpreting the same text, five of the six judges in *Maloney*, interpreted the text in different ways in their individual judgments, albeit arriving at the same answer. Literal interpretation is intended to be pursued where the text is clear. However,

¹⁸⁹ Rice, above n 147, 31.

¹⁹⁰ [1991] HCA 23.

¹⁹¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [41] (Brennan J, with whom Mason CJ and McHugh agreed).

ICERD's broad terms are unlikely to be interpreted in the same way by two different judges, unless perhaps they are also looking at the same extrinsic materials.

This literal and formal methods of interpretation has produced a distinctive approach in Australia where, in contrast to the countries examined in Chapter 5, restrictive measures are held to be special measures despite their punitive nature, their targeting of race, and adverse effects on those they are supposed to benefit. Given Australia's history of discriminatory legislation controlling Aboriginal peoples' lives, and the enactment of the *RDA* to prohibit these types of measures, this is a perverse result. The court's formal interpretative approach combined with its deference to the legislature has set a precedent for parliament to continue with discriminatory measures which adversely impact Aboriginal peoples.

The court's approach ignores Australia's position in the international human rights community and the nature of concepts and values of that community as exhibited in extrinsic materials, including the Committee on the Elimination of Racial Discrimination (CERD) recommendations, and international and foreign decisions.¹⁹² While it is understood that the CERD's recommendations are not binding, it is important that the CERD has been given general competence to interpret *ICERD* for the purpose of its functions, including examining State reports.¹⁹³ This sets a standard and should be important to Australia, as it will affect whether Australia is assessed as complying with *ICERD*. As was noted in Chapter 4, the Australian government in the past has not been overly concerned with human rights compliance.

Ultimately, despite the court asserting its reliance upon an approach based on a literal and formal interpretation and a certain acquiescence which seems aimed at best attaining the intent of the legislature, this approach deflates the importance of the object and purpose of legislation such as the *RDA*. Instead, it perpetuates systemic disadvantage and stereotyping, harms Aboriginal peoples' dignity, and denies equal enjoyment of human rights and fundamental

¹⁹² Rice, above n 147, 32.

¹⁹³ Meron, above n 21, 285.

freedoms. The inability of a formal approach achieving legislative intent has been acknowledged by Thornton:

... an ostensibly formalistic approach, far from revealing deference to the rule of law, may actually frustrate legislative intent — although it is acknowledged that ascertaining the meaning of legislative intent is itself contestable.¹⁹⁴

Thornton provides opposing reasoning supporting the need for judges to be guided by the aims of discrimination legislation. Her reasoning appears more valid in support of respect for the legislature, at least at the time the *RDA* was drafted, by saying that the aims are clear in terms of gaining equality and eliminating discrimination, and where the objects are reasonably clear, people have a right to expect legislation to mean what it says.¹⁹⁵

The literal and formal interpretative approach used by judges, as well as their deference to the legislature, goes some way to explaining this unique approach to special measures, which aims to protect some Aboriginal people while restricting the rights of others. Punitive measures such as income management and alcohol restriction legislation (which result in people being convicted, fined and potentially imprisoned for repeat offences), are examples of legislation that restricts rights. Punitive measures of this nature are not provided for any other minority group in Australia where special measures apply.¹⁹⁶ Further reasoning seems to be required for punitive measures to be designated special measures. Conflation of dysfunction and Aboriginality supports different and harsh treatment of Aboriginal people being labelled as special measures. Bielefeld links the negative view of Aboriginal people to:

... the same fundamentally erroneous assumptions that characterised the many years of colonial legislation preceding it, namely, that there was truth in the Darwinian logic that Indigenous peoples are too child-like and simple-minded to deal with something as complicated as participation in the cash economy.¹⁹⁷

¹⁹⁴ Thornton, above n 74, 2.

¹⁹⁵ *Ibid* 3-4.

¹⁹⁶ For example, University scholarships and specific employment positions are available for women in fields of employment traditionally dominated by men, such as engineering and science.

¹⁹⁷ Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians', above n 5, 535.

As indicated in Chapter 3, these were the very reasons for government management of Aboriginal and Torres Strait Islander peoples' wages and for paying workers less. Labelling measures which restrict the rights of Aboriginal peoples as 'special measures' is not only ironic and hypocritical but also reflective of continuing racial discrimination in Australia. The next chapter examines the likely outcome of a challenge to the income management measure of the Cape York Welfare Reform as a special measure.

CHAPTER 7: THE CAPE YORK WELFARE REFORM INCOME MANAGEMENT COMPONENT AS A SPECIAL MEASURE: CAN INCOME MANAGEMENT BE CHALLENGED?

I INTRODUCTION

Following my critique of the court's approach to special measures in Chapter 6, in this chapter I present arguments and evidence as to why income management is discriminatory and should therefore not be held a special measure, and excepted from the prohibition against racial discrimination.¹ Racially discriminatory provisions of the *Family Responsibilities Commission Act 2018* (QLD) (*FRC Act*) – such as those relating to income management and information sharing – engage s 10(1) *Racial Discrimination Act 1975* (Cth) (*RDA*). While similar provisions exist in Commonwealth social security legislation,² I explain that they are out of reach of s 10(1). I argue that these provisions affect – either by promoting particular rights or suppressing others – numerous human rights, including rights to social security;³ property ownership;⁴ privacy;⁵ self-determination;⁶ equal treatment before legal organs;⁷ equal participation in cultural activities;⁸ to practise traditions, customs

¹ *Racial Discrimination Act 1975* (Cth) pt II.

² This includes the initial enabling legislation: *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) and the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010*.

³ See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 22.

⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(v).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

⁶ See, eg, *ibid* art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1.

⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(a).

⁸ *Ibid* arts 5(e)(vi) and 7.

and ceremonies;⁹ and to access services intended for use by the general public.¹⁰ Identification of these provisions and their effect on human rights is important in illustrating why income management is discriminatory. In doing so in this chapter, I present the likely arguments of the state in support of these provisions being special measures.

Sections 10(1) and 8(1) *RDA* are important provisions in terms of the discussion undertaken in this chapter. Section 10(1) requires equal enjoyment of rights when legislation causes a person to enjoy human rights to a lesser extent because of their race, colour, national or ethnic origin. Section 8(1) states that Part II *RDA* – which includes s 10(1) – does not apply to special measures and refers to Art 1(4) *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*. As discussed in Chapter 1, Arts 1(4) and 2(2) *ICERD* should be read together.¹¹ These Articles are set out in Chapter 1.

It was seen in Chapter 6 that legislation causing any form of distinction based on race, whether beneficial, restricting rights, or punitive, will engage s 10(1) *RDA*.¹² In this chapter this process, as well as the proportionality tests applied by the judges – including Arts 1(4) and 2(2) elements – are examined to determine the potential outcome of a challenge to income management. This outcome will likely be based on judicial reasoning derived mainly from the latest and most relevant case, *Maloney v The Queen*¹³ (*Maloney*). *Maloney* is unique because it is currently the only High Court special measures decision which permits a measure to restrict the rights of its beneficiaries. Therefore it provides the best guidance for assessing whether income management is likely to be held a special measure, and any potential argument against this.

⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 12.

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(a).

¹¹ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [9] (Wilson J), [32] (Brennan J), [9] (Deane J); *Maloney v The Queen* (2013) 252 CLR 168, [13] (French CJ), [88], [91] (Hayne J), [118], [132], [134] (Crennan J), [289], [299], [347], [357] (Gageler J).

¹² See, eg, *R v Grose* (2014) 119 SASR 92; *Maloney v The Queen* (2013) 250 CLR 168; *Western Australian v Commonwealth* (1995) 183 CLR 373; *Gerhardy v Brown* (1985) 159 CLR 70.

¹³ (2013) 252 CLR 70.

In this Chapter, I incorporate new arguments and evidence that income management is racially discriminatory, and therefore not able to be characterised as a special measure. I argue that income management is not connected to its objectives of reducing hardship by directing payments to priority needs; assisting with budgeting; reducing harassment by others in relation to payments; encouraging socially responsible behaviour;¹⁴ or adequately advancing or protecting Aboriginal peoples or individuals. Further, I show that if income management were held capable of being a special measure, it is not the least restrictive measure. Less restrictive measures will be canvassed.

Income management is arguably not a special measure because it requires management of an Aboriginal person's property without their consent, and restricts an Aboriginal person from terminating the management of their property. These actions are prohibited under s 10(3) *RDA*. If s 10(3) applies, income management is incapable of being found a special measure.¹⁵

Understanding the historical and present control of Aboriginal peoples by governments through legislation and policy is important to elucidate why income management cannot secure adequate advancement, or adequate development and protection for Aboriginal peoples. Rather, income management is analogous to the historical management of Aboriginal peoples' wages (allegedly) for their benefit, and is based on deficit discourse, which posits Aboriginal culture as inferior to the mainstream culture.

As discussed in Chapter 6, the approach to restricting rights as applied in *Bropho v Western Australia*¹⁶ and subsequent cases is a vastly different approach to those examined in Chapter 5, where I showed that overseas jurisdictions heavily scrutinise restrictions on rights which target a specific racial group. In contrast, Australian parliaments label Aboriginal people and

¹⁴ Department of Social Services, Government of Australia, *Guide to Social Security Law*, 11.1.1.30 *Objectives of Income Management* <<http://guides.dss.gov.au/guide-social-security-law/11/1/1/30>>.

¹⁵ *Racial Discrimination Act 1975* (Cth) s 8(1).

¹⁶ [2008] FCAFC 100.

Aboriginal communities dysfunctional, legitimising extreme and discriminatory measures which have been accepted by courts.

Generally, reports ‘evidencing’ the disadvantage faced by Aboriginal peoples and the supposed dysfunction of their communities are used to support protective legislation and policy restrictions on rights.¹⁷ Some reports on Cape York Aboriginal communities focus on violence and substance abuse, and could be used in court in support of restrictive measures including special measures. These reports include the specific document which outlined the design of the CYWR – which included income management¹⁸ – and the reports¹⁹ referring to Cape York, cited in Chapters 1 and 2.

The judicial direction of the High Court, including acceptance of measures that restrict rights and punish people harshly through criminal convictions and differential treatment, strongly indicates that challenging income management requires different legal arguments if a different result is to be achieved. While I am not confident that a different result can occur, I provide different legal arguments and evidence to that in *Maloney* to address some of the issues raised by the judges.

II EXISTENCE OF A RACIAL OR ETHNIC GROUP OR INDIVIDUALS

For s 10(1) *RDA* to apply, the enactment of a legislative provision must cause differential treatment based on race, lessening peoples’ enjoyment of human

¹⁷ See, eg, *Maloney v The Queen* (2013) 252 CLR 168, [27], [46] (French CJ), [184] (Kiefel J), [194] (Bell J), [267], [277], [370]-[372] (Gageler J); *Bropho v Western Australia* [2008] FCAFC 100, [7], [9] (Ryan, Moore and Tamberlin JJ).

¹⁸ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge, Design Recommendations* (Queensland Cape York Institute for Policy and Leadership Press, 2007).

¹⁹ See, eg, Tony Fitzgerald and Queensland Department of the Premier and Cabinet, *Cape York Justice Study* (2001) 2, (Brisbane: Department of the Premier and Cabinet Press); Department of Aboriginal and Torres Strait Islander Policy and Development, Queensland Government, *The Aboriginal and Torres Strait Islander Women’s Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development Press, 2000); Noel Pearson, Apunipima Cape York Health Council, *Cape York Partnerships and Alcohol and Drugs Working Group, Cape York Peninsula Substance Abuse Strategy developed by the Alcohol and Drugs Working Group established by Apunipima Cape York Health Council and Cape York Partnerships under the Direction of Noel Pearson* (Cape York Partnerships Press, 2002).

rights and fundamental freedoms.²⁰ It is now well established in case law²¹ that s 10(1) will be triggered even if income management is found to apply generally to all inhabitants in the Cape York Welfare Reform (CYWR) communities, not just Aboriginal and Torres Strait Islander peoples.²² This is because s 10 *RDA* is directed at the ‘practical operation and effect’ of legislation, not simply its form.²³ This is crucial in arguing that income management reduces or prevents Aboriginal peoples from enjoying particular human rights.

Even if the *FRC Act* income management and information sharing provisions were read in isolation, their operation and effect on Aboriginal people cannot be ignored. Each of the CYWR communities – except for Coen, which has a predominantly Aboriginal population – has historically been and continues to be an ‘Aboriginal community’. The application of the *FRC Act* to these communities and particular *FRC Act* provisions strongly indicate that it is intended to apply to Aboriginal and Torres Strait Islander peoples. Being Aboriginal or Torres Strait Islander is an eligibility requirement for appointment as a local commissioner.²⁴ An appropriate understanding of Aboriginal and Torres Strait Islander cultures and histories is required of a commissioner, deputy commissioner²⁵ and registrar.²⁶ One of the principles for administering the *FRC Act* is the requirement to take into account ‘Aboriginal tradition and Island custom ... in matters involving Aboriginal people or Torres Strait Islanders.’²⁷

The above provisions and the communities to which the *FRC Act* apply, provide overwhelming evidence that the legislation’s intended targets are Aboriginal peoples. In her Second Reading Speech, then Queensland Premier Bligh

²⁰ See, eg, *Maloney v The Queen* (2013) 252 CLR 168, [68] (Hayne J); *Gerhardy v Brown* (1985) 159 CLR 79; *Western Australia v Ward* (2002) 213 CLR 1, [99] (Gleeson, Gummow, Gaudron and Hayne JJ).

²¹ *Maloney v The Queen* (2013) 252 CLR 168, [38] (French CJ), [84] (Hayne J) (with whom Crennan J agreed, [112]), [197] (Bell J).

²² See, eg, *Western Australia v Ward* (2002) 213 CLR 1; *Gerhardy v Brown* (1985) 159 CLR 70.

²³ See, eg, *Western Australia v Ward* (2002) 213 CLR 1, [115]; *Gerhardy v Brown* (1985) 159 CLR 70, [97] and [99] (Mason J dissenting), [216]-[219] (Brennan, Toohey and Gaudron JJ), [231]-232] (Deane J).

²⁴ *Family Responsibilities Commission Act 2008* (Qld) s 18.

²⁵ *Ibid* s 17.

²⁶ *Ibid* s 34.

²⁷ *Ibid* s 5(2)(c).

referred to the Prime Minister's Apology to the Indigenous stolen generations and stated that her government is 'working in partnership with the state's Indigenous leaders to find new – sometimes radical ways – to address the dysfunction that has become normalised in many of the communities.'²⁸ She identified the potential for 'legal ramifications' with the *RDA*, but argued that an exemption from the *RDA*'s operation would protect the FRC legislation as the Bill was deemed a special measure 'for the benefit of Aboriginal people.'²⁹ In deeming income management and the NTI to be special measures, the relevant legislative provisions were effectively placed beyond challenge under the *RDA*. While this made suspension of the *RDA* provisions unnecessary, Part II *RDA* was suspended to prevent legal challenge.

Income management in the CYWR is only triggered when a social security recipient breaches one of the 'social responsibilities'. However, s 10(1) *RDA* still applies even though the provisions mean that only some of the Aboriginal people in the CYWR communities will enjoy particular rights to a lesser extent to members of another race.³⁰

III INCOME MANAGEMENT: COMMONWEALTH LEGISLATIVE PROVISIONS AFFECTING THE RIGHTS OF ABORIGINAL PEOPLES

Both Queensland and Commonwealth legislation include provisions which work together to enable income management for the CYWR. While the Queensland FRC makes the decision to income manage,³¹ it is the Federal Secretary of Centrelink who acts to implement income management under the *Social Security (Administration) Act 1999* (Cth) (*SS(A) Act*).³² Without the Commonwealth legislation, income management could not occur. Section 123ZEA *SS(A) Act* permits the FRC to provide information to the Centrelink Secretary if the person is income managed or if the FRC is

²⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 332 (Anna Bligh, Premier).

²⁹ *Ibid* 333.

³⁰ *Maloney v The Queen* (2013) 252 CLR 168, [80] (Hayne J), [200] (Bell J).

³¹ *Family Responsibilities Commission Act 2008* (Qld) s 69(1)(b)(iv).

³² *Social Security (Administration) Act 1999* (Cth) ss 123UF, 123ZK(2). Also, ss 123XM, 123XN, 123XO and 123XP require the Centrelink Secretary to deduct monies from a person's payment to separate it as income managed monies.

considering providing a notice to the Secretary to income manage them and the information is relevant to income management. Once information is disclosed by the FRC, the Secretary may then disclose information about the person to the FRC for it to perform its functions or exercise its powers.³³ The same rights affected by the *FRC Act* are affected by the *SS(A) Act*.

When income management was introduced, ss 4 and 5 of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (*SSOLA Act*) provided that income management provisions in the *FRC Act*³⁴ and *SS(A) Act* were special measures,³⁵ and therefore excluded from the operation of Part II *RDA*³⁶ and any Queensland law dealing with discrimination.³⁷ As discussed below, these sections were subsequently repealed.³⁸ However, this did not change the legislative intention that the relevant provisions are special measures.

A A Weakness in Australia's Legislative Framework – The Racial Discrimination Act 1975 (Cth) Nullified

Despite enactment of the *RDA*, the legislature can still express intent within legislation that provisions of the *RDA* – usually Part II, which includes the prohibition of racial discrimination and the right to equal treatment³⁹ – do not apply to its legislation. This was described in the previous section in relation to the now repealed ss 4 and 5 of the *SSOLA Act*. This provides a clear message that the *RDA* is not a relevant consideration when interpreting the legislation, and warns against potential challenges to income management. Legislative drafting of this nature is an incursion into the role of the judiciary. It disables the judicial role of legislative interpretation and application to facts in specific circumstances to achieve a particular outcome.

³³ *Social Security (Administration) Act 1999* (Cth) s 123ZEA.

³⁴ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 4(1)(e).

³⁵ *Ibid* s 4(2), 4(4).

³⁶ *Ibid* s 4(3), 4(5).

³⁷ *Ibid* s 5.

³⁸ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010* (Cth) cl 3.

³⁹ *Racial Discrimination Act 1975* (Cth) ss 9 and 10.

To counter criticism against the suspension of the *RDA* in relation to the Northern Territory intervention (NTI), the Commonwealth government reinstated Part II *RDA* in 2010 and amended the social security legislation so that income management applied more broadly in the Northern Territory and other areas within Australia.⁴⁰ Nevertheless income management in most of these areas and in the CYWR, continues to either target or disproportionately affect Aboriginal peoples. In January 2016 97% of the people recorded as being income managed under the CYWR were indigenous.⁴¹

A rule of statutory interpretation requires that, where two pieces of legislation come from the same jurisdiction (e.g. are both federal laws), and are inconsistent, the later legislation prevails.⁴² This is premised on later legislation being interpreted as Parliament's intent to repeal earlier legislation.⁴³

The ability of the *RDA* to be repressed by the legislature in the above way highlights a major weakness in the *RDA* compared to a Constitutional Bill of Rights. The latter would require a successful referendum for amendment and would override other legislation despite its later enactment. The inclusion of ss 4 and 5 *SSOLA Act* indicates the legislature's intent to avert the conflict between income management and information sharing provisions, such as would arise under s 10 *RDA*. Simply repealing ss 4 and 5 *SSOLA Act* does not change the way the legislation works. Ideologically, while Part II *RDA* was reinstated without an express provision stating that the *RDA* prevails where

⁴⁰ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12783 (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs); *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); Luke Buckmaster, Diane Spooner and Kirsty Magarey, 'Income Management and the Racial Discrimination Act' (Parliamentary Library, Background Note 2011-12, 28 May 2012) 1-2 <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1511200/upload_binary/1511200.pdf;fileType=application/pdf>.

⁴¹ Australian Government, Department of Social Services, Income Management Summary Data – 1 January 2016 <<https://data.gov.au/dataset/income-management-summary-data/resource/bceeda43-d289-4cf4-86ec-b82e50361dc0>>.

⁴² *Western Australia v Commonwealth* (1995) 183 CLR 373, [99] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴³ Greg McIntyre, 'An Imbalance of Constitutional Power and Human Rights: The 2007 Federal Intervention in the Northern Territory' (2007) 14 *James Cook University Law Review* 80, 102, 107.

there is inconsistency, the income management and information sharing provisions of the *SS(A) Act* prevail because that Act was passed after the *RDA*.

In relation to the *Northern Territory Emergency Response Act 2007* (Cth) (*NTER Act*), the Australian Human Rights Commission suggested a 'notwithstanding clause'. This clause (which could also be used in relation to the social security legislation) was worded as follows:

Without limiting the general operation of the *Racial Discrimination Act 1975* in relation to the NTER measures, the provisions of the *Racial Discrimination Act 1975* are intended to prevail over the NTER Act. The provisions of this Act do not authorise conduct that is inconsistent with the provisions of the *Racial Discrimination Act 1975*.⁴⁴

This recommendation was ignored.

While the application of the above interpretation rule is of concern in relation to later Commonwealth legislation overriding the *RDA*, it cannot be applied to CYWR income management because the *FRC Act* is state legislation. The rule here is derived from the *Constitution*; therein, the *FRC Act* income management and information sharing provisions will be invalid to the extent of any inconsistency with federal provisions such as s 10(1) *RDA*.⁴⁵ Section 10(1) *RDA* enables Aboriginal and Torres Strait Islander people, who, because of a provision of a law, enjoy rights to a lesser extent to persons of other races, colour or national or ethnic origin, to enjoy those rights to the same extent as others. In practice, the FRC makes the decision under the *FRC Act* to income manage, and then directs the Centrelink Secretary to income manage the person's payment. Therefore, if the income management or related provisions under the state *FRC Act* were held to be discriminatory, or would reduce Aboriginal peoples' enjoyment of human rights, and are not excepted as special measures by a court, the federal *SS(A) Act* is not triggered and income management cannot be implemented.

⁴⁴ Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2 November 2011) 12
<<https://www.humanrights.gov.au/our-work/race-discrimination/publications/suspension-and-reinstatement-rda-and-special-measures-nter>>.

⁴⁵ *Commonwealth of Australia's Constitution Act 1900* (Cth) s 109.

It can be argued that ss 69(1)(b)(iv) (income management), and ss 92 and 93 (information sharing) *FRC Act* are inconsistent with s 10(1) *RDA* because they target or disproportionately affect Aboriginal peoples, restricting a number of rights. These rights were mentioned at the start of this Chapter and will be discussed further below. Other *FRC Act* provisions pertaining to a person 'agreeing' to, or the FRC requiring a person to, attend a service or be income managed, a person being required to 'show cause', or extending the period of income management or the amount income managed⁴⁶ also breach these rights.

IV THE HUMAN RIGHTS AFFECTED BY INCOME MANAGEMENT AND ITS ASSOCIATED PROVISIONS UNDER THE *FAMILY RESPONSIBILITIES COMMISSION ACT 2008 (QLD)*

Section 10(1) *RDA* confers the rights mentioned above upon Aboriginal people who enjoy them to a lesser extent because of discriminatory provisions of the *FRC Act*. By reason of s 109 *Constitution*, s 10 *RDA* should prevail over the *FRC Act* provisions to the extent of any inconsistency.⁴⁷

While s 10(2) *RDA* states that s 10(1) refers to 'a right of a kind referred to in Article 5 of the Convention', judicial clarification is required as to whether rights outside Art 5 are covered by s 10(1) and if they are, the breadth of those rights. In *Maloney*, there was judicial discussion as to whether 'right of a kind' is non-exhaustive and therefore wide enough to include rights outside Art 5.⁴⁸ Chief Justice French held that the larger class of rights referred to in Art 1(1) *ICERD* were 'human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life', and that the rights referred to, were not limited to legal rights enforceable under domestic law.⁴⁹ Justice Gageler distinguished human rights from domestic legal rights, as 'moral entitlements'

⁴⁶ *Family Responsibilities Commission Act* ss 68-69, 82, 87-88.

⁴⁷ See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, [26]-[27] (Mason J). This reasoning has been followed in subsequent cases: *Western Australia v Ward* (2002) 213 CLR 1, [99]-[109] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney v The Queen* (2013) 252 CLR 168, [10] French CJ, [64]-[66] (Hayne J), [149] (Kiefel J), [200] (Bell J), [303] (Gageler J).

⁴⁸ *Maloney v The Queen* (2013) 252 CLR 168, [145] (Kiefel J).

⁴⁹ *Ibid* [9] (French CJ).

as set out in Art 1(1), of which Art 5 provides particular examples.⁵⁰ Justice Kiefel indicated that a strong determinant would be the universal nature of the human right or fundamental freedom, rather than its specificity to a particular society.⁵¹ Justice Bell held that the reference to human rights and fundamental freedoms in Art 1(1) could result in s 10(1) engaging either more or fewer rights than understood in 1975, as the content of rights are now clarified by international law.⁵² These analyses suggest that judges are open to inclusion of rights in addition to those listed in Art 5.

As previously discussed, a number of rights included in Art 5 are arguably breached by provisions of the *FRC Act*. To reiterate, these include the right to social security;⁵³ the right to own property;⁵⁴ equal treatment before legal organs;⁵⁵ equal participation in cultural activities;⁵⁶ and to access services intended for use by the general public.⁵⁷ However, the right to privacy and the right to self-determination are likely to be included under the broad range of rights listed in Art 1(1). The right to privacy is found in Art 17 *International Covenant on Civil and Political Rights (ICCPR)* and the right to self-determination is found in common Art 1 of the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. As mentioned in Chapter 4, both conventions have been ratified by Australia. Therefore, s 10(1) *RDA* will be engaged so long as one or more of the rights under Art 5 are found to be limited because of provisions in the *FRC Act*.

V DOES s 10(1) RACIAL DISCRIMINATION ACT 1975 (CTH) APPLY?

In response to an argument that income management restricts rights, the State is likely to argue that the right to social security is not restricted because the

⁵⁰ Ibid [300] (Gageler J).

⁵¹ Ibid [145]-[146] (Kiefel J).

⁵² Ibid [236] (Bell J).

⁵³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv).

⁵⁴ Ibid art 5(d)(v).

⁵⁵ Ibid art 5(a).

⁵⁶ Ibid art 5(e)(vi).

⁵⁷ Ibid art 5(a).

entire payment is still available to the person.⁵⁸ When introducing its Social Security legislation, the Commonwealth government explained the role of income management by referring to Art 9 *ICESCR*, which recognises the right to social security providing access to benefits, whether in cash or kind.⁵⁹ Other potential arguments already raised⁶⁰ in the Explanatory Statement to the Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013 (Cth) include that income management promotes:

- the right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions.⁶¹ Income management could be said to support this right because it isolates money for spending on these priorities;⁶²
- the rights of children to benefit from social security, access education, attain the highest available standard of health and to adequate standards of living;⁶³
- the right to self-determination.⁶⁴ Argument supporting this, includes that despite income management limiting a person's ability to freely spend all their payment, 'it does not impact on their right to freely pursue their economic, social or cultural development.'⁶⁵ Rather, the 'limitation is to ensure that the essential needs of vulnerable people are met, and

⁵⁸ Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* 6-7. This Determination was repealed by the *Social Services and Other Legislation Amendment Act 2014* (Cth).

⁵⁹ *Ibid.*

⁶⁰ *Ibid* 7-8.

⁶¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 11.

⁶² Explanatory Statement, the *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* 7. This Determination was repealed by the *Social Services and Other Legislation Amendment Act 2014* (Cth).

⁶³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 26, 24 and 27.

⁶⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1.

⁶⁵ Explanatory Statement to the *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* (Cth) 7-8. This Determination was repealed by the *Social Services and Other Legislation Amendment Act 2014* (Cth).

provide them with more financial stability, so they can better pursue their economic, social and cultural development.⁶⁶

Although they may offer clarity where legislation is unclear, explanatory memoranda have no force in law. Arguments favouring income management continue, despite failing to address inherent racial inequality engendered between Aboriginal peoples in that it causes some individuals in CYWR communities to enjoy rights to a different extent to persons of another race. It is not simply a case of being treated differently, or receiving the same amount of social security in a different way. The restrictions placed on spending a significant proportion – whether it be 60%, 75% or 90% – of a person’s payment on what they want, the requirement to use a BasicsCard, the limited places where BasicsCards can be used (such as, not at markets or in other private transactions such as online purchases), all restrict the person’s right to use their social security payment to the same extent or in the same manner as persons of another race.⁶⁷

Arguably, information sharing provisions also reduce Aboriginal peoples’ rights. The *Information Privacy Act 2009* (Qld) and *Privacy Act 1988* (Cth) prohibit the release of personal information without a person’s consent;⁶⁸ for purposes other than for which it was collected;⁶⁹ and with the knowledge that it may not be correct.⁷⁰ However, the Commonwealth deals with these conditions by asserting that personal information is appropriately managed and that income management complies with national and international privacy laws.⁷¹ Information sharing provisions in the *FRC Act* and *SS(A) Act* would not be required if there was no need to override privacy legislation.

⁶⁶ Ibid 8.

⁶⁷ Shelley Bielefeld, ‘Compulsory Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy’ (2014/2015) 18(1) *Australian Indigenous Law Review* 99, 105.

⁶⁸ See, eg, *Information Privacy Act 2009* (Qld) IPP 11; *Privacy Act 1988* (Cth) APP 6, APP 11.

⁶⁹ *Information Privacy Act 2009* (Qld) IPP 9; *Privacy Act 1988* (Cth) APP 6.

⁷⁰ *Information Privacy Act 2009* (Qld) IPP 8; *Privacy Act 1988* (Cth) APP 10.

⁷¹ Explanatory Statement, the *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* 8. This Determination was repealed by the *Social Services and Other Legislation Amendment Act 2014* (Cth).

However, information is provided to the FRC on people who are not receiving social security payments and are not subject to the FRC. Up to 30 September 2011, the FRC had received 3,498 notifications relating to people who were not subject to the FRC's jurisdiction.⁷² Agencies are required to provide notices to the FRC simply if a person's address is in a CYWR community and they have breached a social responsibility. The FRC then needs to check whether the person is receiving social security with Centrelink. The Explanatory Notes to the FRC Bill acknowledge that a person who is not within the FRC's jurisdiction may have their privacy breached by this process, but this is supposedly negated because notices and associated material can be destroyed once it is known that the person is not within jurisdiction.⁷³ Overriding the right to privacy and privacy legislation is apparently justified based on the need for the *FRC Act*.

The court's reasoning in *Maloney* suggests that infringement of the rights to social security and privacy are likely to be accepted as engaging s 10(1) *RDA* because the income management and information sharing legislative provisions cause particular Aboriginal people to enjoy some human rights to a more limited extent than others. The effects of income management and information sharing provisions on these and other rights are discussed in more detail below. Reasoning in *Gerhardy v Brown*⁷⁴ (*Gerhardy*) also suggests that any distinction based on race causing unequal enjoyment of rights will engage s 10(1).

A *Right to Social Security and to Own Property*

Income management restricts a person's ability to freely access a large proportion of their social security payment and to spend it how and where they want, or as they wish or need. Receiving all of a social security payment for those who live in CYWR communities is now conditional on meeting 'social responsibilities'.

⁷² Luke Buckmaster and Carol Ey, Parliament of Australia, 'Is Income Management Working?' (Parliamentary Library, Background Note 2011-12, 5 June 2012) 1 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagement>.

⁷³ Explanatory Notes, Family Responsibilities Commission Bill 2008 11.

⁷⁴ (1985) 159 CLR 70.

In *Maloney*, it was accepted that the Aboriginal people on Palm Island enjoyed a right to property to a more limited extent than others.⁷⁵ The property at issue was in the form of the strength and quantity of alcohol that individuals could possess. The alcohol restrictions were held to reduce a person's right to property even though they could possess alcohol of particular types, strengths and volumes (e.g., one carton of mid-strength or light beer). An analogous argument can be made in relation to income management. The court is likely to accept as relevant that restrictions on the use of the payments, even though the person is paid all of their social security payment, will trigger s 10(1).

Another argument in favour of finding a restriction on the right to property is that s 10(3) *RDA* applies. This provision prohibits the management of an Aboriginal person's property without their consent. I argue that social security payments⁷⁶ and income managed accounts are property. Section 10(3) *RDA* by reference to s 10(1) enables Aboriginal and Torres Strait Islander people whose property is being managed without their consent to enjoy their right to that property to the same extent as persons of other races or ethnic origins. The income managed bank account linked to the BasicsCard is property managed because it has terms imposed on it. These terms limit where the income managed money can be spent and the items it can be spent on. The only exception to the prohibition on managing Aboriginal peoples' property is if the relevant law is one that applies to all Australians.⁷⁷ As discussed above, the income management scheme in the *FRC Act* applies to five communities populated predominantly by Aboriginal peoples and therefore is not a law that applies to all.

An argument under s 10(3) is important because, if successful, it removes the ability of the court to find a legislative provision is a special measure. Section 8(1) *RDA* clarifies that while special measures are excluded from being

⁷⁵ *Maloney v The Queen* (2013) 252 CLR 168, [38] (French CJ), [84] (Hayne J), [224] (Bell J), [361] Gageler J).

⁷⁶ Fiona Campbell, 'The Cape York Welfare Reform – Continuing Acts of Paternalism', (2015) 15(1) *QUT Law Review* 114, 115.

⁷⁷ *Ibid.*

prohibited as racially discriminatory under Part II *RDA*, this does not include those measures captured by s 10(1) because of s 10(3).⁷⁸

B Right to Privacy

Information sharing provisions enable the FRC and others – including external services and government agencies (schools, court staff, adult corrective services, child safety and housing) – to access information about people, including children that would otherwise breach a right to privacy.⁷⁹ This sharing of information generally does not occur outside CYWR communities.

If a person before the FRC is directed to attend a community support service under a case plan, the commissioner can require a ‘prescribed entity’⁸⁰ to provide them with ‘relevant information’,⁸¹ including information about school attendance and enrolment details of children; court information, such as convictions, pleas and sentences, community service and probation orders, domestic violence orders, and bail conditions; child safety notices including allegations, investigation details, details of Intervention with Parental Agreements, Case Plans, and Child Safety history; tenancy notices including lease information, rent arrears, and property damage; Corrective Services information on prison records; courses completed, and attendance information from service providers (e.g., Wellbeing Centres, MPower budgeting and financial assistance program, parenting programs); and compliance with case plans. This list also includes service provider information on compliance with income management.⁸² This ‘surveillance’ suggests that although a person can spend their non-income managed money on anything, if it is thought that the

⁷⁸ Ibid 121.

⁷⁹ *Family Responsibilities Commission Act 2008* (Qld) ss 92, 93.

⁸⁰ A prescribed entity is defined under s 90 of the *Family Responsibilities Commission Act 2008* (Qld) as the Chief Executive of child protection services, education, housing services, adult corrective services, criminal justice matters, or the police commissioner, or the principal of a school, the chief executive officer of a community support service attended by a person under a case plan, or a person who provides relevant services in relation to compulsory school age children, or in relation to the parents of the children in a CYWR community.

⁸¹ *Family Responsibilities Commission Act 2008* (Qld) s 93.

⁸² Department of Aboriginal and Torres Strait Islander Partnerships, Queensland Government, *Family Responsibilities Commission Open Data Strategy 2013-2017* <<https://www.datsip.qld.gov.au/resources/datsima/about/publications/frc-open-data-strategy.pdf>>.

person is spending money on items such as alcohol, cigarettes, drugs or gambling, their income managed amount may be increased or the order extended.

It should not be the concern of the FRC and others if a person is complying with their 'social responsibilities', but still drinking, smoking or gambling. However, if a person is on a case plan and has agreed not to do these things, then the FRC can issue a show cause notice.⁸³ The FRC can decide to do nothing, decide to income manage the person, or if they are already income managed, increase the amount or period of income management.⁸⁴ The FRC can take the action it reasonably believes appropriate:

(i) to help the person engage in socially responsible standards of behaviour; or

(ii) to help restore local authority in a welfare reform community area.⁸⁵

Both are vague and undefined objectives. The information permitted to be shared is broad, and some of it extremely sensitive. The information may also not have been proven, and may have only been provided to those outside the police and corrective services by the person concerned, who has consented in writing. The child safety information is also sensitive and generally treated as such by government, particularly because it is about children, and not simply about the adults allegedly involved.

The FRC commissioner can also provide information to an entity, such as a school, court or child protection department, if they reasonably consider that it will assist the entity to decide if it should provide information to the FRC, or will help the FRC and an entity coordinate support services for the person. Information provided to the FRC can be fact or opinion.⁸⁶ Those providing information to the FRC are protected from any liability, so long as they act honestly in providing the information.⁸⁷

⁸³ *Family Responsibilities Commission Act 2008* (Qld) ss 82, 87.

⁸⁴ *Ibid* s 82.

⁸⁵ *Ibid* s 87(1)(b).

⁸⁶ *Ibid* s 91(3).

⁸⁷ *Ibid* s 95.

There are indications that commissioners may be communicating about clients and potential clients with people outside those listed in the legislation. In an interview in a case study by von Sturmer and Le Marseny, one of the commissioners is quoted as saying:

Yes – we can have discussions now that we could not have had in the past, with the clients, the Wellbeing Centre Staff, the hotel and other community members that can help us with people who are going off the rails. We can have these discussions because we are trusted.⁸⁸

That commissioner was also aware that the hotel limits the amount of alcohol that some community members can take away.⁸⁹ It is unclear whether other communications occur between the FRC and the hotel with respect to certain individuals and their alleged issues.

The right to privacy is breached when individuals are required to use a BasicsCard. When a person spends their income managed monies using the BasicsCard, this advertises to others that the person is not performing their social responsibilities. While the BasicsCard serves the purpose of restricting items that can be purchased and where money can be spent, it stigmatises the person and undermines their dignity, as it is a symbol of deficiency or inadequacy.

C Right to Self-Determination

Self-determination means managing one's own affairs. At a broader level, it involves participation in governance – in terms of both self and State governance – as well as a range of forms of autonomy.⁹⁰ The lack of inclusion

⁸⁸ John von Sturmer and Stuart Le Marseny, Department of Social Services, Queensland Government, *Living under the Family Responsibilities Commission: Experience and Testimony: 'Speaking Straight, Speaking from the Heart'*, Summary Report (September 2012), 11 <https://www.dss.gov.au/sites/default/files/files/our-responsibility/families-and-children/living_under_the_family_v1_1%281%29.pdf>.

⁸⁹ Ibid 11.

⁹⁰ See, eg, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3 and 4; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1; Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 53, 55.

and consultation⁹¹ in the policy design and the decision-making process in implementing income management means that Aboriginal people from the CYWR communities are unable to exercise this right. Because they comprise a small proportion of the electorate, Aboriginal Australians have little power in Australia's 'democratic' system.

The exclusion of Aboriginal peoples from the design and implementation of measures applying to them means the measures may be ill-conceived, unwelcome and counter-productive. While the Cape York Institute for Policy and Leadership (CYI) was the organisation that designed the CYWR, it occurred without the involvement of most people in the CYWR communities. As discussed in Chapter 2, the CYI did not work with, or consult, Aboriginal peoples of the CYWR communities in any meaningful way. The CYI is not an elected body, nor does it represent the interests of any particular Aboriginal people in a manner that is usually expected by governments. The CYI stands apart, describing itself as taking the lead in developing innovative policy reform to change Aboriginal people from 'passive welfare dependency to engagement with the real economy' and to restore responsibility.⁹²

While the concepts of consultation and prior and informed consent⁹³ discussed in Chapter 2 have been argued by commentators and counsel to be a requirement of special measures, they have received limited judicial support in Australian special measures cases. In *Maloney*, using a literal interpretative approach, five of the six judges held that the words of s 8 *RDA* and Art 1(4) *ICERD* do not require consultation and by inference, the higher level notion of

⁹¹ See, eg, Phillip Martin, 'Potemkin in Cape York: The Politics of Misrepresentation in Aurukun's Welfare Reform Trials' (Seminar held at Australian National University, Canberra, 2 April 2008) <<http://www.anu.edu.au/caepr/events08.php>>; Phillip Martin, 'Whose Right to take Responsibility?' (June – July 2008) 95 *Arena Magazine* 37; Jon Altman and Melissa Johns, Indigenous Welfare Reform in the Northern Territory and Cape York: A Comparative Analysis, Centre for Aboriginal Economic Policy research, *Working Paper No 44/2008* 11-12; Family Responsibilities Commission, Annual Report (2008-09) 46.

⁹² Cape York Institute For Policy and Leadership, Cape York Partnership <<http://capeyorkpartnership.org.au/game-changers/cape-york-institute/>>.

⁹³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 19.

prior, and informed, consent.⁹⁴ However, despite holding this view, French CJ stated that:

... it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure. That is particularly so where, as in this case, the measure said to be a 'special measure' involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members.⁹⁵

Given the court's interpretation, French CJ's reasoning appears to be aimed at the processes of parliament and the legislature, rather than proof of an element that the court would require.

There is no opportunity for Aboriginal people under the CYWR to engage in self-determination in the same manner as people within mainstream communities and cultures. This is partly due to a lack of representation in government or any representative organisation. One way to redress this would have been to involve Aboriginal peoples from the CYWR communities in the design of measures, and by consulting them on the appropriateness of the measures such as income management. Without their inclusion or consultation in their design, measures serve to reinforce the structural inequality experienced by Aboriginal peoples, which further limits their right to self-determination.

The effects of income management on Aboriginal peoples' self-determination include restricting a person's freedom to enter contracts and spend their money as they wish. It not only restricts their ability to acquire particular items, but limits their bargaining power, and often means they pay more for goods and services. Income management restricts where a person can spend their money, and who they can buy from or give money to if they want to assist someone, including family.⁹⁶

⁹⁴ *Maloney v The Queen* (2013) 252 CLR 168, [15] (French CJ), [61] (Hayne J), [134] (Crennan J), [176] (Kiefel J), [235] (Bell J).

⁹⁵ *Ibid* [25] (French CJ).

⁹⁶ Shelley Bielefeld, 'Compulsory Income Management under the Stronger Futures Laws – Providing "Flexibility" or Overturning Freedom of Contract?' (2013) 8(5)

D *Right to Access Services Intended for Use by the General Public*

A BasicsCard can only be used in certain stores to buy particular products. Its use does not extend to purchasing many services available to the general public, for example in motels, hotels and restaurants, for entertainment such as concerts or shows, or even medical services not covered by Medicare. To access these services, a person needs to use their non-income managed money, which is likely to be minimal given that they can be income managed at 60%, 75% or 90%. They can make a request to Centrelink for use of income managed monies for a particular purpose. Centrelink then assesses the person's case. The income managed person needs to show that they have covered all of their priority needs.⁹⁷ The person needs to know the exact amount required, and must negotiate this beforehand. For example, they may need to negotiate with a taxi service to pay a fixed amount for a journey. This process is similar to the past where Aboriginal people were required to explain why they needed their money, and were paid in rations. Aboriginal people were termed 'assisted', based on a presumption that they could not handle their money, and had their wages and child endowment payments managed by governments.

The lived experiences of Aboriginal peoples under income management were revealed in case study research by von Sturmer and Le Marseny, who found that income management restricted their access to their finances so much that they could not afford taxis or clothes, except for children's clothing. However, as the local clothes store was not set up for BasicsCards, Centrelink had to be contacted and a fax sent from them to the store before clothing could be bought.⁹⁸ This is another example of how the rights of Aboriginal peoples are

Indigenous Law Bulletin 18-20; Shelley Bielefeld, 'Income Management and Indigenous Peoples – Nudged into a *Stronger Future*?' (2014) 23(2) *Griffith Law Review* 299-300; Shelley Bielefeld, 'Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy' (2014/2015) 18(1) *Australian Indigenous Law Review* 106-106.

⁹⁷ Priority needs include bills, rent, groceries, clothes, funerals, health and hygiene items, child care and education. They also include transport and the acquisition, operation or repair of a vehicle, necessary only if in connection with any of the above: *Social Security (Administration) Act 1999* (Cth) s 123TH.

⁹⁸ von Sturmer, above n 88, 11.

restricted when they cannot access goods available to others, or use the service to the same extent as those who are not income managed.

E Right to Equal Participation in Cultural Activities, to Practise Traditions, Customs and Ceremonies

The limited money available to individuals who are income managed can prevent them and their family from travelling to cultural events, including funerals.⁹⁹ This has ramifications in terms of grieving, the display of respect and customary obligations to kin and community. Failure to attend funerals and ceremonies can cause distress and shame, and may result in the punishment of the non-attenders and their family.¹⁰⁰

The threat of income management is intended to deter people from taking their children out of school to attend funerals. The FRC produced a guideline for school principals to follow. It requires negotiation between the parent or carer and principal on the number of days a student can be absent for the passing of a close family member only (e.g., parent, grandparent, sibling or primary carer), focused on 'balancing the child's overall welfare with the educational needs'.¹⁰¹ Punishing parents and carers because their children do not attend school also fails to acknowledge and respect that Aboriginal children are viewed as independent from their parents from a young age. This independence makes it more difficult for parents to require children attend school, and limits their ability to discipline their children.¹⁰² It also fails to acknowledge that trying to enforce parents to control their children's school attendance reflects past attempts by the government to destroy Aboriginal authority structures through legislation and policy. That a parent or carer must seek permission from the principal similarly diminishes their right to make a decision about when it is

⁹⁹ KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, *Implementation of the Family Responsibilities Commission*, Final Report (September 2010) 115.

¹⁰⁰ Western Australian Law Reform Commission, *Aboriginal Customary Laws: The Interaction of Aboriginal Law with Aboriginal Law and Culture*, Final Report (2006) 215 <http://www.lrc.justice.wa.gov.au/_files/P94_FR.pdf>.

¹⁰¹ Family Responsibilities Commission, *Guideline No 1 of 2008: School Attendance* cl 10.

¹⁰² Shelley Bielefeld and Jon Altman, 'Australia's First Peoples – Still Struggling for Protection Against Racial Discrimination' (Paper presented at Australian Human Rights Commission, Perspectives on the Racial Discrimination Act: 40 Years of the Racial Discrimination Act Conference, 19 & 20 February 2015) 200-201.

appropriate or culturally required that a child attend a funeral, as does the directive that Aboriginal children are only to attend funerals of 'direct family'. This shows lack of respect for Aboriginal cultural kinship structures which dictate relationships and responsibilities. Aboriginal culture is seen as prioritising cultural activities over western education, but the governments' lack of respect for the cultural specificities of activities such as funerals ignores two important facts: firstly, that grieving processes within Aboriginal cultures continue longer than just one day; and secondly, that Aboriginal people generally die younger than non-Aboriginal people, meaning that Aboriginal people, including children, will attend more funerals more often than non-Aboriginal children.

F *Right to Equal Treatment Before Legal Organs*

The FRC's processes deny the right to natural justice.¹⁰³ Natural justice requires a disinterested and unbiased decision-maker, provision of adequate notice of the case against the person called before them, and the right to respond.¹⁰⁴ FRC conference attendees receive limited information on allegations against them; don't have a right to respond, as allegations are assumed to be correct; are only allowed a legal representative if the FRC agrees;¹⁰⁵ and are unlikely to know or understand the process or the options available to the FRC.

Unlike other legal organs, the *FRC Act* includes a restrictive right of appeal on points of law to a Magistrates Court,¹⁰⁶ without a stay of decisions.¹⁰⁷ This has been justified on the basis that the FRC makes decisions beneficial for people and that if an appeal could stay an income management decision it would encourage appeals and undermine the CYWR.¹⁰⁸ The Administrative Appeals

¹⁰³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(a); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

¹⁰⁴ John von Doussa (President), Human Rights and Equal Opportunity Commission, *Natural Justice Issues In A Tribunal Hearing* (10 March 2005) <<https://www.humanrights.gov.au/news/speeches/natural-justice-issues-tribunal-hearing>>.

¹⁰⁵ *Family Responsibilities Commission Act 2008* (Qld) s 54.

¹⁰⁶ *Ibid* s 111(1).

¹⁰⁷ *Ibid* s 112.

¹⁰⁸ Explanatory Notes, *Family Responsibilities Commission Bill 2008* (Qld) 10-11.

Tribunal and the Social Security Appeals Tribunal are inaccessible if the matter at issue is an FRC decision.¹⁰⁹

The essentially closed forum of the FRC, the lack of any formality, the limited possibility for an outsider to decipher what has occurred at a previous conference, and the restriction on lawyers diminishes the likelihood of an appeal. Limited access to legal advice and representation because of the remoteness of CYWR communities and the limited finances of the attendee further reduces the ability to appeal.

When it was argued that this right had been breached in *Maloney*, the court applied a test more appropriate to s 9 *RDA*, requiring proof of specific differential treatment of Aboriginal and non-Aboriginal peoples by the legal organ. However, in this case the FRC is distinguishable from the Magistrates Court in *Maloney* because the FRC was specifically constructed to deal with Aboriginal people; for example, by being structured to be ‘culturally appropriate’ through its local Aboriginal commissioners. Nevertheless, fundamental processes such as natural justice, a stay of decision on appeal, and the right to legal representation usually associated with such organs have been dissipated or removed. It is the way in which the organ is intended to operate that results in the unequal treatment.

VI IS INCOME MANAGEMENT’S SOLE PURPOSE TO SECURE ADEQUATE ADVANCEMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES’ ENJOYMENT OF HUMAN RIGHTS?

While income management will engage s 10(1) *RDA* because it restricts enjoyment of one or more of the above rights by Aboriginal peoples, ss 4 and 5 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) make it clear that it is intended as a special measure; therefore, the state will raise special measures as a defence and ask the court to assess income management under s 8(1) *RDA*. If it is held to be a special measure it can continue despite the fact that it consequentially means that Aboriginal

¹⁰⁹ *Family Responsibilities Commission Act 2008* (Qld) pt 11.

peoples enjoy human rights to a lesser extent than others. However, there is no requirement for the state to argue special measures, and the court can collect its own evidence. This process was discussed in *Gerhardy*¹¹⁰ and *Maloney*,¹¹¹ and described as the court's duty to ascertain legislative facts, the court being capable of considering material 'sufficiently probative of the legislative fact to be found.'¹¹² This process relates to facts of characterisation of a measure as a special measure and facts required to prove the elements in s 10 *RDA*.¹¹³ Because of the court's literal and formal interpretation approach and the lack of analysis of a measure's discriminatory effect, it is not enough for the applicant to argue that income management is discriminatory, or at least based on a distinction. The applicant must also prove that income management is not a special measure as it is arbitrary and not connected to its objects, or that it does not adequately advance or protect its beneficiaries.

The stated objects of income management under the Commonwealth legislation are broad and vast. They include directing social security payments to 'priority needs of the recipient', their children, their partner and 'any other dependants', as well as providing budgeting support to meet these needs; to reduce spending on alcohol, gambling, cigarettes and pornography; to reduce harassment associated with others asking for money; 'to encourage socially responsible behaviour' relating to 'care and education of children'; and to improve protection for 'recipients and their families.'¹¹⁴ It is explained that income management 'ensures people direct a proportion of their funds to secure protection against deprivation for themselves and their dependants.'¹¹⁵

Unlike the Commonwealth legislation, the *FRC Act* does not list specific objectives for income management. Its main objects are even more diffuse: to 'support the restoration of socially responsible standards of behaviour and local

¹¹⁰ *Gerhardy v Brown* (1985) 159 CLR 70, [49] (Brennan J).

¹¹¹ *Maloney v The Queen* (2013) 252 CLR 168, [352]-[354] (Gageler J).

¹¹² *Ibid* [353] (Gageler J).

¹¹³ *Ibid* [354] (Gageler J).

¹¹⁴ See, eg, *Social Security (Administration) Act 1999* (Cth) s 123TB; Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* 6-7. This Determination was repealed by the *Social Services and Other Legislation Amendment Act 2014* (Cth).

¹¹⁵ Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* 7.

authority', and to help people resume responsibility for themselves, their family and community.¹¹⁶ These are in response to the notion in the design report for the CYWR that a 'social norms deficit' exists in Cape York caused by 'passive welfare'.¹¹⁷ These vague *FRC Act* objects are to be achieved as follows:

- s 4(2) The objects are to be achieved mainly by establishing the Family Responsibilities Commission—
 - (a) to hold conferences about agency notices; and
 - (b) to deal with the matters to which the notices relate in a way that—
 - (i) encourages community members the subject of a conference to engage in socially responsible standards of behaviour; and
 - (ii) promotes the interests, rights and wellbeing of children and other vulnerable persons living in a welfare reform community area.¹¹⁸

As Gibbs CJ stated in *Gerhardy*, even if legislation has a number of objectives, or a number of measures that could be adopted to achieve those objectives, this will not necessarily invalidate its status as a special measure, so long as the legislation has the sole purpose or objective of achieving adequate advancement of those intended to benefit.¹¹⁹

There are two elements of special measures mentioned in Art 1(4) *ICERD* which are not settled in Australian case law, and have attracted minimal judicial discussion. They are that the measure must be for the sole purpose of 'securing adequate advancement' of the measure's beneficiaries' enjoyment of human rights, and that the measure must not continue after its objectives are achieved.¹²⁰

¹¹⁶ *Family Responsibility Commission Act 2008* (Qld) s 4.

¹¹⁷ Cape York Institute for Policy and Leadership, above n 18, 7.

¹¹⁸ *Family Responsibility Commission Act 2008* (Qld) s 4(2).

¹¹⁹ *Gerhardy v Brown* (1985) 159 CLR 70, [20] (Gibbs CJ).

¹²⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

A *Sole Purpose*

In *Gerhardy*, Deane J distinguished the two questions of whether legislative provisions satisfy a requirement that they were taken for a designated sole purpose, and whether the provisions will achieve that purpose.¹²¹ He explained the court's role of assessing whether a measure is taken for a 'sole purpose' in the context of a proportionality test:

What is necessary for characterization of legislative provisions as having been 'taken' for a 'sole purpose' is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are the appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.¹²²

That is, the measure must *prima facie* be capable of achieving adequate advancement of those the measure is directed at. Justice Deane did not consider it relevant to the court's analysis that the measure may never actually achieve this purpose, while other measures may. Rather, he stated that this was parliament's domain. In *Gerhardy*, the legislative provisions Deane J was referring to were held to be beneficial to the Aboriginal people they were directed at. This may be the reason why Deane J was unconcerned as to whether the provisions would achieve their sole purpose. However, it is more likely that Deane J saw this as an issue for parliament to decide.

Justice Brennan described the context in which the 'sole purpose' is derived, rather than the meaning of the term:

The sole purpose of a special measure is to secure such 'adequate advancement' or 'adequate development and protection' of the benefitted class

¹²¹ *Gerhardy v Brown* (1985) 159 CLR 70, [11] (Deane J).

¹²² *Ibid.*

as is necessary to ensure 'equal enjoyment or exercise of human rights and fundamental freedoms'.¹²³

This is essentially a paraphrase of the first three lines of Art 1(4) *ICERD*. However, an important addition is included. Justice Brennan defines the people to whom the measure is directed as the 'benefitted class', simply because they are intended to benefit from the measure. As discussed in Chapter 6, this misrepresents their true position of not enjoying rights to the same extent as others, and is based on formal equality. This approach suggests that those receiving the measure are somehow provided a privilege.

Justices Deane and Brennan drew upon the words of Art 1(4), which requires a link between a measure and the sole purpose of adequate advancement. In *Gerhardy*, legislative provisions acknowledged rights to land of Pitjantjatjara people because of their traditional connection to the land, and so that they could practise their culture and traditions upon it. One provision required non-Pitjantjatjara people to gain permission from the Pitjantjatjara before entering their land, otherwise entry was a criminal offence.¹²⁴ These provisions can be seen to promote the objective of Pitjantjatjara practising culture and tradition without interference by others. Restricting alcohol to reduce alcohol-related violence and to promote the safety and wellbeing of community members also seems obvious where high rates of alcohol-related violence exist. However, the objectives of income management are loosely defined and it is difficult to see how they could be directly achieved.

As mentioned in Chapter 6, James Anaya, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people between 2008 and 2014, disagreed with the notion of differential treatment, which restricts the rights of a disadvantaged group in order to assist some members of the group.¹²⁵ The High Court does not agree with this analyses: in *Maloney* it found that, despite having a punitive and criminal consequence, it

¹²³ Ibid [32] (Brennan J).

¹²⁴ Ibid [1], [16] (Gibbs CJ).

¹²⁵ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People; Addendum: Situation of Indigenous Peoples in Australia*, A/HRC/15/Add.4 (1 June 2010) 31.

was still a special measure.¹²⁶ Therefore, even if income management is accepted as punitive, this alone may not prevent it being a special measure.

B Adequate Advancement

In a similar manner to Deane J distinguishing the role of the court and the executive, Brennan J stated that the court must accept the executive government's assessment of the need for a racial group's advancement and the measure's likelihood of achieving advancement. However, Brennan J maintained that the court can determine whether the executive's assessment had been reasonably made.¹²⁷ Justice Brennan included the beneficiaries' wishes as part of the assessment, which he said were of 'great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.'¹²⁸ Generally this will require consultation, however, as mentioned above, the court has rejected any requirement that consultation is necessary for special measures.

The concept of 'advancement' is used in such a way as to assume that the measures' beneficiaries are disadvantaged, and that their situation or position needs to be upgraded to a level experienced by others.¹²⁹ This fails to acknowledge the distinct cultures of Aboriginal peoples and that their particular rights and fundamental freedoms should be protected in a way that best suit their needs, because these needs are quite different to those central to western culture. However, to an outsider, pursuit of these rights and freedoms could be perceived as offending the requirement against maintaining unequal or separate rights in Art 2(2) *ICERD*.

Justice Hayne in *Maloney* interpreted 'adequate' to mean that if an alternative measure could be found which was less restrictive of the rights and freedoms of the relevant group or individuals, it could be concluded that the provisions stated to be a special measure were not adequate.¹³⁰ For Hayne J, this was a

¹²⁶ *Maloney v The Queen* (2013) 252 CLR 168, [46] (French CJ), [103] (Hayne J), [137] (Crennan J), [249] (Bell J), [355] (Gageler).

¹²⁷ *Gerhardy v Brown* (1985) 159 CLR 70, [47]-[51] (Brennan J).

¹²⁸ *Ibid* [37] (Brennan J).

¹²⁹ Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Law and Philosophy Library Press, 1990), 16-17.

¹³⁰ *Maloney v The Queen* (2013) 252 CLR 168, [101] (Hayne J).

form of proportionality analysis which did not involve a court assessing ‘whether a goal could be achieved in any better way.’¹³¹ This distinction, while somewhat artificial, appears to respect the role of the executive, while enabling the court to assess the relevant measure’s appropriateness compared to other measures. Justice Kiefel also required that no less restrictive alternative can be available.¹³²

The alcohol restrictions in *Maloney* resulted in Aboriginal people being charged for possessing alcohol, where it would be otherwise legal in a non-Aboriginal community. These restrictions result in increased contact with the criminal justice system, increased criminal convictions and the punishment of Aboriginal peoples through judicial sentencing. On this point of criminalisation, Crennan J indicated that she may be open to evidence and argument of less restrictive measures. However, she stated that:

there was no material before the Court which would permit the Court to doubt that the means were directed to the purpose explained in the extrinsic materials. Nor was there a basis put forward for assessing the capacity of alternative and less restrictive means to effect an equivalent protection of the Palm Island community, and its individual members, from violence and public disorder associated with the misuse of alcohol.¹³³

However, while allowing an opening for alternative measures, her first sentence indicates an approach which requires the defendant to disprove that the criminalisation was for the stated purpose, despite the potential for many purposes or effects to be relevant.

Chief Justice French said that while less restrictive alternatives could have been debated and adopted, it could not be denied that the relevant provisions would be reasonably capable of being appropriate and adapted to their purpose, and that the criminalisation of conduct by the provision does not mean the provision was not a special measure under Art 1(4) *ICERD* and s 8 *RDA*.¹³⁴

¹³¹ Ibid [102] (Hayne J).

¹³² Ibid [130], [177]-[182] (Kiefel J).

¹³³ Ibid [137] (Crennan J).

¹³⁴ Ibid [46] (French CJ).

Given that judges do not require government parties to provide evidence of their particular measure being the least restrictive, it is assumed that the onus will be on the party challenging a measure. It is unclear as to how receptive judges will be to evidence, given their delineation of executive government/parliament's role and the role of the court, along with the prerogative of parliament to fund and decide which measures are to be implemented. Less restrictive measures would need to achieve the same goals to the same extent as the challenged measure for that measure to not be reasonably necessary.¹³⁵

Therefore some of the judges¹³⁶ leave an opening for evidence on the appropriateness of other measures to better achieve objectives and adequate advancement. This appears to be at odds with judicial reliance on parliament to decide measures. These arguments of alternative measures are yet to be tested.

To assess a measure in the context of its sole purpose to secure adequate advancement, an analysis should be required of what exactly that adequate advancement is. The context should be linked to the objects of the measure and the rights it is aimed at promoting. An assessment of the measure's ability to achieve those aims is also required. Measures aimed at increasing the number of Aboriginal people employed in specific industries through designated positions and education and training pathways, display a clear link between the measure and sole purpose of adequate advancement. These types of measures are capable of being quantified. In contrast, income management has no connection to its objects. Evidence is needed to show the court whether and how the measure has the ability to achieve adequate advancement.

VII IS INCOME MANAGEMENT PROPORTIONATE TO ITS OBJECTS?

In order to argue against income management as a special measure, it must be shown that income management does not satisfy the test of reasonable

¹³⁵ Ibid [102] (Hayne J), [137] (Crennan J), [182]-[183] (Kiefel J).

¹³⁶ Ibid.

necessity;¹³⁷ that it is not reasonably appropriate and adapted for the sole purpose of adequate advancement,¹³⁸ and that it fails the characterisation test.¹³⁹ In *Maloney*, the judges applied different proportionality tests to decide if the measure was a special measure. Justices Hayne, Kiefel and Crennan held that an assessment of alternative less restrictive measures was also part of these tests.¹⁴⁰

The requirement of a proportionality analysis of any sort assumes that the measure is linked to its objectives, and does, at least to some extent, result in some level of advancement towards equal enjoyment or exercise of rights and freedoms. This is premised on government acting in the interests of Aboriginal peoples. Proportionality analysis ignores history and the consequences of policy, legislation and structural racial discrimination. I argue that income management cannot achieve the *FRC Act* objects or adequate advancement. If persuaded at this level, judges will not require argument on the existence of alternative, less restrictive measures because the provision is arbitrary and therefore discriminatory and not a special measure. An assessment by the court of racial discrimination is fundamental to any argument that income management is racially discriminatory and not a special measure; ie, not simply a racial distinction.

The proportionality tests applied by the Australian courts are distinct from those applied in the United States, Canada and South Africa. They lack rigor, mainly because the court is unconditionally accepting of the executive government's role in designing and implementing policy. In *Gerhardy*, Brennan J explained that the court is limited to assessing the reasonableness of the decision to implement a measure; the taking of the measure is a political decision.¹⁴¹

The words 'as may be necessary' in Art 1(4) were thought by Crennan, Kiefel and Gageler JJ in *Maloney* to qualify the measure. They stated that the measure is only justified if it is necessary to achieve equal enjoyment of human

¹³⁷ Ibid [137] (Crennan J), [178]-[183] (Kiefel J), [374] (Gageler J).

¹³⁸ Ibid [21] (French CJ), [243]-[244] (Bell J).

¹³⁹ Ibid [98]-[102] (Hayne J).

¹⁴⁰ Ibid [102]-[104], [109] (Hayne J), [182]-[183] (Kiefel J), [127], [137] (Crennan J).

¹⁴¹ *Gerhardy v Brown* (1985) 159 CLR 70, [40]-[43] (Brennan J).

rights.¹⁴² This test is likely to be satisfied simply because Aboriginal people are seen as 'disadvantaged'. In *Gerhardy*, Deane J stated that if he were required to apply this assessment of the legislative provision, he would be of the view that, due to a lack of evidence, it had not been shown that it was 'necessary to achieve a purpose of a kind referred to in Art 1(4).'¹⁴³ However, Deane J then held that such a provision 'will not be precluded unless it appears that the provision is not capable of being reasonably considered to be appropriate and adapted to achieving that purpose.'¹⁴⁴ This weakening of connection between the legislative measure and adequate advancement reflects the court's approach of deferring to the legislature, rather than conducting a detailed assessment. Where it is argued that a provision implementing a measure is racially discriminatory, the court should conduct an analysis of whether the measure and its effects are discriminatory in a substantive sense.

Justices Hayne and Kiefel in *Maloney* held that no less restrictive alternative to the measure can be available.¹⁴⁵ However, the judges did not provide parameters on comparable measures. Without the inclusion of an assessment of the existence of less restrictive measures, the above approach gives power to the executive government to decide if a measure is required, and the nature of that measure. This approach assumes that the executive will act in the best interests of the measure's beneficiaries, despite Australia's long history of damaging policy and legislation directed at Aboriginal peoples.

Chief Justice French, and Bell J in *Maloney* required a measure to be 'reasonably appropriate and adapted to' the sole purpose of securing adequate advancement.¹⁴⁶ The sole purpose of a measure is the attainment of its objective.¹⁴⁷ This is a more detailed test, which includes an assessment of facts to determine whether the sole purpose of a measure is to secure adequate advancement, and whether it is reasonably capable of doing so.¹⁴⁸ Perhaps

¹⁴² *Maloney v The Queen* (2013) 252 CLR 168, [130], [131] (Crennan J), [177]-[182] (Kiefel J), [358] (Gageler J).

¹⁴³ *Gerhardy v Brown* (1985) 159 CLR 70, [17] (Deane J).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Maloney v The Queen* (2013) 252 CLR 168, [102]-[103] (Hayne J), [177]-[182] (Kiefel J).

¹⁴⁶ *Ibid* [21], (French CJ), [244] (Bell J).

¹⁴⁷ *Ibid* [244] (Bell J).

¹⁴⁸ *Ibid* [46] (French CJ), [244] (Bell J).

because of this last aspect, French CJ and Bell J stated that comparison with other potentially less restrictive measures was not required.¹⁴⁹

The court's approach can be criticised for lacking an assessment of the racially discriminatory effects of the measure. It was shown in Chapter 6 that the court's s 10(1) analysis simply consists of recognising the existence of a racial distinction, and that rights are enjoyed to a lesser extent because of that distinction. This defers any assessment of discrimination to s 8(1). Sadurski condemns the court's approach as avoiding the issue:

the analysis in terms of a special measure does not lend itself well to the discussion of the proper level of the classification to the purposes. It avoids scrutiny of the appropriateness of the distinction to the legitimate end, and of the degree of victimization and stigmatization of non-beneficiaries of the Act: two basic parts of a developed test of discrimination. By embarking on this safe, special-measures device, the Court has failed to lay judicial foundations for such a test.¹⁵⁰

Rather than non-beneficiaries being adversely affected by a measure – as was held in *Gerhardy* in relation to non-Pitjantjatjara people – those to whom income management directly applies, and who are definable as 'beneficiaries', are adversely affected. The court's failure to assess racial discrimination, such as in *Maloney*, suggests that it is unlikely to welcome the invitation to do so in assessing income management. However, the court's reasoning can be used to argue the lack of connection between income management and the *FRC Act's* vague objects.¹⁵¹ Not only are its objects imprecise, as far as measuring them, income management is incapable of achieving them. If legislation is unlikely to achieve its objectives, it cannot be held to have the sole purpose of achieving adequate advancement.

Previous cases have not required any party to prove or disprove the link between a measure and its objects. It appears logical that the onus of proving this link when a measure is challenged belongs to the state, because s 8 *RDA*

¹⁴⁹ *Ibid* [246] (Bell J).

¹⁵⁰ Wojciech Sadurski, 'Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986-1988) 11 *Sydney Law Review* 5, 43.

¹⁵¹ *Family Responsibility Commission Act 2008* (Qld) s 4.

is an exception provision. The process involves the applicant arguing that provisions are discriminatory, or, the result of a distinction based on race, and that as such, it causes the applicant to enjoy human rights to a lesser extent than others. It is therefore for the state to raise defences, which may include a special measures argument, supported by submissions and evidence. However, this is not the court's position. In *Maloney*, French CJ and Gageler J were the only judges to provide detailed comment on onus of proof.¹⁵² They rejected a requirement of this onus of proof, stating that if the court engages in fact-finding to assist in deciding upon a measure, that this activity corresponds to constitutional or legislative fact-finding, which is not constrained by the rules of evidence.¹⁵³ Chief Justice French stated that the characterisation of whether a provision is a special measure was a legal question.¹⁵⁴ While judges can ascertain evidence themselves – usually in the nature of official, public or authoritative documents – evidence can include inferences or statements, but it must be 'sufficiently probative of the legislative fact to be found.'¹⁵⁵

The search for 'facts' relating to a measure's characterisation may in some cases require a court to make policy assessments.¹⁵⁶ This contradicts the court's stated understanding of its role as distinct from executive government. It also suggests that a party arguing against a special measure should place evidence before the court. At this point in time, evidence in the form of evaluations exist in relation to the CYWR and income management and its ability to achieve particular outcomes. However, this level of evidence is not always available. Where it does not exist, experts may be relied upon to make suppositions, with the court weighing the evidence as it sees appropriate. As previously discussed, and suggested by Crennan J in *Maloney*, evidence could be provided on less restrictive measures.¹⁵⁷

¹⁵² *Maloney v The Queen* (2013) 252 CLR 168, [45] (French CJ), [349]-[355] (Gageler J).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* [45] (French CJ).

¹⁵⁵ *Ibid* [353] (Gageler J).

¹⁵⁶ *Bruch v Commonwealth of Australia* [2002] FMCA 29.

¹⁵⁷ *Maloney v The Queen* (2013) 252 CLR 168, [137] (Crennan J).

A *Income Management – Not Linked to its Objects, Adequate Advancement, or Adequate Development and Protection of Aboriginal Peoples or Individuals*

I argue that income management has no connection to its objects, adequate advancement or protection of Aboriginal peoples or individuals. Income management's objects can be compared to its actual outcomes found in current evaluations.

While the focus of the court has been on a measure being directed at achieving advancement and protection, both the negative consequences of the measure and whether the measure is capable of achieving adequate advancement should be examined in detail. In *Vanstone v Clark*,¹⁵⁸ Weinberg J rejected the submission that, where a legislative provision is accepted as a special measure, the different elements of the provision cannot be separately attacked as discriminatory. Justice Weinberg stated that the submission:

involves a strained, if not perverse, reading of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.¹⁵⁹

Justice Weinberg's statement is reflective of the need to examine every aspect of a measure to assess whether it is a special measure. For example, in *Maloney*, the court examined the issue of criminal prosecution, but didn't think it overrode the beneficial nature of the measure. However, there was no evidence before the court of the effect of criminal prosecution, particularly in regard to increasing an already high rate of contact with the criminal justice system; the consequences of accumulation of offences; the consequences of fines on a person receiving social security; the numbers of people with no previous conviction being criminalised as a result of the special measure; and the consequences of criminal convictions when applying for jobs and voluntary

¹⁵⁸ [2005] FCAFC 189, [209].

¹⁵⁹ *Vanstone v Clark* [2005] FCAFC 189, [209] (Weinberg J).

roles in the community. Nor was there evidence of less restrictive measures that could be argued as capable of achieving the same objects.

The social responsibilities targeted and data indicators, such as numbers of children enrolled in and attending school, tenancy compliance, criminal conviction rates and child protection notifications,¹⁶⁰ are used by the FRC and government to suggest that income management meets its stated objectives 'to support the restoration of socially responsible standards of behaviour and local authority',¹⁶¹ and 'to help people in welfare reform community areas to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.'¹⁶² Further, evaluation reports have been conducted on income management measures, including the CYWR, using criteria¹⁶³ such as a person not receiving further notices for breaches of social responsibilities, or increased school attendance to provide indications of 'success'. However, it is questionable as to whether such criteria truly correspond to the legislative objects.

However, it is not income management on its own that is promoted as achieving the *FRC Act* objectives. Other programs under the CYWR are also acknowledged as contributing to the achievement of these objectives. These include successfully referring and requiring people to attend services; implementing case management; bestowing authority on local commissioners; engaging in Pride of Place (an initiative to beautify peoples' yards); offering educational trusts for children; providing Wellbeing Centres offering counselling and support, as well as the MPower program to provide financial literacy; implementing external measures such as alcohol restrictions; revoking council liquor licences; and closing the Aurukun tavern.¹⁶⁴

¹⁶⁰ Family Responsibilities Commission, *Quarterly Reports* <<http://www.frcq.org.au/?q=content/quarterly-reports>>.

¹⁶¹ *Family Responsibilities Commission Act 2008* (Qld) s 4(1)(a).

¹⁶² *Ibid* s 4(1)(b).

¹⁶³ In the case of the CYWR, the criteria include a person not receiving further notices for breaches of social responsibilities (i.e., regarding school enrolment or attendance, tenancy breaches, criminal convictions and child protection matters).

¹⁶⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation 2012* (2013) 5, 30, 43.

The limitation of a single welfare reform measure, such as income management, to resolve social problems of school attendance, substance abuse, violence, gambling and child protection has been acknowledged by Noel Pearson in his submission for Cape York Partnerships on the Social Security Legislation Amendment (Debit Card Trial) Bill 2015.¹⁶⁵ This limitation should be of concern to a court in its assessment of whether income management is causally linked to its objectives and to achieving adequate advancement, because these are fundamental requirements of special measures.

B *Lack of Evidence of the Ability of Income Management under the Cape York Welfare Reform to Meet its Objectives or to Secure Adequate Advancement*

Evidence can be used to support assertions that income management is racially discriminatory and not a special measure. The Cape York Welfare Reform Evaluation in 2012 (CYWR Evaluation) found that income management does not immediately impact on people's compliance with relevant social responsibilities. At the time of the evaluation, 67% of those who had ceased income management had received one new notice, 36% of those who were presently income managed had one new notice, and 64% had two or more new notices.¹⁶⁶ This indicates that income management does not stop notifications, with the inference that people continue to breach their social responsibilities, despite being income managed. The CYWR Evaluation concluded that this may partly be due to the short duration of the CYWR, and that those recently 'subject to income management are resistant to change and less likely to respond to the sanction of income management.'¹⁶⁷ On the other hand, it may be that income management has no connection to the behaviours identified as 'social responsibilities'. At best, all income management can control is the items that cannot be purchased by someone using money that has been income managed. It does not stop a person from buying these items with their non-income managed money or family and friends sharing these items.

¹⁶⁵ Noel Pearson, Cape York Partnership, Submission to the Senate Standing Committee on Community Affairs, *Inquiry into the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 inquiry*, 22 September 2015, 12.

¹⁶⁶ Department of Families, Housing, Community Services and Indigenous Affairs, *Cape York Welfare Reform Evaluation 2012 (2013)*, 207.

¹⁶⁷ *Ibid.*

The stated aims of income management for the Northern Territory (NT) mainly focused on diverting money spent on substance abuse and gambling towards financial support of children's needs and wellbeing.¹⁶⁸ This aim, while an intended outcome of income management, is not strongly linked to it. This aim is also irrelevant for childless people in Aboriginal communities. In their collation of methodological problems with research on income management, Mendes, Waugh and Flynn focused on the difficulty of gaining objective evidence of lasting behavioural change – such as parents and carers encouraging their children to attend school – and stated that it is unclear if income management successfully addresses problems with addiction.¹⁶⁹ Mendes also questions whether there is any link between income management and gaining or applying skills such as parenting, contending that:

It is contentious to suggest a direct correlation between CIM [compulsory income management] and improvements in parenting skills and work readiness independent of other supports provided. For example, child protection trials may inspire better care of children because participants are threatened with potential loss of custody. ... It also remains to be seen whether these improvements are sustainable, given that the personal problems that previously hindered good parenting or employment, or both, may be long-standing.¹⁷⁰

While assuming that income management in the NT may make more money available for food and other necessities, thus improving nutrition, the Australian Indigenous Doctors Association (AIDA) suggested that these positive impacts are counteracted by social, psychological, and health impacts, including shame, humiliation, anger, disempowerment and anxiety associated with having to use the BasicsCard. While they recommended immediate cessation of income management in the NT, the AIDA suggested an income management regime similar in some respects to the CYWR. It argued that income management could be used in specific circumstances where there were

¹⁶⁸ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 5

¹⁶⁹ Philip Mendes, Jacinta Waugh and Catherine Flynn, Monash University, Department of Social Work, *The Place-based Income Management Trial in Shepparton: A Best Practise Model for Evaluation* (Social Inclusion and Social Policy Research Unit, Department of Social Work, Monash University Publisher, 2013) 19.

¹⁷⁰ Philip Mendes, 'Compulsory Income Management: A Critical Examination of the Emergence of Conditional Welfare in Australia' (2013) 66(4) *Australian Social Work* 495, 502.

incidences of child abuse, if children were not enrolled in or attending school, and other 'relevant behavioural triggers' in conjunction with case management.¹⁷¹ This either assumes that child abuse, and non-enrolment or attendance at school is linked to an inability to manage money, or that income management should be used to punish and entice people to act 'appropriately'. Unless a person voluntarily enters into income management, this recommendation is problematic. It is unlikely that someone enduring governmental intervention in these circumstances can voluntarily engage in income management, because there is an underlying threat of having their children taken away as a result of resisting income management. While linking income management to social or behavioural factors, including disadvantage, may seem better than blanket income management, if income management does not work, or, as the AIDA states, causes further damage, it should not be advocated as a solution, except where a person voluntarily requests it.

Although income management in the NT has a much broader application than income management under the CYWR, and payments are generally managed at a lower rate of 50%, the methodology of NT income management and its evaluation are relevant to assessing whether income management is in fact achieving the adequate advancement of the people it is intended to benefit. A report on NT income management identified that any evaluation must be broad and not focus on single indicators of success or failure:

The evaluation methodology involves considering a wide range of existing indicators as well as indicators specifically derived for this evaluation. In this no specific indicator is seen as being definitive. The reason for this is that if income management is achieving its objectives of achieving substantial improvements in wellbeing and improved financial management skills and capabilities, then it would be expected that this would be consistently reflected at least across a number of the indicators examined. It is worth bearing in mind that when a large number of indicators is considered – as is the case in this evaluation – even if a program is having no impact on outcomes, there will be a small number that may

¹⁷¹ Australian Indigenous Doctors' Association and Centre for Health Equity Training, Research and Evaluation, UNSW, *Health Impact Assessment of the Northern Territory Emergency Response*, Canberra, (2010) 20-25 <<http://hiaconnect.edu.au/reports/health-impact-assessment-of-the-northern-territory-emergency-response/>>.

be positive or negative merely by chance; as such, an isolated positive or negative indicator cannot be interpreted as a measure of the success or otherwise of a program.¹⁷²

The CYWR Evaluation found that similar trends in crime reduction are occurring in other communities which do not have the CYWR.¹⁷³ While including data and a survey of community members, it struggled to connect outcomes with the CYWR, and income management in particular. This was partly due to changes in the communities at the time, including the closure of the Aurukun tavern; the methods of teaching used in Aurukun schools; the employment of truancy officers; and the bolstering of services that came with the CYWR. The Cape York Academy – of which Noel Pearson is the Chairperson – commenced in Aurukun, Hope Vale and Coen in 2010, implementing a method of teaching called direct instruction.¹⁷⁴ Direct instruction is criticised for providing scripted lessons which fail to consider local cultural knowledge and community contexts, and which require teachers to treat students equally, despite their different learning experiences and the contexts in which their education has occurred.¹⁷⁵ Violence towards Aurukun's school principal in early 2016 by non-students on two occasions ended in the school being closed for six weeks, and resulted in criticism of direct instruction.¹⁷⁶

The CYWR Evaluation found that in its first three years, half the adult population, or 76% of people receiving social security or CDEP,¹⁷⁷ breached at

¹⁷² J Rob Bray, Matthew Gray, Kelly Hand and Ilan Katz, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre University of New South Wales Press, 2012), 41-42.

¹⁷³ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, above n 166, 5.

¹⁷⁴ See, eg, Cape York Aboriginal Australian Academy, *Good to Great Schools Australia, 2016 Teaching and Leadership Careers with Cape York Academy* <<http://www.goodtogreatschools.org.au/teaching-careers>>; Cape York Aboriginal Australian Academy, *Welcome to Cape York Aboriginal Australian Academy* <<https://cyaaa.eq.edu.au/Pages/default.aspx>>.

¹⁷⁵ Allan Luke, *EduResearch Matters, Direct Instruction is not a Solution for Australian Schools* (7 July 2014) <<http://www.aare.edu.au/blog/?tag=direct-instruction>>.

¹⁷⁶ See, eg, Chris Sarra, 'Noel Pearson's Program Part of the Problem in Aurukun', *ABC News* (online), 29 May 2016 <<http://www.abc.net.au/news/2016-05-29/pearson-program-part-of-problems-in-aurukun-chris-sarra-says/7456902>>; Editorial, 'Call for Education Review in Aurukun', *SBS News* (online), 26 May 2016 <<http://www.sbs.com.au/news/article/2016/05/26/calls-education-review-aurukun>>.

¹⁷⁷ Those engaged in the Community Development Employment Project who did not receive any social security payments could be called before the FRC, but they could not be income managed.

least one of the social responsibilities, bringing them into contact with the FRC. The number of FRC notices remained constant over the years 2008-2011.¹⁷⁸ A large proportion of the FRC's clients returned before the FRC over time, and by 2011, the proportion of new clients had declined to less than 10% of all clients.¹⁷⁹ However, the CYWR Evaluation suggested that '[t]he reduction in breaches may not be a function of income management alone, as it is possible that the fact of being repeatedly brought before the FRC encourages individuals to comply.'¹⁸⁰

The fact that the number of notices was in decline was stated in the CYWR Evaluation to be proof of the effectiveness of income management. However, with inconsistent results for the number of subsequent notices for clients after being income managed, the CYWR Evaluation struggled to find causal connections between income management and behavioural change. While Hope Vale, Coen and Mossman Gorge showed reductions by 9 percentage points or more, Aurukun notices increased by 7%. From these results, the CYWR Evaluation concluded that there are some indications of an association between income management and subsequent lower rates of notices for Hope Vale and Coen residents compared to Aurukun or Mossman Gorge.¹⁸¹ These results reflect the lack of connection between income management and the issuing of notices for breaches of social responsibilities.

Data from FRC Annual Reports (Table 1) show that 89 people were income managed in 2008/2009;¹⁸² 232 people were income managed in 2009/2010;¹⁸³ and 223 people were income managed in 2010/2011.¹⁸⁴ In these annual reports, the exact same number of income management orders for people with orders is recorded. This may be a mistake, given that the later annual reports record two different figures. In 2011/2012, 208 people were income managed and 218 orders made;¹⁸⁵ in 2012/2013, 268 people were income managed and

¹⁷⁸ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, above n 166, 185.

¹⁷⁹ Ibid 186.

¹⁸⁰ Ibid 34.

¹⁸¹ Ibid 208-209.

¹⁸² Family Responsibilities Commission, *Annual Report 2008-09*, 26.

¹⁸³ Family Responsibilities Commission, *Annual Report 2009-10*, 32.

¹⁸⁴ Family Responsibilities Commission, *Annual Report 2010-11*, 44.

¹⁸⁵ Family Responsibilities Commission, *Annual Report 2011-12*, 47, 50.

304 income management orders made;¹⁸⁶ and in 2012/2013, 239 people were income managed and 304 income management orders made.¹⁸⁷ In 2014/2015, the number of people income managed decreased to 194; however, this number was still high in proportion to the populations of the CYWR communities.¹⁸⁸ At the same time, the number of income management orders remained high at 238.¹⁸⁹ If income management was working effectively, it might be expected that the number of people and orders relating to income management would decrease over time, rather than increasing or being maintained at a high rate.

Table 2 – Number of People Income Managed and Number of Orders Made by Year

Year	Number of People Income Managed	Number of Income Management Orders
2008/2009	89	89
2009/2010	232	232
2010/2011	223	223
2011/2012	208	218
2012/2013	268	304
2013/2014	239	304
2014/2015	194	238

The CYWR Evaluation essentially showed statistically significant improvements in school attendance rates in Aurukun and Mossman Gorge, while Coen and Hope Vale generally maintained their already high attendance rates; however, there was a small decline in attendance for Hope Vale in 2011.¹⁹⁰ The increase in attendance at Aurukun – from 46.1% to 70.9% – has been attributed to the

¹⁸⁶ Family Responsibilities Commission, *Annual Report 2012-13*, 43, 46.

¹⁸⁷ Family Responsibilities Commission, *Annual Report 2013-14*, 46, 49.

¹⁸⁸ Family Responsibilities Commission, *Annual Report 2014-15*, 47, 51.

¹⁸⁹ Ibid.

¹⁹⁰ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, above n 166, 3-4, 29, 45.

CYWR and FRC.¹⁹¹ In Aurukun unexplained absences for students whose parent or carer was called before a conference were on average 25% lower than in the month before the conferences.¹⁹²

The increase in attendance rates being attributed to income management and the CYWR has been questioned. Indigenous educationist Chris Sarra suggests that it may instead be due to the 'injection or the investment in quality leadership and quality teaching.'¹⁹³

As it has not gained the expected results in each community, the level of income management has been increased to 90%,¹⁹⁴ and the FRC now informs parents/carers of their child's school enrolment data.¹⁹⁵ In contrast to this increasingly punitive approach, Hope Vale has developed a local solution in which multiple services meet to connect education to employment outcomes for students.¹⁹⁶

There was no trend reported for child abuse or neglect data in the CYWR communities.¹⁹⁷ The CYWR Evaluation examined convictions of the Magistrates Court, but also looked more broadly at crime data to assess whether the CYWR is rebuilding the anticipated social norms. This notion of 'rebuilding' is premised on present social norms as deficient and that unstated 'ideal' social norms are to be achieved. Rebuilding social norms is assessed based on whether offending, including domestic violence, has reduced.¹⁹⁸ A statistically significant downward trend in the overall offence rates occurred in these communities; however, this cannot be attributed solely to income management because the same trend was found in other Aboriginal and Torres Strait Islander communities where income management was not present.¹⁹⁹

¹⁹¹ Ibid 30.

¹⁹² Ibid 30.

¹⁹³ Australian Broadcasting Commission, 'The full story... Dispute over Improved School Attendance', *The World Today*, Annie Guest (Reporter), 1 June 2016 (Chris Sarra) <<http://www.abc.net.au/worldtoday/content/2009/s2700647.htm>>.

¹⁹⁴ Family Responsibilities Commission, *Annual Report 2013-2014*, above n 187, 28, 34, 36.

¹⁹⁵ Ibid 49.

¹⁹⁶ Ibid 49-50.

¹⁹⁷ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, above n 166, 36

¹⁹⁸ Ibid 219.

¹⁹⁹ Ibid 42.

Asserting criminal statistics as a measure of whether social norms have been rebuilt avoids defining what the social norms originally were.

In measuring Aboriginal people's perceptions, the CYWR Evaluation found, overall, that more people said there was positive change (compared to no change or negative change) for the following aspects of child wellbeing: healthy eating (more = 51.2%, same = 38.7%, less = 10.0%); child activity (more = 62.3%, same = 26.8%, less = 10.9%); and happiness (more = 54.9%, same = 36.5%, less = 8.6%). However, in relation to perceptions of respect for elders (more = 28.5%, same = 33.0%, less = 38.5%)²⁰⁰ there was a disturbing downward trend. Elders are traditional decision-makers within Aboriginal communities, and if they are not given respect, the objective of restoring local authority fails.

When asked if community life was 'on the way up', 'the same', or 'on the way down', 58.9% said 'on the way up', 34.7% said 'the same' and 6.5% said 'on the way down'. When asked the same question about their personal life, 56.1% said 'on the way up', 41.4% said 'the same', and 2.5% said 'on the way down'.²⁰¹ The reasons behind their answers (e.g., why they thought X) was not recorded and are therefore unknown. There is also no way of knowing what community perceptions were of these issues prior to the introduction of the CYWR. There were no similar surveys conducted in the non-CYWR communities, therefore it is possible that other factors could have influenced the responses in the CYWR communities. These results should be viewed with caution. These stated perspectives may not accurately reflect what actually occurs in CYWR communities, and people may provide the answer they think is being sought.

The NT evaluation found that some people may have responded in a way that they thought the government would approve of, and withheld expressing negativity in fear of harsher measures being implemented.²⁰² The NT evaluation held that 'it is important to base analysis on the outcomes achieved by the program relative to its objectives, and not simply views of participants

²⁰⁰ Ibid 156-157.

²⁰¹ Ibid 157.

²⁰² Bray, Gray, Hand and Katz, above n 172, 168.

and others.²⁰³ It was further acknowledged that an effective program may be viewed negatively by some, while an ineffective program may be popular.²⁰⁴

Despite the lack of substantive positive findings, the Queensland and Commonwealth governments have relied on the CYWR Evaluation to praise the CYWR and to extend the *FRC Act*. The then Commonwealth Minister for Indigenous Affairs, Senator Nigel Scullion, referring to the CYWR Evaluation, stated that 'income management is helping ensure the basic needs of individuals and families are being met', and that the CYWR 'generated improvements such as more children going to school, parents taking more care and personal responsibility for their children as well as restoring local Indigenous authority.'²⁰⁵ The data for the latter two claims was not provided, nor are they quantifiable.

The CYWR Evaluation stated that imposed income management was successful in ensuring families' and children's needs were met.²⁰⁶ However, this was not measured in terms of identifying the needs and measuring their attainment. Noel Pearson has stated that income managing 60% or 75% of a person's payment did not appear to diminish gambling and substance abuse.²⁰⁷ He suggested that while income managing at 80% will guarantee money is available for children's needs, it is unlikely to prevent alcoholism.²⁰⁸ Despite this admission that the levels of income management were not impacting on drinking, Pearson suggests that this could change with the increased level of 90% introduced in late 2014.²⁰⁹ However, given that not everyone is income managed, the cultural practice of sharing or 'demand sharing' will ensure that most income managed people will have access to money or alcohol. Income management is premised on an incorrect understanding that Aboriginal people

²⁰³ Ibid 169.

²⁰⁴ Ibid.

²⁰⁵ Nigel Scullion (Commonwealth Minister for Indigenous Affairs), 'Continuing Income Management in Cape York' (Media Statement, 20 November 2013) <<http://www.nigelscullion.com/media-hub/indigenous-affairs/continuing-income-management-cape-york>>.

²⁰⁶ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, above n 166, 34.

²⁰⁷ Pearson, Cape York Partnerships, Submission to the Senate Standing Committee on Community Affairs, above n 165.

²⁰⁸ Ibid 10.

²⁰⁹ Ibid 6.

in the CYWR communities view social security as their money, not to be shared. Rather, reciprocity is a cultural practice that generally ensures family and kin will be looked after.

Pearson fails to acknowledge that income management is part of a process of disempowerment and encouraged dependence, both antithetical to the *FRC Act's* objects. Despite finding that those being income managed were asking others for money, Pearson praises income management as protecting people from 'humbugging' and also provides 'a useful cultural mechanism for 'saving face' where individuals who are subject to 'demand sharing' pressures from kin' can give acceptable reasons for not providing.²¹⁰ While Pearson portrays this cultural practice as undesirable, I suggest that income management prevents people from engaging in an important cultural process with their kin. This is a form of reciprocity amongst kin and is an important demonstration of obligation and respect.²¹¹ If people wanted to avoid this practice they could request voluntary income management.

There are similarities between the FRC and past policy and legislation discussed in Chapter 3, where Aboriginal people were controlled by government and Church missions. While these practices may have been well intended at the time, they were the consequence of a belief that Aboriginal culture was deficient and western culture ideal. In hindsight, it is clear that policy and legislation to control Aboriginal people were based on the objective of assimilation with long-lasting negative effects on Aboriginal people.

Arguments both for and against income management should refer to the historical assumptions and mistreatment of Aboriginal people in order to draw attention to parallels with, and consequences of, similar measures. These include controlling Aboriginal peoples' movements, employment, wages and child endowment on the basis that Aboriginal culture is deficient. Despite past governments' failures, the same approach persists through institutional racism

²¹⁰ Ibid 7.

²¹¹ Eleanor Bourke and Colin Bourke (Australian Government, Australian Institute of Family Studies), *Families and Cultural Diversity in Australia: Aboriginal Families in Australia* <<https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>>.

perpetrated in governments and its structures. This extends to the FRC. Focus is placed on the 'authority' held by local commissioners; this authority may partly derive from culture, but it is heavily derived from the *FRC Act* provisions, with the FRC remaining a statutory structure with the power to punish through income management orders. The FRC's lead commissioner, Commissioner Glasgow, has admitted that the FRC is based on the Magistrates Court, because that is the model he knows and understands.²¹² The FRC is essentially a western model with government-appointed commissioners who require people to conform to western standards. Von Sturmer and Le Marseny found that in two CYWR communities, commissioners represented their clans, but that there is movement towards representing the whole community irrespective of kinship structures. This is seen as a contradiction in the FRC structure; it is also a contradiction between western and traditional Aboriginal concepts of authority and how they work.²¹³ The FRC model requires a commissioner to declare their conflict when a family member attends a conference, and remove themselves from the proceedings, despite the fact that the family member is the very person over which the commissioner has authority. Conversely, this western model requires commissioners to make decisions about people they have no cultural authority over. The model, based on a western concept of authority, assumes that because a person is appointed to a role as commissioner, respect will be automatic, irrespective of kinship structures. In saying this, I intend no disrespect to the commissioners, and acknowledge that they hold important roles in the community and do important work. However, it is their westernised roles in other organisations and good character that are likely to be important in their gaining commissioner positions.

VIII LESS RESTRICTIVE ALTERNATIVE MEASURES

As seen in Chapter 6, the court separates its role from that of the legislature and the executive, careful not to delve outside of what it sees as its interpretative role. While this could result in the enactment of further oppressive

²¹²Catherine Ford, 'Great Expectations: Inside Noel Pearson's Social Experiment', *The Monthly* (online), November 2012
<<https://www.themonthly.com.au/issue/2012/november/1354075149/catherine-ford/great-expectations>>.

²¹³ von Sturmer, above n 88, 20.

legislation, judges do have an opportunity to temper this position through the use of proportionality tests. Proportionality tests require examination of other measures which may be less restrictive and as effective as income management in meeting the same objectives.

While not unanimously supported by the judges in *Maloney*, a requirement for the special measure to be the least restrictive measure forms an important part of proportionality analysis. However, searching for less restrictive measures assumes that income management is capable of achieving its objectives, and is for the sole purpose of adequate advancement. The objectives of income management are multiple and vague, making it difficult if not impossible for one measure to achieve them. More restrictive measures such as those in the NTI can be identified. The State could argue that the CYWR income management is less restrictive than those. However, those measures will need to be as effective as income management in achieving its objectives.²¹⁴

Income management is more broadly applied under the NTI, and is continuous, rather than being triggered due to non-compliance with social responsibilities. However, in the NTI there is a process for people to apply for exemptions, and the overall percentage of income management is only 50%.²¹⁵

In relation to school attendance, the Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) was trialled in Doomadgee between 2009 and 2012.²¹⁶ This was a harsh measure where social security payments could be suspended to punish parents and carers whose children were not enrolled in school or attending school adequately. They were first issued with a notice providing a timeframe (minimum of 28 days) for compliance;²¹⁷ if no compliance, their payment was suspended, and in some

²¹⁴ *Maloney v The Queen* [2013] HCA 28, [102]-[103] (Hayne J), [130], [131] (Crennan J), [177]-[182] (Kiefel J).

²¹⁵ Explanatory Notes, *Family Responsibilities Commission Bill 2008* 7.

²¹⁶ Australian Government, Former Department of Education, Employment and Workplace Relations, Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) Trial (2009-2012), Final Evaluation Report, May 2014, <http://www.dpmc.gov.au/sites/default/files/publications/Improving_School_Enrolment_Attendance_through_Welfare_Reform_Measure_trial.pdf>.

²¹⁷ Students who had more than five unauthorised absences in a ten week period (i.e., less than 90 percent attendance) triggered a notice.

circumstances cancelled.²¹⁸ Payments were restored and repaid in full if parents and carers complied with the enrolment or attendance notice within 13 weeks of suspension; however, if they failed to comply after 13 weeks, their payments could be cancelled.²¹⁹ This measure was narrowly focused on school attendance, possibly including behavioural change, and unlikely to be broad enough to compare with CYWR income management, which requires compliance with a number of other 'social responsibilities'.

If income management was simply about effectively managing money, there are other voluntary programs which have been trialled in Aboriginal communities and administered by Aboriginal organisations that have fulfilled similar objectives. For example, Tangentyere Council – which manages 18 Housing Associations (Town Camps) in Alice Springs – assisted over 800 people to voluntarily use Centrepay to pay their bills and rent.²²⁰ Alternatively people can be supported if necessary to set up automatic payments for the relevant amount for rent and bills and further assistance with budgeting if required.²²¹

In relation to child protection notifications, the person can only control how they look after their children. There is nothing to stop other people making a notification. These notifications may be made out of spite and therefore lack substance.

Criminal convictions could be addressed through measures that promote self-esteem, for example, men's sheds, men's groups and women's groups; employment; sport; community activities; and alcohol, drug and mental health programs. These approaches are not punitive in nature and do not discriminate, based on race, to achieve positive outcomes.

²¹⁸ Australian Government, Former Department of Education, Employment and Workplace Relations, above n 216, 1-7.

²¹⁹ Ibid 123, 126.

²²⁰ Combined Aboriginal Organisations of the Northern Territory, 'A Proposed Emergency Response and Development Plan to Protect Aboriginal Children in the Northern Territory: A Preliminary Response to the Australian Government's Proposals', 10 July 2007, 16 <http://apo.org.au/files/Resource/2787_cao_report_8_july.pdf>.

²²¹ *Indigenous Consumer Assistance Network, Money Management Program* <<http://ican.org.au/programs/money-management-program-2/>>.

Family violence orders could be used to instigate change in family relationships by promoting education on the roots of family violence, including personal triggers and behaviour change. This may include victims and other family members working together to develop strategies to protect and support victims and to encourage the person inflicting violence to understand and change their behaviour.

Successful strategies in increasing Aboriginal school attendance have included breakfast programs; the provision of a bus to drive children to and from school; culturally inclusive teaching and learning practices and school environments; employing Aboriginal teachers or teachers' aides;²²² home visits; community liaison; personal contact and follow up after absences; personal planning; and goal setting.²²³ Recent events in Aurukun suggest the type of schooling there is not achieving its goals, and could therefore benefit from these sorts of strategies.²²⁴ The Learning on Country program in the NT involves community leaders and indigenous rangers teaching students about customary knowledge and culture, as well as literacy and numeracy. An evaluation of this program found higher rates of attendance for participants than non-participants.²²⁵

Dr Chris Sarra when school principal in the Aboriginal community of Cherbourg, increased the attendance rate from the lowest in Queensland to meet the state

²²² Solid Kids – Solid Schools – Solid Families, *Creating Culturally Secure Schools* <<http://www.solidkids.net.au/>>

²²³ See, eg, David McRae, Geoff Ainsworth, Jim Cumming, Paul Hughes, Tony Mackay, Kaye Price, Mike Rowland, Joan Warhurst, Davina Woods, Vic Zbar, Strategic Results Project National Coordination and Evaluation Team, *What has Worked (and will again)*, (Australian Curriculum Studies Association and National Curriculum Services, 2000); David McRae, Geoff Ainsworth, Jim Cumming, Paul Hughes, Tony Mackay, Kaye Price, Mike Rowland, Joan Warhurst, Davina Woods, Vic Zbar, *What Works? Explorations in Improving Outcome for Indigenous Students* (Australian Curriculum Studies Association and National Curriculum Services, 2000) 177, 197, 278.

²²⁴ Sarah Elks, 'Aurukun Divided over Controversial Direct Instruction Teaching', *The Australian* (online) 28 May 2016 <<http://www.theaustralian.com.au/national-affairs/indigenous/aurukun-divided-over-controversial-direct-instruction-teaching/news-story/71b874bf7b98e1bdceba1072a6c89e0d>>.

²²⁵ Dr William Fogarty, Dr Robert Schwab, Dr Melissa Lovell, Australian National University, *Learning on Country Program: Progress Evaluation Report 1 May 2015* <<https://www.dpmc.gov.au/sites/default/files/publications/LoCP%20progress%20evaluation%20report%20-%20Final%20for%20public%20release%20-%202015%20October%202015.pdf>>.

average by implementing a strengths-based approach which embraced Aboriginality. Student performance also improved.²²⁶

While these strategies may engage children they do not necessarily achieve the CYWR income management objectives of behavioural change and reinstating local authority. Increasing the number of houses; changing policing methods and reducing police numbers (Aurukun is said to have approximately 14 police²²⁷ for a population of 1,194 people²²⁸); subsidising groceries (to meet the prices of regional centres); providing child care; and adequate and culturally appropriate (Aboriginal controlled and run) social services may be more likely to assist Aboriginal people in the CYWR communities to enjoy human rights to a greater extent than they do currently. Implementing these recommendations entails utilising and improving policy and program initiatives already available in most non-Aboriginal communities, rather than special measures. However, the key to the success of these programs is that they must be designed and delivered by Aboriginal people, with Aboriginal organisations generally retaining control on how the programs are implemented. Income management, while designed by an Aboriginal organisation, lacked input from local Aboriginal communities and is premised on punishing people to gain compliance, which is arguably why it is largely unsuccessful. As a result, income management under the CYWR can be characterised as a racist policy, and its lack of connection to its objectives should exclude it from being considered a special measure. Also, its cost – approximately \$220.2 million to the end of 2015 – is difficult to justify given its limited outcomes. Arguably, this money could have been better used by each community to design and implement local programs to their own benefit.

²²⁶ See, eg, Chris Sarra, *Review of the Strong and Smart Vision at Cherbourg State School* (12 August 2003) <<http://strongersmarter.com.au/wp-content/uploads/2013/01/CHERBOURG-Strong-and-Smart-Review-2003.pdf>>; Chris Sarra, 'The Way Forward: Indigenous Children of the Education Revolution' (Address to the National Press Club, Canberra, 26 May 2008).

²²⁷ Dominic Geiger, 'Cape York Community Calms after Storm of Violence', *The Cairns Post* (online), 28 November 2015 <<http://www.cairnspost.com.au/news/cairns/cape-york-community-of-aurukun-calms-after-storm-of-violence/story-fnpqrsxl-1227626225209>>.

²²⁸ Aurukun Shire Council, *Census Data* <<http://www.aurukun.qld.gov.au/shire-profile/our-culture/census-data/>>.

IX CONCLUSION

Even though income management under the CYWR is triggered when social responsibilities are deemed unmet, rather than through a blanket approach, assumptions about the behaviour of Aboriginal people based on the deficit discourse remain embedded in the *FRC Act*. This Act is a continuation of government paternalistic and racist attempts at assimilation, and does not address the longstanding effects of colonisation on Aboriginal people, nor does it acknowledge and respect Aboriginal culture. The enactment of the *RDA* was to prohibit racial discrimination and achieve equality through special measures. However, despite its importance and its incorporation of a fundamental international human rights convention, the *RDA* is ordinary legislation, and is fragile, its provisions capable of being overridden by more recent Commonwealth legislation.

Reliance has been placed by governments and the Cape York Institute for Policy and Leadership on the numerous reports on social issues in Cape York, which justify special protection in the form of income management in the CYWR communities. At present, the focus is on the behaviour of Aboriginal people, which is portrayed as dysfunctional, when in fact it should be on governments, past and present, and their institutions. Today, as it has been since colonisation, governments have not reflected on the effects of paternalistic legislation on Aboriginal and Torres Strait Islander peoples or that similar and punitive legislation will not achieve a different outcome.

Income management is an example of how governments manipulate human rights concepts to fit their policy directions. The protections intended to be afforded by the *RDA* when it was enacted are still required today for the exact same reasons. However, it is now clear that these protections will not be achieved without constitutional protection of non-discrimination based on race.²²⁹ It is also unlikely that the judiciary's interpretation of the *RDA*, and its current understanding of its role in assessing legislation, will result in any question or requirement of accountability.

²²⁹ Bielefeld and Altman, above n 102, 204.

Deeming income management a special measure, and removing all avenues to challenge the *Family Responsibilities Commission Act 2008 (Qld) (FRC Act)* and *Social Security (Administration) Act 1999 (Cth) (SS(A) Act)* by suspending *Part II Racial Discrimination Act 1975 (Cth) (RDA)*, not only removed Aboriginal peoples' right to equality and freedom from discrimination, but clarified that the *SS(A) Act* overrode the *RDA* where provisions conflict. Despite reinstatement of Part II *RDA*, a challenge to the *SS(A) Act* remains beyond a potential applicant's reach due to the court's application of statutory interpretation rules. However, as I have shown in this chapter, an opening remains for *FRC Act* provisions to be challenged by arguing that ss 10(1) and 10(3) apply, and that s 8(1) is not applicable because it has no connection to its objects and the sole purpose of securing adequate advancement, or because it requires management of Aboriginal peoples' property without their consent (s 10(3)) and therefore cannot be characterised as a special measure. While I have referred to evidence that shows why income management should be held to be racially discriminatory, and therefore fail as a special measure, I do not have confidence in this outcome being achieved. This is mainly due to the interpretative approach used by the judiciary, in particular the High Court. While each judge in *Maloney* provided separate reasons the commonalities in their reasoning were a formal interpretation of equality and discrimination, a literal statutory interpretation of the *RDA* and *ICERD*, and deference to the legislature. In referring to the High Court's approach, Hunyor states that it 'continues the tradition of significant judicial deference to the legislature when considering whether something is a special measure, based on reluctance to adjudicate what is seen as essentially a matter of policy.'²³⁰

Governments portray Aboriginal people as dysfunctional, requiring complex policy to address their many needs, and often also requiring considerable funds and efforts by public servants, with little or no impact or success. When reports on 'Aboriginal disadvantage' are produced to courts – as occurred in *Maloney*

²³⁰ Jonathon Hunyor, 'A Glass Half Empty? Alcohol, Racial Discrimination, Special Measures and Human Rights', in Australian Human Rights Commission, *Perspectives on the Racial Discrimination Act: 40 Years of the Racial Discrimination Act Conference*, 2015, 190 <https://www.humanrights.gov.au/sites/default/files/document/publication/Conference%20Papers_Publication%20layout%20Final_0.pdf>.

– the disadvantage is associated with alcohol, ‘passive welfare’ and violence. There is no analysis of the effects of colonisation, or lack of employment or economic development opportunities in remote Aboriginal communities. Because the issues are portrayed as grave, the government response is drastic, through control or oppression to drive change.

The CYWR Evaluation and the NTI Evaluation indicate that income management is neither as effective as predicted or portrayed. I refer to this information in this chapter because it is important from both a legal and social perspective. If a measure discriminates against some Aboriginal people for the betterment of other Aboriginal people, there should be strong evidence to support it. Although I interpret some of the information in these reports as powerful in its influence, I am not confident that a court would accept this evidence, even when provided by experts. Even if accepted, it may be interpreted as income management requiring more time, or not being harmful and therefore able to continue. This is because judges separate the policy world of governments from their role. While the judges in *Maloney* incorporated proportionality tests into their assessment of the measure, their level of analysis was heavily reliant on government expertise.

Because of the delineation of the roles of the parliament and the judiciary, the court, rather than requiring a close link between a measure and its objects, seems to simply assess whether, at a broad level, a measure is aimed at achieving the adequate advancement of Aboriginal people. As I have argued above, this is not sufficient, given the aim of Art 1(4) to achieve equality by promoting the enjoyment of human rights. Therefore, the court may not require that income management be connected to its objectives, so long as it can be construed as ‘advancing’ Aboriginal people. ‘Adequate advancement’ has not been defined, and given the court’s lack of detailed assessment to date, it may be deemed to have been satisfied so long as the measure is ‘taken for’ the sole purpose of securing adequate advancement. This would simply require an assessment of the reasons why the government says it implemented the measure, rather than whether it can achieve adequate advancement. The vague objectives of income management are unlikely to be measurable in such cases.

Unless the court examines income management in detail, from the perspective of Aboriginal peoples and its effects on them, it is unlikely to find income management discriminatory. Rather, the court will acknowledge that income management treats Aboriginal peoples differently to others and that Aboriginal peoples' access to particular human rights are affected. So long as income management diminishes or enhances human rights by treating Aboriginal peoples differently, the court will deem s 10(1) to have been invoked. However, as stated above, a court is likely to exempt income management from the prohibition against racial discrimination by deeming it a special measure. While this finding is disturbing to myself and other lawyers and community members, this will not be a revelation to Aboriginal people. The very fact that, to date, there has not been a challenge to income management under the CYWR may indicate an understanding that it cannot be challenged or there is no point in doing so. This also raises the issue that imposing measures which restrict rights of Aboriginal people without consultation or consent is of itself discriminatory. This is an important matter which the High Court in *Maloney* essentially excluded from argument because of their literal interpretation of Art 1(4). Hunyor argues the importance and reasons for consultation:

I have previously argued against characterising 'top down', non-consultative and restrictive measures like this as 'special measures'. Such an approach leaves open the way for discrimination cloaked in paternalism. In the context of Indigenous peoples it is also, amongst other things, inconsistent with the right to free, prior and informed consent as recognised by Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') and the right to self-determination recognised by article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, as well as article 3 of UNDRIP.²³¹

Any future finding by the court that a restrictive measure such as income management is a special measure, will further empower Parliament and the legislature to enact paternalistic racist legislation. It will also further disempower and deter Aboriginal people and lawyers from challenging racist legislation and measures. While this illustrates the vulnerability of the *RDA* and

²³¹ Ibid 190.

its interpretation, further negative decisions will provide a valid disincentive to challenging income management.

Income management blames Aboriginal peoples for the effects of colonisation, including its resultant and continuing discrimination. Ultimately income management is punitive, with a goal of compliance and assimilation which is antithetical to the purpose of special measures.

In the next chapter I make recommendations on how legislation and judicial processes could provide protection against racial discrimination directed at Aboriginal people.

CHAPTER 8: CONCLUSION

I INTRODUCTION

This chapter summarises the main points of this thesis, provides answers to the eight research questions, and makes recommendations as to how to better prevent racial discrimination against Aboriginal peoples.

The thesis covers the history of the Cape York Welfare Reform (CYWR) income management measure from design to implementation, and from trial to permanency. I refer to new paternalism to explain the broader context of income management and discuss the role of deficit discourse in order to understand the rationale used to promote income management. Past Queensland legislation applicable to the CYWR communities, and the histories of those communities, are examined to contextualise income management with regard to the ongoing detrimental effects that colonisation has had on Aboriginal people. The human rights framework in Australia – including domestic legislation targeting racial discrimination, and international treaties – was analysed to show how certain mechanisms could be used to challenge policy and legislation which support racially discriminatory income management.

In passing the *Racial Discrimination Act 1975 (Cth) (RDA)*, the conflict between the federal and Queensland parliaments, and within the federal parliament, reflected the attitudes of the day. However, contemporary restrictive legislation imposing income management and alcohol restrictions on Aboriginal peoples reflects current racist attitudes at the parliamentary level. Judicial interpretation of the *RDA* has restricted its effectiveness, overriding the *RDA*'s intent by applying a literal and formal interpretation. As I argue below, income management legislation is racist because it targets Aboriginal people as culturally inferior and is directed, among other aims, at changing particular cultural practices.

The cultures of Aboriginal peoples distinguish them from other Australians, as do the circumstances they have endured since colonisation. However, their historical disadvantage, and their ability to adapt to changes in their

circumstances, are ignored by governments. Ultimately Aboriginal peoples are expected to act like non-Aboriginal Australians, and when they do not, they are deemed dysfunctional.

The United States of America (US), Canada and South Africa have similar histories of racial discrimination to Australia, but provide different approaches to prohibiting racial discrimination and promoting equality. While their constitutional and legislative protections differ from those in Australia, it was shown in Chapter 5 that the courts of these countries would arrive at a different outcome if income management was challenged in their jurisdictions. Their legislation and methods of judicial interpretation acknowledge both the racism of the past and its current incarnation, and an intention to prevent its recurrence.

In finding that an Australian court is likely to decide that income management is a special measure, it has been important to understand the legal mechanisms applied to interpret the concepts of non-discrimination, discrimination and equality. External non-legal factors, including deficit discourse and new paternalism, also provide context to this legal decision-making process. While Australian case law is limited with respect to challenges to special measures, *Maloney v The Queen*¹ (*Maloney*) is extremely important in the development of special measures law, including measures directed at restricting rights of Aboriginal peoples. This unique case provides guidance in predicting the outcome of a legal challenge that income management is racially discriminatory. The aim of this thesis is to examine and predict the likely outcome of such a challenge; however, a more important question is: should income management be a special measure? While this question can be answered from a purely legal perspective, it is essential to consider self-determination as of major importance in answering this question. The self-determination of Aboriginal peoples – which must be on their terms – has been significantly affected by the processes of colonisation, and its lack

¹ (2013) 252 CLR 168.

demonstrates Aboriginal peoples' minority status in a majoritarian democratic process.²

This chapter refers to the questions posed in Chapter 1 and offers direction to potential solutions and recommendations for change related to the issues identified in the other chapters.

II ANSWERING THE RESEARCH QUESTIONS

In Chapter 1, I pose eight research questions, the first being an overarching question, the subject of this thesis. The remaining questions are important to both answering this question and to more specific issues raised by income management and judicial legislative interpretation. While these questions are addressed throughout the thesis, this section provides a summary and a synthesis of the answers.

A *Research Question 1 – Should the Cape York Welfare Reform Income Management Measure be Characterised by a Court as a Special Measure?*

While I formulated legal arguments and reasons against income management being a special measure in Chapter 7, I concluded that the court is likely to hold that income management is a special measure. This prediction is based on the court's literal and formal interpretative approach, its deference to the legislature, and its belief that it has a limited role in adjudicating whether it is reasonable for parliament to classify income management a special measure. This approach places control with parliaments and can reinforce legislation that is racially discriminatory.

While I acknowledge the likely result of judicial interpretation of legislation enacting special measures, I argue that a court should not find CYWR income management a special measure. The purpose of the *RDA* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* are to prohibit racial discrimination and to promote enjoyment of human rights to achieve equality. Income management, however, imposes conditions –

² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3 and 4.

adhering to so-called social responsibilities – on social security for Aboriginal peoples in the CYWR communities, and restricts rights of those who, it is alleged, have not complied with them. In a further attempt at assimilation, demanding compliance with these social responsibilities means that Aboriginal peoples may breach their cultural responsibilities, such as attending funerals and sharing money and resources with kin. This approach assumes that western values prevail over Aboriginal culture and because Aboriginal people will not “choose” to change, change can be enforced through income management.

While governments would argue otherwise, it is evident that income management – by being directed at particular Aboriginal communities to restrict enjoyment of their human rights – is racist and punitive as it diminishes their ability to comply with their culturally-specific social responsibilities. It removes choice and the ability for a person to freely spend their own money. Income management is therefore not conducive to advancing Aboriginal peoples’ enjoyment of human rights as required by Art 1(4) *ICERD*.

If the court interpreted the concepts of equality, non-discrimination and discrimination in a substantive way, and applied the intent of the *RDA* and *ICERD*, rather than applying a literal interpretation, it might still arrive at the same conclusion – that income management is a special measure. This is because income management is purported to be beneficial in promoting the rights of vulnerable members of the community, such as children. However, it should not be possible to arrive at this finding because it is unlikely that there is any causal connection between income management’s objects and its putative outcomes. While different judges apply different proportionality tests, they do not necessarily see it as their role to assess whether the measures are connected to their objectives, or whether they in fact restrict human rights. I discuss this further when answering Question 6.

I argue for stronger and more detailed analyses by the court. This is an area where other countries’ approaches – despite their different legislative protections – can provide guidance. The approaches of courts in the US, Canada and South Africa are discussed in Chapter 5 and in Question 7. If

Australian courts were to consider cases from other countries and international law, to take heed of United Nations Committees' recommendations, or refer to the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* for guidance, the outcome may be different. However, this would also require a different statutory interpretation approach, an investigation of potential consequences of the measure – including its discriminatory effects – and an acknowledgement of the substantive meaning of equality, non-discrimination and discrimination.

B *Research Question 2 – What Human Rights are Promoted and Restricted by the Income Management Measure of the Cape York Welfare Reform?*

This question is answered in detail in Chapter 7. My conclusion is that, despite assertions that income management promotes particular rights, income management is not aligned with its objectives and is therefore unlikely to achieve them. Nominating particular rights as promoted by income management assumes that these rights are not presently enjoyed to the extent they could be when a person is income managed. There appears to be no evidence as to how or to what extent the rights were enjoyed before people are income managed, and therefore no comparison with the enjoyment of these rights during or once people are no longer being income managed. The link between a person not meeting social responsibilities and income management effectively influencing them to do so is unclear. Income management is presented as punishment and a last resort for people who do not engage with the FRC, or do not attend services when referred by the FRC. This process is not conducive to the enjoyment of rights.

Income management is said to promote the right to an adequate standard of living, the right for children to benefit from social security, and the right to self-determination.³ It could be argued that income management promotes the first two rights because its intention is to isolate money for spending on priority items, which also means there is less money to spend on substances such as cigarettes, other drugs and alcohol. However, without any assessment, this

³ Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013 7-8.*

assumes that the person's money was not used in such a way as to enable their enjoyment of these rights, and also assumes that, once income managed, the person will ensure their income managed monies are used to promote enjoyment of these rights.

Income management stereotypes Aboriginal people who come before the FRC as not being able to manage their money. However, in ordering income management, the FRC provides no assessment as to whether or not a person is already spending their money in a manner that promotes their rights. By restricting the proportion of a social security payment an Aboriginal person can freely access, that person can no longer enjoy their right to social security to the same extent or in the same manner as persons of another race.⁴

Asserting that income management promotes the right to self-determination ignores the history of colonisation, including similar past racially discriminatory measures. Rather than promoting the right to self-determination, governments, by not consulting with Aboriginal people about whether they desire income management, diminish this right. A continued literal interpretation of special measures by the court is unlikely to recognise these issues. Though consultation and the higher right of prior and informed consent are not legal requirements for special measures, they are essential for self-determination, otherwise ill-fitting and racially discriminatory measures will continue to be imposed on Aboriginal peoples.

At an individual level, Aboriginal people are restricted in terms of deciding how and where they can spend their income managed money. Their bargaining power is restricted and they may not be able to buy goods they need, and may end up paying more, due to less competition. Income management therefore also restricts access to services intended for use by the general public.⁵

⁴ Shelley Bielefeld, 'Compulsory Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy' (2014/2015) 18(1) *Australian Indigenous Law Review* 99, 105.

⁵ Shelley Bielefeld, 'Compulsory Income Management under the Stronger Futures Laws – Providing "Flexibility" or Overturning Freedom of Contract?' (2013) 8(5) *Indigenous Law Bulletin* 18-20; Shelley Bielefeld, 'Income Management and Indigenous Peoples – Nudged into a *Stronger Future*?' (2014) 23(2) *Griffith Law Review* 299-300; Shelley Bielefeld, 'Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy' (2014/2015) 18(1)

Restricting a large proportion (60%, 75% or 90%) of a person's social security payment can also restrict their right to equal participation in cultural activities, including the practice of traditions, customs and ceremonies. This can occur even if a person has enough money in their income managed account for those purposes, because in order to access those funds, they must negotiate with government staff to explain the need for money for travel, accommodation, cultural offerings and other items. They may also have kinship responsibilities towards others and be required to look after them by paying for their travel and accommodation.

I have made a case that the FRC operates differently to most other legal organs. It denies Aboriginal peoples the right to natural justice by providing limited information to conference attendees on allegations against them. It also presents Aboriginal peoples with no right to respond; allows legal representation only at the FRC commissioners' discretion; restricts a right of appeal to points of law; does not allow a stay of an FRC decision; and is a closed system in which few people can attend its conferences. Lack of legal representation means that a person attending a conference is unlikely to understand the process or the FRC's options. This restricts the person's right to equal treatment before legal organs. It could be argued that the FRC operates in a more informal manner to accommodate the Aboriginal people called before it. However, removing fundamental legal concepts such as natural justice, the right to legal representation, the right to be heard and the right to appeal, is racially discriminatory because it targets Aboriginal peoples and restricts or removes rights available in other jurisdictions to non-Aboriginal peoples.

The right to privacy is overridden by the FRC and government agencies, as Aboriginal peoples in the CYWR communities do not know if and when the FRC or government employees may be sharing their information, or whether information shared is accurate. The required use of a BasicsCard is an advertisement to others of assumed inadequacy every time an income

Australian Indigenous Law Review 105-106.

managed person purchases goods and services. This is likely to stigmatise and affect a person's dignity.

I also argue that the income management of an Aboriginal person's property – being both their payment and their bank account – is done without their consent. If accepted by a court, this argument, discussed further in Question 5, removes any possibility that income management can be a special measure.

C Research Question 3 – What is the Legal/Judicial Approach in Regard to Determining a Special Measure?

This question is mainly answered in Chapters 6 and 7. While there was acknowledgement of the importance of substantive equality by Brennan J in *Gerhardy*⁶ and Gageler J in *Maloney*,⁷ both these judges and others in these cases applied a formal interpretation. This is in contrast to the High Court's approach in constitutional cases, where it applies a substantive construction of discrimination and equality.⁸

The court has adopted an insular approach to challenges of special measures. In *Maloney*, the High Court, excepting Gageler J, rejected extrinsic material such as international committee recommendations, and did not take guidance from international cases. This was consistent with a literal interpretative approach which fails to acknowledge the broad terms of *ICERD* and the importance of gaining guidance from experts, such as the Committee on the Elimination of Racial Discrimination – especially important in Australia where few similar cases have been decided. The limited cases on special measures and restrictions on rights may have resulted in the court in *Maloney* applying an approach appropriate to special measures cases, instead of an approach more suitable for restrictive measures or racial discrimination. This would distinguish traditional special measures (e.g., Abstudy, identified employment positions and identified study scholarships) which are beneficial to Aboriginal peoples, from restrictive measures (e.g., alcohol restrictions and income management) which diminish human rights and punish Aboriginal peoples.

⁶ *Gerhardy v Brown* (1985) 159 CLR 70, [26] (Brennan J).

⁷ *Maloney v The Queen* (2013) 252 CLR 168, [340], [358] (Gageler J).

⁸ See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461, [571] (Gaudron J); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

While there has been some limited judicial acceptance in Australia of measures which restrict rights, income management which targets Aboriginal people cannot be a reasonable restriction on rights, because these usually apply generally, rather than targeting a group based on race.

While I argue that the court should find all measures directed at restricting rights of Aboriginal people racially discriminatory and that they therefore should be prohibited, the decision in *Maloney* enables these restrictions to be regarded as special measures. Therefore, a rigorous analysis should be required to determine if a) the object of a measure is legitimate; b) the measure is capable of achieving its object; and c) the restriction is proportionate to the legitimate object of the measure.⁹ In addition, a requirement to consult and gain consent from the Aboriginal people affected should be carried out before designing and implementing the measure, as should an assessment of the likelihood of adequate advancement of those Aboriginal people if the special measure were implemented.

Because the court interprets the *RDA* in a literal way, it simply assesses whether s 10(1) applies to a legislative provision, without incorporating an analysis of whether the provision itself is racially discriminatory. It is difficult to comprehend how a provision restricting the rights of a minority group could not be racially discriminatory. Therefore, in deciding whether a provision that restricts rights or is punitive is a special measure, an assessment of potential discrimination under the provision should be required. While the court is willing to identify distinctions under s 10(1), where there is differential treatment based on race, it has been reluctant or unwilling to assess whether the distinction is discriminatory. The literal interpretation ignores the purpose of the *RDA* as described in its Preamble; namely, that the *RDA*'s provisions are there to prohibit racial discrimination and other forms of discrimination and to give effect to *ICERD*.

The court draws a distinction between its role and that of parliament. While the court will assess whether a special measure is reasonably made, it leaves

⁹ Andrew Chapman, *Human Rights: A Very Short Introduction* (Oxford University Press, 2007) 100-101.

control with parliament to determine whether a law is a special measure. Part of this process includes accepting parliament's reliance on reports presenting Aboriginal peoples and their communities as dysfunctional, and thereby potentially justifying harsh and punitive measures. There is minimal analysis of the elements of a special measure as required by Arts 1(4) and 2(2) *ICERD*. The approach ignores the context of the purpose of enacting the *RDA*, *ICERD*, *UNDRIP* and other instruments to prohibit racially discriminatory laws, and also ignores the fact that the court has a role in scrutinising legislation to ensure that it is not racially discriminatory.

D *Research Question 4 – Can a Special Measure be Racially Discriminatory Against Some or All of Those it is Aimed at?*

This is a complicated question to answer because the court does not assess whether legislation is racially discriminatory. The answer to Question 3 explains the court's reluctance to delve into questions of discrimination when parliament labels legislation a special measure. The court's formal interpretative approach indicates that if it found legislation racially discriminatory it would need to assess whether it was benign or harmful discrimination. Both forms could apply to alcohol restrictions in that they are aimed at assisting the vulnerable part of the targeted group (as referred to by parliament) but restrict the rights of, and punish, those who are said to engage in harmful behaviour such as substance abuse. The same argument can apply to income management of those said to not comply with their social responsibilities. I argue in this thesis that these measures are punitive in that they attempt to force people to comply with certain behaviours and standards, and as a result aim to change the culture of Aboriginal peoples. Rather than weighing the benefit of the measure through a proportionality test, its detriment should be assessed for racial discrimination.

Given that these measures are imposed, restrict rights, and are punitive, I argue that they are racially discriminatory and should be repealed, as my answers to Questions 1 and 3 assert that the court will not assess the racially discriminatory nature of a measure. If the court is unwilling to assess the discriminatory nature of alcohol restrictions, given their harshness in restricting people's rights and the resultant punishment by a court – including a criminal conviction when they

are breached – it is unlikely to assess the racial discrimination inherent in income management.

Deficit discourse, discussed further in Question 8, presents Aboriginal people as dysfunctional and harmful to themselves and their communities. This provides justification for harsh, racially discriminatory measures to protect vulnerable community members. This discourse has justified overriding our understanding of the requirement to prohibit racial discrimination as embedded in the *RDA*. Government commissioned reports equate disadvantage as dysfunction, often ignoring the ongoing harm inflicted on Aboriginal peoples by colonisation and enduring paternalistic attitudes, as well as the racial discrimination which prompted enactment of the *RDA*. It also ignores the point of special measures – to correct past wrongs and promote equal enjoyment of human rights.¹⁰

E Research Question 5 – Is Income Management Likely to be Held to be Racially Discriminatory by an Australian Court?

This question is answered in Chapters 6 and 7 and to some extent in Questions 3 and 4 above. The judgments in *Maloney* provide guidance to the potential outcome: the court's literal interpretation approach suggests that it is unlikely that a measure will be found racially discriminatory. This approach, combined with the court's deference to the legislature, suggests that any challenge under s 10(1) would fail and income management would be held a special measure.

In Chapter 7 I argued that the ability of the court to find income management a special measure could be removed¹¹ if an Aboriginal person's social security payment (i.e., the money paid to them) or the income managed bank account are their property and are being managed without the Aboriginal person's consent.¹² Section 8(1) *RDA* specifically removes measures by which an Aboriginal person's property is managed without their consent from the definition of a special measure because they are racially discriminatory. The

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1-2.

¹¹ *Racial Discrimination Act 1975* (Cth) s 8(1).

¹² *Ibid* s 10(3); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) s 5.

only time such management can occur is if it applies to everyone, not just Aboriginal peoples.¹³

A barrier to this challenge is that social security payments have not been defined as property in Australia. The court may use domestic definitions of property, which are more restrictive than those in international cases¹⁴ that have found this type of social security payment to be property. However, in *Maloney* the court found alcohol to be property;¹⁵ therefore, as discussed in Chapter 4, it may continue to provide a broad interpretation of property that could include a social security payment or a bank account. If these were held to be property then it could be argued that s 69(1)(b)(iv) *FRC Act* (the income management provision) is inconsistent with s 10(3) *RDA*. Section 109 *Constitution* provides that federal legislation (the *RDA* or *Queensland Discriminatory Laws Act*) overrides state legislation (the *FRC Act*) to the extent of the inconsistency.¹⁶

Income management under the CYWR is unique in Australia because it cannot be implemented without the operation of both state (*FRC Act*) and federal legislation (including the *Social Security (Administration) Act 1999* (Cth)). An order under s 69(1)(b)(iv) *FRC Act* is required for income management to be implemented by the Centrelink Secretary.¹⁷ Therefore if the *FRC Act's* income management provision was held invalid, income management could not occur under the CYWR.

¹³ See, eg, *Racial Discrimination Act 1975* (Cth) s 10(3); *Aboriginal Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) s 5(2).

¹⁴ See, eg, *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005); *Abdulaziz v United Kingdom* A94 (1985) 7 Eur Court HR 471; *Ásmundsson v Iceland* (European Court of Human Rights, Chamber, Application No 60669/00 12 October 2004); *Gaygusuz v Austria* [1996] Eur Court HR 36; *Moskal v Poland* (2010) Eur Court HR 22.

¹⁵ *Maloney v The Queen* (2013) 252 CLR 168, [38] (French CJ), [84] (Hayne J), [227] (Bell J), [361] (Gageler J).

¹⁶ *Western Australia v Ward* (2002) 213 CLR 1, [106]-[107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁷ *Social Security (Administration) Act 1999* (Cth) s 123UF(1)(b).

F Research Question 6 – Does, or Should, the Court Assess Whether the Measure is Capable of Achieving the Stated Goal?

This question is raised because of the court's common practice of deferring to the legislature, discussed in Chapters 6 and 7. High Court judges have asserted that parliament, rather than the court, is the body that should decide special measures.¹⁸ Nevertheless, the *RDA* exists so that the court can interpret legislation in the context of the *RDA*'s provisions and objects, and to eliminate racial discrimination.

The case law indicates that parties are not required to prove or disprove whether special measures – including measures restricting rights – can achieve their goal. The burden of proof in respect to measures that restrict rights and target Aboriginal peoples should be on governments. In implementing these measures, governments should be required to show how a measure is linked to its objectives and how it will achieve adequate advancement of Aboriginal peoples; and to prove that it is not racially discriminatory in a substantive sense.

The court does not conduct a detailed analysis of whether a measure can attain its goals. However, Art 1(4) *ICERD* requires that a measure is not to be continued after its objectives are achieved; therefore, it is inferred that the measure must be capable of achieving its objectives. In the past, it has been obvious that measures such as employment positions and study assistance are closely tied to measurable objectives of achieving equality in education and employment.

However, income management has many vague objectives. They include directing social security to a recipient's 'priority needs' and providing budgeting support to meet these needs; reducing spending on alcohol, cigarettes, pornography and gambling; reducing incidents of people asking for money; encouraging socially responsible behaviour relating to care and education for

¹⁸ See, eg, *Gerhardy v Brown* (1985) 159 CLR 168, [26] (Dawson J); *Maloney v The Queen* (2013) 252 CLR 168, [47] (French CJ).

children;¹⁹ and restoring socially responsible behaviour and local authority.²⁰ It is difficult to see any direct link between income management and these objectives other than punishment.

These objectives are based on the assumption that an income managed person is deficient in one or more of the areas stated above, despite the fact that there is no process by which income management can be assessed to see if it achieves its objectives. As with historical discrimination, this assumption is based on stereotyping Aboriginal people. The combination of deficit discourse and new paternalism, as discussed in Question 8, have contributed to this thinking, not too different from racist legislation prior to 1975 which justified control over Aboriginal peoples under the name of 'protection' Acts, purportedly for their benefit but which restricted their rights and punished them. In order to fulfil the *RDA's* intent of prohibiting racial discrimination the court now should undertake a detailed examination of any legislation which appears to be racially discriminatory

The court has rejected the argument that s 8 *RDA* requires any party to bear the onus of proving a special measure. In *Maloney*, French CJ and Gageler J remarked that no party is put to proof because the facts relevant to the characterisation of a law as a special measure are held to be legislative facts, ascertainable by the court.²¹ Despite this power, the court did not ascertain these facts in that case; rather, it was satisfied by contextual material from reports focused on disadvantage. Requiring proof of connection between a measure and its objectives – while not the practice of the court at present – should be integral in assessing whether it is a special measure. The restriction on Aboriginal peoples' rights in itself should raise suspicion of legislation, especially given Australia's racist history. This deference by the court to the legislature removes an important process of assessing the true nature of measures.

¹⁹ See, eg, *Social Security (Administration) Act 1999* (Cth) s 123TB; Explanatory Statement, *Social Security (Administration) (Recognised State/Territory Authority — Qld Family Responsibilities Commission) Determination 2013* (Qld) 6.

²⁰ *Family Responsibility Commission Act 2008* (Qld) s 4.

²¹ *Maloney v The Queen* (2013) 252 CLR 168, [354]-[356] (Gageler J).

G Research Question 7 – If an Australian Court was Asked to Determine if the Income Management Component of the Cape York Welfare Reform was a Special Measure, Would the Answer be Different to that of a Court from the United States of America, Canada or South Africa, and Why?

I examine and answer this question in Chapter 5 by discussing the different legislation and interpretative methods of courts in the US, Canada and South Africa, and conclude that these jurisdictions are unlikely to determine that income management is a special measure.

In the US, where a law is aimed at a group defined by race, the legislative body must prove that it is reasonable, not discriminatory and is required based on overriding public interest.²² The findings in the US showed that restricting rights of a racial group is suspect, and that courts should apply a high level of scrutiny, acknowledging that these measures are likely to be racist,²³ and that it is unacceptable to continue perpetuating racial discrimination. The Canadian approach is also likely to find income management racially discriminatory because it not only draws a distinction based on race, but also causes disadvantage by perpetuating prejudice and stereotyping. Canada's approach to special measures is that they are complementary to equality, rather than an exception as is the case in Australia.

The Canadian test in *R v Oakes*²⁴ (*Oakes*), which applies after discrimination is found, would require the Queensland government and the Commonwealth (if joined to an action) to prove that the restriction on rights is reasonable and demonstrably justified in a free and democratic society. Australian governments would need to provide evidence of what would happen if income management was imposed or not. At this point, given that the CYWR has been evaluated, the court could refer to the evaluation reports.²⁵ A proportionality test is applied to assess the balancing of interests. Given the argument that income

²² Warwick McKean, *Equality and Discrimination under International Law* (Oxford University Press, 1985) 238.

²³ *Korematsu v United States*, 323 US 214, 323 [216] (Black J delivering the opinion of the court) (1944).

²⁴ [1986] 1 SCR 103.

²⁵ See, eg, KPMG, Department of Families, Housing, Community Services and Indigenous Affairs, *Implementation of the Family Responsibilities Commission*, Final Report, September 2010; Department of Families, Housing, Community Services and Indigenous Affairs, Government of Australia, 'Cape York Welfare Reform Evaluation 2012', 2013.

management will benefit the vulnerable, this test would examine the benefit and detriment to both the vulnerable and the income managed. This was done to some extent in *Maloney*, but it was essentially based on conjecture regarding the reduction of harm caused by alcohol-related violence. However, there was no analysis of the harm caused by alcohol restrictions, including criminal convictions for possession of alcohol, and restrictions on Aboriginal peoples' rights.

Similar to Canada, the *Harksen* test in South Africa requires the court to examine whether a law differentiates between people or categories of people, and, where it does, whether it is linked to a legitimate governmental purpose. This test asks whether the grounds – such as race – on which a differentiation occurs, is prohibited, and if it is, then *prima facie* it is unfair.²⁶ As with the Canadian *Oakes* test, the government has the onus of proving it not to be unfair.²⁷ The measure must also be reasonably capable of achieving its objectives,²⁸ and the existence of less restrictive measures must also be assessed.²⁹

There is an assumption in South Africa that any government measure which targets race is racial discrimination paraded as a special measure. Given our history of colonisation, an Australian court should rely on the same presumption to prevent further infliction of harm.

Much of my analysis is derived from the identification of income management as a legislative measure directed at Aboriginal peoples which restricts their rights. There appears to be a gap in Australian law and judicial analysis regarding this area. Given the court's literal interpretation approach, it may be that new legislation is required to prohibit measures directed at restricting the

²⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (Constitutional Court).

²⁷ European Network of Legal Experts in the Non-discrimination Field (on the Grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), Sandra Fredman, *Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India*, 2012, European Commission Directorate-General for Justice, Luxembourg: Office for Official Publications of the European Communities 53.

²⁸ *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court), [41] (Moseneke, J, Chaskalson CJ, Langa DCJ, Madala J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concurring).

²⁹ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 36.

rights of racial groups. However, parliaments' present position of supporting this type of legislation means that legislative protection is unlikely to occur.

*Bropho v Western Australia*³⁰ (*Bropho*) provided an opportunity to address restrictions on rights directed at Aboriginal peoples. However, as seen in Chapter 6, while acknowledging that the measure in *Bropho* restricted rights, it was held by the court that it addressed dysfunction and therefore not based on race.³¹ Re-examining the facts in *Bropho*, following the decision in *Maloney*, it is likely that the High Court would identify the measure as one targeting Aboriginal peoples with the intent to protect the vulnerable, and that it is therefore a special measure.

The approaches in the US, Canada and South Africa indicate an acknowledgment of the separate role of the legislature and court, and the importance of ensuring that laws do not discriminate. The answer to Question 8 provides a context as to why restrictive measures directed at Aboriginal peoples are not assessed by Australian courts in the same manner as in other jurisdictions.

H Research Question 8 – What are the Roles of the Concepts of Deficit Discourse and Paternalism in Understanding Special Measures?

Initially, special measures were implemented in Australia to assist in promoting equal enjoyment of human rights. The requirement for special measures acknowledges that, in order to achieve substantive equality,³² more than just the prohibition of racial discrimination is required. In the case of Aboriginal peoples, special measures are needed because of the inequality and disadvantage caused by colonisation. However, special measures alone will not achieve equality, or overcome the disadvantage faced by Aboriginal peoples. Understanding, identifying and eliminating institutional and structural discrimination is required, along with acknowledging and incorporating cultural difference into policy and legislation. This means including Aboriginal peoples

³⁰ [2008] FCAFC 100.

³¹ *Bropho v Western Australia* [2008] FCAFC 100, [71] (Ryan, Moore and Tamberlin JJ).

³² William Jonas and Margaret Donaldson, 'The Legitimacy of Special Measures' in Sam Garkawe, Loretta Kelly and Warwick Fisher (eds), *Indigenous Human Rights* (Federation Press, 2001) 13.

in parliament on their own terms, and enabling their involvement in the development and implementation of policy and legislation.

However, despite the above, a recent approach to special measures for Aboriginal peoples in Australia is contextualised by deficit discourse and new paternalism. The new paternalism imports a way of thinking about Aboriginal people as dysfunctional, and therefore requiring control for their own good. For example, it requires Aboriginal peoples who are receiving social security payments in the CYWR communities to change their behaviour and comply with social responsibilities. It restricts what people can spend their money on to force them to prioritise payment of debts and to make 'good choices' when spending.

Deficit discourse provides a context in which governments can design and impose measures which restrict particular Aboriginal peoples' human rights and punish them for non-compliance. It incorporates an analysis of cultural attributes, presenting specific cultural practices – such as demand sharing, a cultural obligation to share with kin (also known as 'humberging') and ceremonial attendance by children for more than a day – as undesirable and, by definition, socially irresponsible.

Deficit discourse portrays Aboriginal peoples in a negative way; this justifies harsh treatment, and blames them for not conforming to western norms. There is no acknowledgement of existing racial discrimination and its continuing harm, or of Aboriginal peoples' unique cultures and strengths, which enable them to continue their culture today despite present and past discrimination. Aboriginal people are presented as 'the problem' and are therefore not involved in the 'solution'. While the Cape York Institute for Policy and Leadership (CYI) had a role in designing the CYWR, it is not a body representative of Aboriginal peoples in the CYWR communities, and as shown in Chapter 2, the CYI did not consult with these communities during the design process.

The CYI identified a number of reports referring to substance abuse and violence in Cape York to substantiate the requirement for the CYWR. These types of reports are relied upon by the government and the court to justify harsh measures which restrict rights, and even punish individuals, in order to gain

compliance. This is in contrast to addressing discrimination and the consequences of colonisation, which are more likely the causes of substance abuse and violence in the CYWR communities.

The CYI, along with Queensland and federal governments, have targeted what they view as undesirable aspects of Aboriginal culture as in need of change. However, it is unrealistic to think that the threat of income management as a punishment for a child not attending school, will override cultural practices that are essential elements of life in Aboriginal communities. Acknowledging and respecting these cultural practices, and finding alternatives to punishment, would seem more appropriate and relevant than income management. One example of such an alternative would be that, rather than punish parents for having their children miss school for a funeral, extra classes could be scheduled to allow the children to catch up on the lessons they have missed.

Deficit discourse provides both the context and the basis for harsh methods of control. Deficit discourse and new paternalism ignore harm caused by colonisation and assimilation policies of the past. There is an inability to acknowledge the similarity between “modern” special measures which restrict rights, and racially discriminatory policy and legislation prior to 1975. The concept of special measures has been re-defined to legally enact racially discriminatory legislation in an attempt to control and assimilate Aboriginal peoples.

Deficit discourse and new paternalism are fundamental to the justification of racially discriminatory measures, as they depict these measures as being for the general good of Aboriginal peoples. The limit to this new approach, which defines special measures to include measures that restrict rights and punish Aboriginal peoples, is unknown at this stage. However, change is needed to put an end to blatant racial discrimination against Aboriginal peoples.

III FURTHER ISSUES IDENTIFIED IN THE THESIS

I acknowledge that when identifying issues and proposing solutions I am restricted by my non-Aboriginal background. In this section I summarise a

number of issues yet to be considered, with the aim of focusing on solutions in the form of recommendations.

I argued in the answer to Question 8 that Aboriginal people are presented as the problem through deficit discourse and new paternalism. New paternalism requires Aboriginal peoples to adopt mainstream values and change their existing cultures.

Answers to Questions 6 and 8 show that the Queensland and federal governments, the CYI and courts, lack understanding and adequate acknowledgement that Aboriginal peoples have endured historical disadvantage stemming from colonisation and racism. Describing Aboriginal people in CYWR communities as having deficient social norms, and labelling their communities as dysfunctional, provides justification for attempts to blame Aboriginal peoples for their circumstances, and to punish them and change their cultures.

Answers to Questions 1, 3, 4, 5 and 6 exemplify the fact that, in Australia, the *RDA* and *ICERD* are not strong enough and are not implemented or interpreted to the extent they could be to prohibit racial discrimination against Aboriginal peoples. The *RDA* is an ordinary piece of legislation; therefore, it is ineffective where it is inconsistent with later federal legislative provisions, even if those later provisions are racially discriminatory. The later provisions are interpreted as intended to impliedly override the earlier enacted *RDA* provisions.

Answers to Questions 1 and 3 demonstrate that the court's literal and formal interpretation of the *RDA*, and its schedule the *ICERD*, fail to implement the intent of the legislation. This results in legislative provisions being deemed valid, when instead they should have been prohibited because of their racially discriminatory effect. The interpretation by the court in *Maloney* confirms the validity of parliament's racially discriminatory legislation, but in doing so frustrates the *RDA*'s and *ICERD*'s intent.

Answers to Questions 3 and 6 identify a lack of judicial analysis of the racially discriminatory nature of measures directed at Aboriginal peoples, which restrict

their rights. The lack of analysis may continue to result in restrictive measures such as CYWR income management being held to be special measures.

A number of other issues are identified by this thesis, discussed below. Recognising these is important to understand how measures directed at restricting Aboriginal peoples' rights can be held special measures. They also play an important role in identifying areas and processes for implementing reform and developing recommendations.

A The Ability of Parliament to Legislate to Suspend Part II of the Racial Discrimination Act 1975 (Cth) in Order to Circumvent a Legal Challenge

This was done when income management legislation was initially enacted in the CYWR and the Northern Territory intervention (NTI) and for some time after. This shows the fragility of including protections against racial discrimination in ordinary legislation. It also shows the lengths that parliament will go to in protecting suspect legislation.

B Lack of Constitutional Recognition of Rights

Unlike other countries studied in this thesis, Australia does not have a constitutional Bill of Rights which protects Aboriginal peoples' rights. A Bill of Rights would provide a higher level of protection than presently exists. It should also require that the onus of proving that a measure which restricts human rights is a special measure should be on those who assert it. Presently, this is not required; rather, the court asserts that it can rely on its legislative fact-finding powers to locate relevant evidence.

C Section 51(xxvi) Commonwealth of Australia's Constitution Act 1900 (Cth)

Section 51(xxvi) of Australia's *Constitution* has been interpreted by the High Court as enabling laws that impose obligations or disadvantages on Aboriginal

peoples.³³ This could include restrictive measures such as income management.

D *The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is not Consistently Applied*

UNDRIP is an important document for Aboriginal peoples. It could be used as a guide for parliament, the legislature, government and the court in designing and interpreting legislation. However it is seldom used for these purposes, and is not consistently applied by these institutions in Australia.

E *Australia's Democratic System does not Accommodate Aboriginal Voices*

Gaining the right to vote for Aboriginal peoples through the amendment of the *Commonwealth Electoral Act* 1918 (Cth) was important, but in practical terms it has had little impact in terms of Aboriginal peoples' influence on the democratic system because of their small proportion in the population.

Aboriginal peoples no longer have a mechanism or body by means of which they can engage with governments and be consulted. Since the government's abolition of the Aboriginal and Torres Strait Island Commission (ATSIC), there has not been an equivalent body to hold governments accountable, including regarding its obligations under international treaties.³⁴

F *Lack of Inclusion of Aboriginal Peoples in Their Own Affairs*

Measures such as income management have not, in their design, included Aboriginal peoples and communities they affect. This is despite assertions by the CYI that Aboriginal people from the communities were involved in these processes. Consulting after a measure has been designed – as was allegedly attempted with the CYWR, or after implementing the measure – as occurred with the NTI, cannot be considered consultation.

³³ *Western Australia v Commonwealth* (1995) 183 CLR 373, [98] (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh, JJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 186 [14] (Gibbs, CJ), 243 [1] (Aickin J), 209 [6] (Stephen J), 244 [1], 244 [2] (Wilson J), 262 [18] Brennan J).

³⁴ Megan Davis, 'Arguing Over Indigenous Rights: Australia and the United Nations' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007) 97.

G Enticement to Accept Restrictive Measures

It is unfair and unethical to entice or threaten Aboriginal organisations by making funding, resources and infrastructure contingent on accepting restrictive measures such as income management. As it was shown in Chapter 2, Hope Vale's Council was offered housing and associated assistance by the federal government if it entered into a welfare reform agreement with it. Clearly this would impact on decision-making, and was thus an unfair and unethical action. Similarly, Aurukun Council was told that the Community Development Employment Project would continue if it agreed to the CYWR.

H Excessive Spending on Ineffective Measures

The Queensland government's insistence on Hope Vale's involvement in the CYWR is even more difficult to understand given the disproportionate amount of money spent on the CYWR, and its continuation despite a lack of identifiable outcomes. The other CYWR communities that were also intended to benefit from the money invested in them, had no control or influence over how the money was spent.

I Lack of Strength-based Approaches

By nature, deficit-based approaches ignore the importance and strength of Aboriginal culture, and its power to provide focus for those who live both inside and outside the communities. These strengths should be acknowledged by governments, and should be understood as providing support for Aboriginal people to make decisions for their communities in their own way and with their own organisations, rather than governments intervening.

J Promoting Western Legal Constructs as Suitable for Aboriginal Peoples

I have discussed the institutional nature of racial discrimination in this thesis. Its enduring nature raises more complex issues than just the existence of racist legislation. The western legal system does not accommodate Aboriginal cultures, and as a result continues to support racial discrimination. Adaptations of courts and processes – such as those seen in sentencing and in the Family Responsibilities Commission (FRC) – are western constructs. They are processes, policies or institutions that have not been designed by Aboriginal

peoples, but imposed on them. Employing Aboriginal people to apply western laws through a western organisation acts to mask the heavy involvement of the state.³⁵ In any case, the FRC's head commissioner and deputy commissioner are required to hold western legal qualifications, despite the FRC lacking the usual level of transparency of courts, tribunals and commissions. While the inclusion of elders in decision-making is a positive step, a model based on engaging with individuals and cultural aspects of each relevant community would be more appropriate, effective and conducive to self-determination.

The next section relies on the issues raised above as a basis for recommendations for change. Most of these recommendations focus on changes to legislation, but also include change to socio-political understandings of inclusion and self-determination.

IV RECOMMENDATIONS FOR CHANGE

Identifying issues, as I have done above, can direct focus to areas requiring change. In this section, I make a number of recommendations for reform; however, some of these are ideals and are unlikely to occur in Australia. Nonetheless, I make them in the hope that they will assist in eliminating all racial discrimination in Australia, including systemic discrimination against Aboriginal peoples. In saying this, I understand that a cultural and political shift is required so that Aboriginal peoples and their cultures are respected as distinct, rather than expected to comply with the standards of mainstream culture. While I propose these recommendations, I acknowledge that this is a task requiring Aboriginal peoples' input and direction. Any legal answer must deal with the entrenched perspective of western dominance by the legal system. A legal answer is inadequate and should be seen as supporting policies and processes to eliminate discrimination and promote substantive equality. Changes in the legal process will not necessarily change community attitudes. However, prohibiting racist legislation is a start and will exemplify that the law and consequently, related institutions, should not be racist.

³⁵ Chris Cunneen, 'Problem: Police' (1992) 1(139) *Australian Left Review* 27.

A Repeal s 51(xxvi) Constitution

First, s 51(xxvi) *Constitution* should be repealed to avoid the possibility of parliament using it to enact laws which restrict the rights of Aboriginal peoples, or are detrimental to them, and courts finding that adverse laws may be valid.³⁶

The *Constitution* is unique because it is Australia's foremost legislation. A referendum is required to amend the *Constitution*, which would require a majority of votes in a majority of states. This makes it both difficult to remove s 51(xxvi) and to add provisions to include human rights protections.

B Constitutional Bill of Rights

An associated constitutional Bill of Rights, similar to those in the US, Canada and South Africa, but adapted to Australia's circumstances, would be ideal. Aboriginal people would need to be involved in its drafting to ensure the inclusion of provisions compatible with their needs, unique history and culture. In protecting or promoting rights, it is important to ensure that racial discrimination is prohibited. The concepts of substantive equality and discrimination must be incorporated into the Bill of Rights.

C Human Rights Act

A Queensland Human Rights Act is presently being canvassed and may be more realistic and appropriate for Queensland's Aboriginal and Torres Strait Islander peoples than a federal Human Rights Act, but would have limited effect as it would only apply to Queensland legislation and could be overridden by Commonwealth legislation. Strong legislation promoting human rights and prohibiting all forms of discrimination is still required at a federal level. Its principles should include: self-determination; participation in decision-making,

³⁶ *Western Australia v Commonwealth* (1995) 183 CLR 373, [98] (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh, JJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 186 [14] (Gibbs, CJ), 243 [1] (Aickin J), 209 [6] (Stephen J), 244 [1], 244 [2] (Wilson J), 262 [18] (Brennan J).

based on free, prior and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination.³⁷

A Queensland Human Rights Act should require review of proposed legislation and past legislation that is potentially discriminatory to ensure human rights compliance by a parliamentary committee. A report would be drafted by the committee and provided to parliament. Part of this process should include an assessment by the committee of the legislation's compliance with *UNDRIP* where relevant to Aboriginal peoples. Additionally, an applicant should be able to apply to the Supreme Court for a declaration where a statutory provision is thought to be inconsistent with a human right.³⁸ Bills should not be debated by Parliament until it has received and considered the parliamentary committee's report. Legislation should also be required to provide a statement of its compatibility with human rights. The term 'legislation' needs to be better defined to include all forms of legislation so that regulations are included.³⁹ A practice of the Queensland Liberal National Party was to amend legislation, omitting detail and then later placing important provisions in regulations. While public consultation usually occurred in relation to the amendments, proposed provisions for regulations were not made available for public scrutiny.

A Human Rights Act – whether federal or state – would require an avenue to challenge breaches of human rights of individuals or groups. It would also include a provision requiring a purposive interpretation, and that it be interpreted in a manner compatible with the promotion of human rights. The enactment of relevant provisions would also require an approach that includes reference to relevant international treaties and cases, international committee recommendations and other expert opinions. Legislation directed at restricting

³⁷ Mick Gooda, Australian Human Rights Commission, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), 92-93
<https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_native_title_report_2013.pdf>.

³⁸ Section 33 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) includes a process whereby when a question of law arises in a court or tribunal proceeding that relates to the application of the Charter or with respect to the interpretation of a statutory provision in accordance with the Charter, the question may be referred to the Supreme Court by a part or the court or tribunal.

³⁹ George Williams and Daniel Reynolds, Submission Number 6 to the Legal Affairs and Community Safety Committee on *Human Rights Inquiry for a Human Rights Act*, 11 March 2016.

the rights of Aboriginal peoples and other cultural minority groups must be prohibited. The same clauses should be included in the *RDA*, with the requirement to apply substantive interpretations of equality and discrimination.

A state or federal Human Rights Act should promote equal enjoyment of human rights by Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples must be involved in the drafting of provisions which recognise them as first peoples, and the unique rights they are entitled to enjoy.

D Amending the Racial Discrimination Act 1975 (Cth) so that it Cannot be Overridden

Even if a Constitutional Bill of Rights were passed and the *RDA* was to continue, the *RDA* would still require strengthening. It has been seen that, as an ordinary piece of legislation, the *RDA* can be overridden by later federal legislation and parts of it suspended at the will of parliament. To overcome these weaknesses, the *RDA* could include a provision stating that it cannot be overridden by later legislation, or amended, unless the subject matter of that legislation or amendment is the prohibition of racial discrimination, and the provisions replacing *RDA* provisions provide stronger protections and strengthen the *RDA*, rather than remove its power. A provision should be included stating that legislative provisions or other measures directed at or which disproportionately restrict rights of Aboriginal peoples are racially discriminatory and are therefore prohibited. This last provision must be worded carefully. Guidance could be gained from the South African *Harksen* test. It was seen in *Bropho v Western Australia*⁴⁰ that the court refused to acknowledge that Aboriginal people were targeted by the closing of the reserve where they lived. Rather, the court accepted the argument that the closure of the reserve was meant to address dysfunction in the community, despite Aboriginal people encompassing most of that community.⁴¹ The same argument could be made in Cape York, where each community constituted by a high proportion of Aboriginal peoples was subject to income management, only targeting those asserted to have not complied with social responsibilities.

⁴⁰ [2007] FCA 519; [2008] FCAFC 100.

⁴¹ *Bropho v Western Australia* [2008] FCAFC 100, [71]-[72] (Ryan, Moore and Tamberlin JJ).

E Requiring Proof that a Measure is a Special Measure

A provision should be included in the *RDA* requiring those asserting a special measure to bear the burden of proving the character of the measure, providing evidence that the measure is capable of achieving its objects and that the measure is for the adequate advancement of the Aboriginal people it is directed at. The party challenging a measure's character as a special measure must then provide evidence to rebut the assertion that it is a special measure. Special measures require connection to their objectives; therefore, reference to an *RDA* provision should be included in the challenge, requiring that the objectives of measures intended to be a special measure are stated in clear terms. In the case of most special measures this should be obvious and not burdensome.

F Requirement in the Racial Discrimination Act 1975 (Cth) for Consultation and Consent

Provisions should be included in the *RDA* requiring consultation and consent by Aboriginal peoples to measures likely to disproportionately affect them. The provisions should include recourse where measures are implemented without consultation and consent, and where the measure is deemed invalid.

It must be up to Aboriginal peoples to determine what constitutes adequate consultation; different Aboriginal peoples may define consultation differently, and may require differing forms and standards based on the subject matter. Article 19 *UNDRIP* requires consultation with indigenous people through representative bodies. At present, there is no representative body for Aboriginal peoples in Australia funded and resourced to enable consultation; therefore, Aboriginal peoples should be supported to provide a model or forum in which to be heard. This should not be an advisory body selected by government to respond to questions or provide information sought by government. Aboriginal peoples have the best knowledge about who should be part of these organisations and they should decide this and their governance structures rather than governments.

G Compliance with the United Nations Declaration on the Rights of Indigenous Peoples

Reference and guidance by parliament and government from *UNDRIP* could greatly assist in enabling Aboriginal peoples' participation, choice and control of measures for them. This could be done with reference to its principles of self-determination; the participation of Aboriginal peoples in decision-making, strengthened by good faith consultation and consent; respect for protection of Aboriginal peoples' cultures; and non-discrimination and equality. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, suggests that *UNDRIP* should be the starting point for all legislation, policies and programs. He identifies a requirement for a national implementation strategy implementing *UNDRIP* and an audit process to assess compliance.⁴²

Institutional racism must be addressed. Western laws have been used to control Aboriginal peoples since colonisation, and the imposition of these laws has had longstanding adverse consequences. The western legal system offers minimal acknowledgment of Aboriginal peoples and their cultures; it needs to change so as to include traditional Aboriginal forms of law and justice.

Aboriginal people must be included in designing legal structures and legislation. The FRC local commissioner roles provide acknowledgement of the importance of Aboriginal elders and their roles in their communities. Their selection includes the Minister consulting with the local community justice group or if one does not exist, 'as many relevant community groups for the area as the Minister considers appropriate.'⁴³ The Minister then chooses the Commissioners and must consult with the FRC Board⁴⁴ before recommending them to the Governor in Council.⁴⁵

⁴² Mick Gooda, Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), 161
<<https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf>>.

⁴³ *Family Responsibilities Commission Act 2008* (Qld) s 14(2).

⁴⁴ *Family Responsibilities Commission Act 2008* (Qld) s 13.

⁴⁵ *Family Responsibilities Commission Act 2008* (Qld) ss 12(2), (3).

Elders and their communities need to decide their own structures and how their laws apply. This requires governments to acknowledge that Aboriginal peoples have their own culture, law and rules, and that it is appropriate and indeed necessary that they be allowed to determine their futures. It should be Aboriginal peoples' choice whether they want western legal systems, or adapted structures like the FRC, or their own structures. I acknowledge that this recommendation is not well defined because it is for Aboriginal peoples to decide if they want legal structures, or some other way of practising their lore and rules.

H *Strength-Based Rather than Punitive Approaches*

Governments must rely on strength-based approaches derived from the relevant Aboriginal peoples when suggesting legislation, policy and programs. These approaches must focus on existing strengths and capabilities to find solutions, rather than being punitive and fault-finding. Promotion of human rights is inherent to strength-based approaches, rather than a diminution of rights as seen with income management and alcohol restrictions. Again, Aboriginal peoples must be involved in the design of strength-based approaches, and if what is offered by governments is not wanted or needed by those peoples, governments should accept this.

These changes can only occur if politicians acknowledge the issues I have identified as detrimental to Aboriginal peoples. Rather than spending large amounts of money on programs the government thinks are beneficial to Aboriginal peoples, Aboriginal people must be supported and adequately funded to determine their own future, including the power to implement their own programs based on what works best for them.

V CONCLUSION

The aim of this thesis was to examine whether the High Court would find the CYWR income management measure a special measure within the terms of the *RDA* and *ICERD*. Given its factual similarities to income management of Aboriginal people in Cape York, I critiqued the processes the High Court used

in making their 2013 decision in *Maloney* – an important precedent in predicting the outcome of a challenge to income management.

The reason for this analysis and interest in income management arises because of the immediate suspicion of racism raised by legislation directed at restricting the rights of Aboriginal peoples as it has extensive consequences. However, laws can be complex and judicial interpretation is not always straightforward. The method of interpretation of what is racial discrimination in Australia – especially that based on *Maloney* – while arriving at an outcome acceptable to the court and parliament, is unlikely to be acceptable to Aboriginal peoples. Rather than promoting the purpose of the *RDA* and *ICERD*, the literal and formal interpretation methods applied by the court supports the implementation of racist legislation, and therefore play a role in perpetuating racial discrimination against Aboriginal peoples. It is concerning that the very human rights instruments designed to protect people from racial discrimination are used to allow and even justify racial discrimination by confirming its characterisation as a special measure. This enables a new style of special measures that are justified because they are said to promote the rights of the vulnerable, even if they restrict the rights of others.

While these new special measures are apparently accepted by parliaments, the court and parts of the community, they play a similar role to previous racist legislation that has been used to control Aboriginal peoples. It is important to reflect on the past and to understand the parallels with the past treatment of Aboriginal people. Neither the legislature nor the court seem to see this as their role, even though it is crucial to reflect on the historical effects of legislation on Aboriginal peoples' rights while assessing and amending existing legislation, and bringing in new legislation that is not racially discriminatory.

There has been no clarification by the court as to what parameters for future special measures would look like, or what is required for a measure to be prohibited because it is racially discriminatory. Without a significant shift in the court or parliament's approach, it is likely that future measures will be enacted that would further restrict Aboriginal peoples' rights. There is no other minority

group in Australia which endures discriminatory treatment to the same extent as Aboriginal peoples.

Australia has taken an insular approach to identifying racial discrimination against Aboriginal peoples. Both parliaments and the court would benefit from examining approaches to identifying and prohibiting racial discrimination, such as those used by other countries with similar colonial histories to Australia, including the US, Canada and South Africa. Each of these countries have different approaches, including specific methods of identifying racial discrimination, especially where rights are restricted. However, it is likely that despite these differences, each country's courts would hold the CYWR income management measure to be racially discriminatory and therefore invalid. International expertise expressed in the form of United Nations Committee reports, while rejected in *Maloney*, is valuable in providing an international interpretation.

A broader context supports Australia's judicial interpretation. This includes deficit discourse, which describes Aboriginal peoples and their communities as dysfunctional, justifying a form of new paternalism which requires Aboriginal people to be "responsible" and adhere to western cultural values. Rather than acknowledging the ongoing damage caused by Australia's racist history of colonisation and its effects on Aboriginal peoples, courts and parliaments place direct blame on Aboriginal peoples, who are portrayed as the problem. Present racist policy, legislation and practice promotes western culture and aims to assimilate Aboriginal peoples into the mainstream community. While in this thesis I acknowledge that this encompasses institutional discrimination, it also constitutes the continuation of colonisation.

Governments must acknowledge the strengths and needs of Aboriginal peoples when drafting legislation, and their right to self-determination must be recognised and respected. Self-determination must flow from Aboriginal peoples' perspectives, rather than being decided by governments. If governments are sincere about improving Aboriginal peoples' lives, they must provide funding to allow Aboriginal peoples to implement self-determination through their own legal structures and processes.

This chapter discussed a number of issues identified in this thesis, and has provided recommendations to address these issues and implement change. Without dramatic change, racial discrimination against Aboriginal peoples will continue. Aboriginal peoples have continuously advocated for their rights; however, their voices are not often heard or taken into consideration. For many years, Aboriginal people have been without their own representative body⁴⁶ through which they can advocate for change and provide services to their communities. While advocacy has never ceased and new bodies have formed, there has never been the same level of collective influence as when the Aboriginal and Torres Strait Islander Commission existed. Catering for Aboriginal peoples' distinct cultures and needs is now mainly conducted by mainstream organisations, except for some important indigenous health and legal services. The latter services, while crucial, are generally under-funded and react to needs, rather than being able to focus resources on lobbying to change government policy and practice. Aboriginal peoples need to have their own mechanisms to hold governments accountable, to provide their own services in their own way, and to drive the change required to direct and improve their lives.

The CYWR income management regime exemplifies Australia's treatment of Aboriginal people as inferior, continuing Australia's punitive approach towards Aboriginal people with the aim of gaining their compliance. Australia requires a cultural and political shift in the way it views Aboriginal peoples if racial discrimination is to be eliminated. Aboriginal peoples and their cultures must be acknowledged and respected as an integral part of their identity, as well as a central part of Australia's history and identity. Until this shift occurs, legislative change is unlikely to be effective in eliminating racial discrimination and promoting the rights of Aboriginal peoples.

⁴⁶ The Aboriginal and Torres Strait Island Commission closed in 2004.

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