Review of Stronger Futures in the Northern Territory Act 2012 and related legislation

A submission prepared for the Parliamentary Joint Committee on Human Rights

---

Prepared by the

Jumbunna Indigenous House of Learning (Research Unit)

University of Technology, Sydney

13 October 2014

Dear Committee Members,

RE: 12-Month Review of the *Stronger Futures in the Northern Territory Act 2012* ('the Laws') and related legislation.

We welcome the opportunity to contribute to the Parliamentary Joint Committee on Human Rights ('Committee') review of the Laws.

Jumbunna Indigenous House of Learning, Research Unit ('Jumbunna') undertakes research and advocacy on Indigenous legal and policy issues of importance to Indigenous people, their families and their communities. Jumbunna personnel have experience as researchers, academics and practicing solicitors and have experience working with numerous Aboriginal communities who have experienced the impacts of the laws.

We note that current and former Commonwealth Governments have acknowledged the discriminatory nature of the Laws but have argued that they are 'Special Measures' and thus forms of differential treatment permissible at law.

Jumbunna rejects this characterisation and submits that the failure to secure the active participation of the affected Indigenous communities in the design and implementation of the measures precludes the characterisation of the Laws as 'Special Measures', and renders any discriminatory treatment in breach of Australia's obligations under international law.

State parties' duty to consult with Indigenous people and peoples in relation to decisions that affect them

The obligation of States to effectively consult with Indigenous peoples on decisions that affect them is 'firmly rooted in international human rights law'.[1] The duty is unambiguously stated in a number of international instruments including articles of the United Nations Declaration on the Rights of Indigenous People ('the Declaration') and ILO Convention No 169, and is fundamental to the core United Nations human rights treaties, the International Convention on the Elimination of All Forms of Racial Discrimination ('the Convention Against Racial Discrimination') and the

[1] Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people,* UN Doc A/HRC/12/34 (15 July 2009) [38] <http://www2.ohchr.org/english/issues/indigenousIndigenous/rapporteur/annualreports.htm>.

International Covenant on Civil and Political Rights ('ICCPR').[2]

The importance of the duty to consult with Indigenous peoples is heightened when a government claims that its actions, including the enactment of legislation, are Special Measures. Special measures are forms of favourable or preferential treatment described by the UN Committee on the Elimination of Racial Discrimination ('CERD') and international law experts as 'affirmative measures', 'affirmative action' or 'positive action,'[3] intended to ensure the adequate advancement of certain racial groups who require support to enjoy their human rights in full equality.

In order to discern the obligations of state parties under the Convention against Racial Discrimination, the Convention should be read together with relevant general recommendations published by CERD. A 'General Recommendation' is an authoritative statement by CERD on the interpretation of the rights, duties and standards contained within the Convention. Relevantly, CERD has published General Recommendation 32 and General Recommendation 23 that detail the obligations of state parties in purporting to enact 'Special Measures', and obligations as they apply to Indigenous peoples respectively. Both general recommendations emphasise the duty of state parties to consult with affected Indigenous people/s in relation to any action that affects them.

The specific obligations of state parties relating to Special Measures set out in General Recommendation 32 stipulate that a Special Measure must be, inter alia, "*designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities".*[4] Arguably, where that duty is not met, notwithstanding any domestic legal declarations, a law is not a Special Measure under international law.

We note that the scope and content of the duty may vary according to specific circumstances, however Jumbunna's analysis of the laws leads to the conclusion that this duty was not met at the time the laws were enacted, and has not been met since.[5] In these circumstances, it cannot be said that the laws comply with Australia's obligations under international law, or that they fully give effect to the obligations arising under the Convention Against Racial Discrimination.

---

[2] Ibid [38]-[39].
[3] CERD, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [12].
[4] Ibid [18].
[5] See for example, Alison Vivian, 'The NTER Redesign Consultation Process: Not Very Special', (2010) 14(1) *Australian Indigenous Law Review*, 46; Alison Vivian & Ben Schokman, 'The Northern Territory Intervention and the Fabrication of 'Special Measures'', (2007) 13(1) *Australian Indigenous Law Review*, 78.

In March 2012, Jumbunna prepared a report titled "*Listening but not Hearing: A response to the NTER Stronger Future Consultations June to August 2011*". A copy of that report is **enclosed** for the Committee's reference. We consider that observations in that report remain relevant to the legality and propriety of the Laws.[6] First and foremost we observed that the legislation was enacted on the basis of a flawed consultation process designed and enacted without sufficient involvement of affected Aboriginal communities in each stage of the consultation process. The Government, in enacting the Laws, failed to meet its obligations to enter into good faith negotiations with Aboriginal communities to achieve free, prior and informed consent of communities, rendering the Laws incapable of fulfilling the requisite consultation standards.

As a consequence of this, and has been stated continually by international experts, the enactment and maintenance of the Laws has resulted, and continues to result, in Australia's breach of its international law obligations.

Maloney v The Queen [2013]

We note the views expressed by the Committee in paragraphs 1.112 to 1.115 of the Eleventh Report of the committee released in June 2013 of the need to separate human rights obligations under domestic law and international law. In our view, this analysis is correct.

In line with the Committee's observations, we note that caution should be exercised in adopting an expansive interpretation of the *Maloney* decision. In particular, we are concerned that the effect of the *Maloney* decision may be to declare lawful a domestic legal regime that does not in fact accord with the contemporary standards of International law. This appears to be so, notwithstanding that the purpose of the *Racial Discrimination Act 1975* ('RDA') is to incorporate Australia's obligations under the Convention Against Racial Discrimination into domestic law.

Whilst *Maloney* is authority for the applicable criteria for determining what constitutes a 'Special Measure' for the purposes of Australian law, it does not assist in addressing the issue of whether the Laws accord with Australian governments' obligations under international law. In interpreting the provisions of the RDA, the Court rejected an argument from the Appellant that the Court should have regard to the development of contemporary International law norms. The result is that the

[6] The content of the 'duty to consult' has been spelled out by Prof James Anaya, the former Special Rapporteur on the Rights of Indigenous Peoples in his 2009 Annual Report: above, n1 [36]ff. Importantly, in the context of evaluating the broad social and economic initiatives of the Laws, the Special Rapporteur observed that compliance with the duty to consult does not merely fulfil human rights obligations but has the practical benefit of avoiding potentially detrimental outcomes: at [36].

current leading domestic judicial declaration on the RDA is not compatible with the international law obligations of state parties.

Of concern also is the degree to which the Court limited the role of judicial oversight in determining the existence of the substantive criteria of Special Measures. The Court held that its role is limited to ensuring that a State's legislative assertion that a Special Measure is necessary and/or enacted for the sole purpose of advancement was one that is 'reasonably open'. In relation to the issue of alcohol, the Court concluded that fact finding may require the Court to rely upon what it perceived as 'notorious facts'[7] and stated that the sources it could have regard to in determining facts in the matter needn't be 'official, public or authoritative' and could include '*inferences…drawn from the regulations and statutes themselves'*.[8]

The consequence of this decision is that a State can effectively 'declare' that a measure is a Special Measure through statements of intent made in the legislative process, and the Court will not assess the nature of the measure against objective criteria. The judgment preserves within the Australian polity the principle of the supremacy of Parliament, but does little to ensure the international human rights of those who may face racial discrimination.

These submissions have been prepared by Alison Vivian and Craig D. Longman on behalf of Jumbunna IHL.

Yours Sincerely,

Prof. Larissa Behrendt

[7] *Maloney v R* [2013] HCA 28 (19 June 2013) [21] (French CJ).
[8] *Maloney v R* [2013] HCA 28 (19 June 2013) [353] (Gageler J)