Stop the Intervention Collective Sydney (STICS) Forum

NSW Teachers Federation Building, 23-33 Mary Street Surry Hills NSW

The Failure of the Rudd Government's Aboriginal Policy

An Address delivered by Professor the Honourable Alastair Nicholson AO RFD QC

Honorary Professorial Fellow, Faculty of Law, University of Melbourne

Former Chief Justice, Family Court of Australia

Monday 29 March 2010

I commence by paying my respects to and acknowledging the Gadigal clan of the Eora Nation and its elders, the traditional custodians and owners of the land that we stand and meet on tonight. I will honour your country, walk softly and leave no footprints.

I also acknowledge the representatives of other Aboriginal nations represented here today and thank them for their support. Thank you to everyone else for showing your support for democracy in this country by being here to support this forum.

I would like to commence my remarks by quoting from an inspiring speech delivered by an Aboriginal woman, Christine Fejo-King at the launch of the book "This is What We said" in Canberra this year. She said:

"For so long Aboriginal Australians lived under the policy of 'protectors', it almost seems that we have gone full circle and have arrived back at that point. A state of affairs spoken of by a number of people in this book! Will we in the future be taken back to the time when the approval of the 'Protector of Aboriginals' must be sought for our movements, our education, employment and our marriages as noted on my parents marriage certificate here, or the 'Register of our Births' as shown here on my grandmothers birth certificate which I have permission by the matriarch of our family to raise and to show. Will we have to seek exemption from a new 'Protector of Aboriginals' before we can again experience life outside the policies of the Northern Territory Intervention? We will not do it! We are proud of our law, our culture and the resilience of our peoples.

Free us from your paternalistic yoke, we are not children, stop privileging the voice of so called Aboriginal leaders (your tag, not ours) who aren't even from the Northern Territory and have no right to speak above the voices of our elders and community leaders who are on the whole good and honourable men and women. Yes there is a difference of opinion about income management but why should that be surprising? Give people a choice and support them where necessary to manage their money, but do not disempower and shame us more than you already have and are currently doing.'

I would also like to acknowledge the group 'concerned Australians', who produced that book, which is available here tonight and urge you to buy it and distribute it to as many people as you can.

I particularly acknowledge the contribution of Michele Harris from that organisation to the production of the report "Will They Be Heard" and to this book. You will also have received a flyer which I urge you to sign as an expression of opposition to this legislation. I also acknowledge the hard work of STICS and particularly Sabine Kacha and the others who have made this forum possible.

The following quote is I think apt to tonight's subject matter

"The Australian is forcefully loquacious, until the moment of expressing any emotion. He is aggressively committed to equality and equal opportunity for all men, except for black Australians. He has high assurance in anything he does, combined with a gnawing lack of confidence in anything he thinks."

Robin Boyd ***'The Australian Ugliness' Text Publishing2010***

It comes from a book written over 50 years ago, which is to be re-launched in Sydney this week. I was both struck and saddened by the appropriateness of the quote to the situation that we face today. Before 2007, one might have thought that it was an interesting reflection of a time that has past. Unfortunately John Howard and Mal Brough made that relevant again today when they launched the Intervention in the Northern Territory.

They were truly an unholy combination. Howard the conservative and cunning political opportunist, who had demonstrated over 11 years a lack of empathy and understanding for the Aboriginal people, but who was on the ropes politically with an election looming. Brough, the can-do former military man who thought that all the Aboriginal people needed was the sort of direction and discipline that only he could provide. Together they provided a recipe for disaster, for which they must bear full responsibility.

Unfortunately they knew the bulk of the Australian people well and in particular that their egalitarianism did not extend to black Australians. Like the asylum seekers they were not people at all, but rather beings 'out there' who needed to be controlled and made to conform. By throwing into the mix spurious claims

that it was all being done to protect the children, Howard and Brough were assured of popular support.

This factor also meant that the Opposition Labor Party, looking forward to what it saw as an election win later in the year, was not prepared to let an issue of principle stand in the way if it meant giving Howard some oxygen. Accordingly, it supported the Intervention. There lies part of the cause of our present problem.

Pat Dodson had something different to say:

"The tragedy of the Howard Government's eleven-year hold on power is that Indigenous policy has focused on destroying the potential for this nation to respect and nurture the cultural renaissance of traditional Indigenous society. Public policy that celebrates Indigenous culture has been shunned.

We are left with a vague sense that the problems of the present-day crisis have no history and that the way forward is for Indigenous people to abandon their identity and be absorbed into European settler society".

He continued:

"In this conservative world view, population movements from remote communities or welfare dependent towns to urban environments with economies struggling with or sustained by the global market are simply par for the course. Such communities sink or disappear. Forty thousand years of a society founded upon different presuppositions to the Greco-Roman tradition and the Protestant work ethic of industrialisation is finally colliding head on with the believers of the meteor called the global market economy.

The benign use of government language — mainstream services, practical reconciliation, mutual obligations, responsibilities and participation in the real economy — cloaks a sinister destination for Australian nation building.

The extinguishing of Indigenous culture by attrition is the political goal of the Howard Government's Indigenous policy agenda. Our nation is confronted with a searing moral challenge."[1]

The question that the Rudd Government needs to answer is why it will not confront that searing moral challenge and why is has continued to roll over like a puppy and continued to support Howard's Intervention?

In November 2007, some seven days after Labor's election win, I delivered the Lionel Murphy memorial lecture for that year at Parliament House, Sydney. The mood that night was suitably euphoric. When I wrote the lecture I spent a considerable amount of time attacking the Intervention and that seemed to be well received by a largely Labor supporting audience.

I commented in relation to the Intervention:

The breadth of the legislation is frightening and it significantly overrides the rights of many Indigenous people in ways that would not be tolerated by the ordinary Australian community. It is discriminatory and racist and bundles all Indigenous people together as potential pornographers, child molesters and persons habitually addicted to the excessive consumption of alcohol.

As to the future under the Rudd Government I said:

It is to be hoped that the Rudd Labor Government will approach the implementation of this legislation in a much more sensitive manner and with real consultation with the Indigenous people. Unfortunately, its past support for the legislation may operate to restrict amendment or repeal of some of its more offensive aspects. However, it is open to it to take a much more inclusive approach to the Indigenous community and to hold proper consultations with it.

It is the Rudd Government's abject failure to meet those expectations that brings us here tonight.

What the Rudd Government did commit to do was to reinstate the Racial Discrimination Act in those communities affected by the Intervention. This it has failed to do to date and will continue to fail to do with its new legislation.

It is that election promise with which it purports to comply in introducing the ***"Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009".***

For reasons that I will demonstrate, that Bill is a sham which, in the guise of reintroducing the Racial Discrimination Act to those communities, in fact perpetuates its repeal so far as the more objectionable aspects of the Intervention are concerned.

The introduction of this legislation follows upon the holding of purported 'consultations' by the Government with Aboriginal people in the affected areas of the Northern Territory. Those consultations were similarly a sham as Professor Larissa Behrendt and her colleagues from the Jumbunna Indigenous House of Learning at UTS pointed out in their report "Will They Be Heard" in November 2009.

They identified the following deficiencies in the 'consultations':

38. "The deficiencies in the process include:

a. Lack of independence from government on the part of the people undertaking the consultancy;
b. Lack of Aboriginal input into design and implementation;
c. Lack of notice;
d. An absence of interpreters;
e. The consultations took place on plans and decisions already made by the government;
f. Inadequate explanations of the NTER measures;
g. Failure to explain complex legal concepts; and
h. Concerns about the government's motives in implementing consultation.

39. These deficiencies mean that there has been a failure to consult with Indigenous people, bringing into question the credibility of alleged support and rendering invalid any potential claim that the consultations amount to genuine 'consent'."[2]

That report was launched by the Rt Hon Malcolm Fraser in Melbourne in November 2009. The Government response was a torrent of 'spin' which failed to answer the criticisms in the report and ignored the fact that this report was based upon the only hard evidence available of the nature of the 'consultations', namely a comprehensive video coverage of them at four significant Aboriginal communities in different parts of the Northern Territory.

However, the Government obviously had concerns about the effect of the Racial Discrimination Act upon the program of income management that it was determined to continue under the Intervention, because in the new Bill it has purported to extend the concept to all welfare recipients in Australia that the Minister designates on the basis of area, thus seeking to avoid the criticism that the Bill is discriminatory on racial grounds.

This is a graphic demonstration of the lengths to which this Government is prepared to go to protect this central feature of the Intervention. I have described it as a ruse to get around the Racial Discrimination Act by appearing to make it potentially applicable to all welfare recipients. While I think that this is correct, its potential is nevertheless frightening in the hands of this Government or its successors. It means that henceforth, recipients of welfare payments will be beholden to the decisions of public servants as to where and how they spend their money. They will be effectively treated a supplicants

rather than people who have a legal entitlement to financial support from the community as they are now.

As to income management, I consider that the retention of income management principles and its extension to all welfare recipients in designated areas demonises and in effect punishes welfare recipients as a class. Such blanket measures are sloppy, cheap and unfair solutions that reflect lazy politics.

It is appropriate at this point of my address that I turn to some points about the new Bill. Its status is that it has been the subject of a Senate Committee report which gave it majority approval and is awaiting passage at the next parliamentary sittings. It will obviously pass as it is opposed only be the Greens.

While these facts leave me with feelings of anger and despair, the fact that it has not yet passed leaves a window, albeit a tiny one, for public pressure to be placed upon the Government to avoid the adoption of a course so opposed to recognised principles of human rights and racial equality.

In this address I largely concentrate upon the income management measures contained in the proposed legislation, but it is worth noting that many other objectionable features of the Intervention have not been addressed by the Government, nor were they addressed during the so-called 'consultations' by the Government with the Aboriginal communities.

One obvious one is the differential treatment of Indigenous persons as to sentencing and bail applications with respect to issues of customary law, which is obviously discriminatory. Effectively, judges are not permitted to take issues of Aboriginal customary law into account in making sentencing and bail decisions. They can however take such matters of custom into account in dealing with people of any other ethnic background. The Government has recently indicated that it will not repeal this Howard era legislation. I regard this as an extraordinary and reprehensible decision, which seems to reflect the reality of this Government's approach to Aboriginal people.

This reality conflicts with the public position of the Government in respect of the apology and a recent highly publicised launch of a new program of recognition of the Aboriginal community. The question is what does the Government really stand for? Regrettably, I think that the answer can be found in its actions rather than its words.

This becomes even clearer upon a detailed examination of the Bill.

In considering the Bill it is necessary to pay some regard to historical issues.

I refer first to some of the relevant provisions of the ***Racial Discrimination Act 1975***.

S 9 of that act provides:

"***(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.***"

S 10 provides:

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Article 1, Para 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which appears as a Schedule to the Act and upon which the Act is based and which is incorporated into domestic law 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 have been achieved."

Article 2.2 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 for different racial groups after the objectives for which they were taken have been achieved."

The relationship between special measures, including these two Articles and the RDA is fully discussed in "Will They Be Heard?"[3] As was there pointed out, one of the characteristics of special measures is that they are designed and implemented on the basis of *prior consultation* with affected communities and the active participation of such communities and may, if they have a potentially negative effect, only be special measures if enacted with the consent of the affected people.[4]

It is apparent that these provisions of the RDA and the requirements associated with special measures presented great difficulties to the Howard Government's NTER proposals in 2007 and I now turn to the legislation that put the emergency response into effect.

It was apparent to those advising the then Government that this legislation could not sit comfortably with the RDA because it clearly did involve racial discrimination against Aboriginal people in a number of ways too numerous to set out here but including the so called Income Management Regime.

It therefore became necessary to nullify the provisions of the RDA so far as those subject to that legislation were concerned and this was done, with the support of the then Opposition.

Ss 132 of the NTERA Act provided as follows:

"Racial Discrimination Act

(1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the Racial Discrimination Act 1975 , special measures.

(2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975 .

(3) In this section, a reference to any acts done includes a reference to any failure to do an act."

The other legislation underpinning the NTER contained similar provisions.

What is significant is that the legislation first asserted that what was being done in the NTER constituted 'special measures'. This was untenable and it is highly unlikely that the simple assertion that the measures were special measures within the meaning of the Convention would have been upheld by a court. The least of the problems would have been the difficulties involved in the complete lack of any consultation that accompanied the legislation either before or after it was enacted. It thus became necessary to effectively repeal the RDA in the areas affected by the NTER and this was achieved by s 132 (2). For good measure the Government simply overrode any inconsistent NT laws in s 133.

The Rudd Government's amending Bill repeals all of these sections in an apparent attempt to indicate compliance with its election promises.[5] However, a careful examination of this legislation reveals how qualified that compliance is.

S 4 of schedule 1 of the amending Bill provides:

"To avoid doubt:

> ***(a) the repeal of sections of an Act by this Schedule does not have retrospective effect; and***
>
> ***(b) section 8 of the Acts Interpretation Act 1901 applies to the repeal (unaffected by any contrary intention)***

At first sight this appears to be unexceptionable. However what it does is to preserve the legal effect of everything that was done under the NTER legislation while protecting the Commonwealth from any claims for damages that might otherwise have arisen.

At the same time it highlights the ephemeral nature of the protection afforded by the RDA to victims of racial discrimination in Australia in that it confirms that such protection is very much in the hands of the Government of the day. This falls a long way short of the sort of constitutional guarantee that would be afforded by a Bill of Rights.

However an examination of the further provisions of the Bill reveals just how limited the effect of the so called repeal is. Nowhere is this more apparent than in the area of income protection.

Income Protection

Schedule 2 of the Bill headed "Income management regime" first operates to repeal the definitions of welfare payments contained in s 123TC of the Social Security (Administration) Act.

The Bill in s 28 inserts a new Category E welfare payment definition into s 123TC that removes any reference to Aboriginal allowances such as ABSTUDY but is defined more broadly.

It repeals definitions of declared relevant, exempt and relevant Northern Territory areas from s 123 TC. Most importantly, it repeals s 123 UB of the Social Security Act which defines the persons subject to the income management regime by their presence or otherwise in relevant Northern Territory areas and s 123 UG which enabled the Secretary to declare certain people to be '**exempt Northern Territory persons**'. Various other consequential amendments are made directed at removing the association between income management and the Northern Territory in an attempt to show that the new legislation is not in form discriminatory to Aboriginal persons.

However, the real test of the sincerity (or lack of it) of this approach is to be found in the 'Saving and Transitional' provisions of the new Bill and particular in Clause 23 because, despite the repeal of s 123 UB referred to above, it is preserved with full force and effect in relation to persons who were subject to it in the NT for a further period of 12 months from the date that the Bill becomes law. For these people, who include most of the Aboriginal population of the NT it is as if the repeal of the RDA has never happened.

Presumably the Government would seek to rely upon its so-called 'consultations' with the people to justify this as a 'special measure' or alternatively will make a new declaration under the amended legislation to operate from the end of the 12 month transition period to continue with income management in those areas, relying upon the same 'consultations'. We thus have the ironic situation that the very Act that purports to end racial discrimination and restore the RDA in fact perpetuates the discrimination that the original NTER legislation was designed to effect.

New Income Management Measures

These are contained in part 2 of the Bill. They enable a child protection officer or the Queensland Commission to require that a person be subject to income management, or the Secretary to determine that a person is a vulnerable welfare payment recipient and therefore subject to income management. Other persons so subject are "disengaged youth", "long term welfare recipients", people whose children or their partner's children do not meet school enrolment requirements, or have unsatisfactory school attendance and those who voluntarily submit themselves to the scheme.

The area criterion of the original legislation has been removed so that the section has universal application throughout Australia. However, it is also clear that the criteria are now designed to target Aboriginal people without expressly saying so, but may now encompass others as well. Since so many Aboriginal people are long term welfare recipients, the measures are clearly directed at them as the major targets of the legislation.

Further, the area criterion is introduced in a different way.

The new s 123TFA provides:

The Minister may, by legislative instrument, determine that:

(a) a specified State; or

(b) a specified Territory; or

(c) a specified area;

is a declared income management area for the purposes of this Part.

Proposed ss 123UCA, UCB and UCC target persons ***within the declared income management area*** who are vulnerable welfare payment recipients, disengaged youth between 15 and 25, or long term welfare payment recipients.

What is quite clear is that the legislation gives unprecedented power to the Minister and the Secretary in respect of welfare recipients throughout Australia. However, what is also clear is as I have suggested, that this is little more than a ruse to overcome the provisions of the RDA and that the real targets of the income management scheme are likely to be Aboriginal people including Aboriginal people living beyond the NT. It is little more than a clumsily

disguised and cynical attempt to perpetuate racial discrimination against them. If that was not bad enough, it has the additional and frightening potential to extend well beyond them.

Alcohol, Prohibited Material, Acquisition of rights title and interests in land, Licensing of Community Stores

I do not propose to discuss these provisions in detail. They differ from the income management regime in that they do not purport to extend these provisions to the whole community or beyond the NT. They each contain an objects clause which is clearly designed to constitute each of these provisions as a special measure within the meaning of the Convention. For example as to alcohol, proposed Schedule 3 s6A states:

The object of this Part is to enable special measures to be taken to reduce alcohol-related harm in Indigenous communities in the Northern Territory.

Similarly in relation to prohibited material proposed Schedule 4 s98A states:

The main object of this Part is to enable special measures to be taken to protect children living in Indigenous communities in the Northern Territory from being exposed to prohibited material.

Similarly, in relation to the issue of acquisition of rights, title and interests in land proposed Schedule 5 s30A states:

The object of this Part is to enable special measures to be taken to:

(a) improve the delivery of services in Indigenous communities in the Northern Territory; and

(b) promote economic and social development in those communities.

Proposed Schedule 6 s91A states the object of licensing of Community Stores as follows:

(1) The object of this Part is to enable special measures to be taken for the purpose of promoting food security for certain indigenous communities in the Northern Territory.

(2) In particular, this Part is to enhance the contribution made by community stores in the Northern Territory to achieving food security for certain Indigenous communities.

While it may be arguable that all or some of these provisions could constitute special measures it is at least doubtful as to whether this can be achieved ***ex post facto*** as the Government has sought to do.

So far as alcohol is concerned it has also taken a number of additional steps in the legislation that are either designed to achieve this object or to take into account some of the concerns expressed during the consultations.

For example the compulsory posting of notices as to alcohol and pornography and the need to state penalties has been relaxed and a degree of consultation is allowed for as to these matters.

Similarly, the automatic designation of the whole of prescribed areas as a public place has been relaxed and the minister may not make a declaration in relation to a prescribed area or part of it as a public place unless requested to do so by a resident. There are also provisions for consultation and discussion and specific criteria are set out for the making of such a declaration.

Again in relation to prohibited material there is now a provision for the Minister to declare that the relevant part ceases to have effect in relation to a specified prescribed area or part thereof and similar provisions for consultation as is the case with alcohol.

There are few changes to the leasing provisions contained in the NTER Act. One is a provision that prevents the Commonwealth from engaging or permitting others to engage in mining on leased land. There is also a provision requiring the Commonwealth to have regard to the traditions, observances, custom and beliefs of Indigenous people generally or of particular groups of Indigenous persons in administering leases.

So far as community stores are concerned there are quite detailed provisions relating to their management but nothing that requires particular comment in this context.

The only amendment to the Australian Crime Commission Act 2002 is to the definition of Indigenous violence or child abuse which is defined as serious violence or child abuse committed against an Indigenous person.

Conclusion

This is disgraceful legislation which perpetuates the paternalism and racial discrimination inherent in the Intervention. It is a disturbing extension of bureaucratic powers and the power of the executive over welfare recipients and seems to reflect a philosophy more in tune with that of the previous Government that what one would expect of a Labor Government.

The real issue that troubles me is as to why this Government, which was elected with such expectation of change, is behaving in this way towards Aboriginal people. What are its sources of advice and who is giving it? Is it the Department which administered the Intervention in the first place? Is the Minister the moving spirit or the Prime Minister?

It seems to be an inadequate explanation to say that it is a continuation of the policy, or lack of it, that led the Government while in Opposition to support it. Surely it did so for purely political reasons and not as a matter of policy? If this was so there would be nothing easier than to walk away from it now they are in Government.

Is it an attempt by the Government to garner Opposition support for its reintroduction of the Racial Discrimination Act by the passage of a Clayton's version that leaves the Intervention untouched? If so why would the Government want to do this? Surely it would be better to wrong foot the Opposition by making it either cave in or be put in the position of opposing the reintroduction of the Act to the NT and thus in favour of racial discrimination?

It is interesting to note that at the recent Senate Committee Inquiry there was overwhelming opposition to the continuation of income management from the welfare sector, which should have embarrassed the Government.

There are also strong arguments that the continuation of these policies runs contrary to various UN human rights instruments and to the Declaration of the Rights of Indigenous peoples, which the Government purports to support.

I am reluctantly drawn to the conclusion that this Government, like its predecessor, is not serious about Aboriginal Reconciliation, despite its lip service to the contrary.

Its task has undoubtedly been made easier by the lack of media and public concern about this legislation. Modern media thrives on conflict, to the point where every absurd statement by an Opposition spokesperson opposing Government measures is given substantial and often undue publicity. It may be that because opposition to these measures is coming only from the Greens, the welfare sector and small groups of concerned citizens like this one, the media feels that it can ignore this issue, despite its importance.

I am an unabashed supporter of constitutional guarantees of rights and freedoms embodied in a Bill of Rights. If ever there was a good example of the need for one it is this one, where we have a situation where the two major political parties are ignoring the issue, which is one of important minority rights. Had we had such a guarantee in 2007 the Intervention would not have happened because the Racial Discrimination Act would have been embodied in such an instrument. Similarly we would not be debating the present issue, because independent albeit unelected judges would strike down such offensive legislation as an attack on democracy.

I urge all of you to continue the fight against this legislation and to maintain that fight even if it is passed. As an Australian I am tired of my country being subjected by its Governments to classification as racist and white supremacist and I am tired of being ashamed of my country as I have been since the advent of the Howard Government and now its successor.

---

[1] Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia p*ublished by Arena Publications, is a series of essays edited by Jon Altman and Melinda Hinkson and is the first book to cover the Northern Territory Intervention. These extracts are from a section of an essay written by Pat Dodson published in Crikey.com on 13 September 2007*

[2] "Will They Be Heard" Nicholson, Behrendt et al. Jumbunna House of Indigenous Learning UTS Sydney, November 2009

[3] Will they be heard? at p34 and following;

[4] Will they be heard? at paras 171-3;

[5] See Schedule 1 ss 1,2,3 and 4.