Senate Standing Committee on Community Affairs: Reinstating the RDA in the NTER legislation

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The critical importance of the concept of special measures in the current Bill is clear in the Minister's second reading speech of 25 November 2009:

> The bill will strengthen the NTER by reinstating the Racial Discrimination Act. The Government believes that all NTER measures are either special measures under the Racial Discrimination Act or non-discriminatory and therefore consistent with the Racial Discrimination Act.

The concept of special measures was central to the original Howard Government NTER legislation. The original legislation deemed the provisions of the legislation to be special measures and thus not discriminatory. However, as added insurance, the provisions were also excluded from the operation of Part II of the Racial Discrimination (prohibition of racial discrimination). This was in case the claim of special measures did not stand up.

Under the legislation currently before the Parliament, given the reinstatement of the RDA, the Government's claim that the legislation represents special measures becomes absolutely critical – even more so than previously. A number of the provisions, even with proposed changes, remain, on their face, clearly racially discriminatory. No one disputes this. They can only be saved from the charge of racial discrimination and being contrary to the Racial Discrimination Act if they are in fact special measures.

Speaking to this Bill, the Minister stated: 'the government considers that the redesigned measures are special measures under the Racial Discrimination Act…". The Explanatory Memorandum also makes clear that the provisions of the proposed NTER legislation are intended to be special measures.

But is it that easy? Can Governments simply decide that provisions of legislation are special measures, and therefore are not to be considered as racially discriminatory?

This Senate Committee, amongst other things, is examining "the effectiveness of the amendments proposed in the Bill to reinstate the Racial Discrimination Act 1975 and deliver on our international commitments under the UN Convention on the Elimination of All Forms of Racial Discrimination."

The bill appears – although it is arguable - to largely deliver on reinstatement of the RDA, although there are problems there. But does it deliver on meeting our international obligations? In this context whether the NTER measures can be considered special measures is therefore critical.

In my view, the concept of special measures is incorrectly applied to the provisions of the NTER legislation as amended by this bill. That is, that the original NTER measures were not special measures in the accepted sense of the term, are not currently special measures, and will not become special measures with the passage of the changes proposed by the bill. This is despite the Minister's assertions to the contrary.

The first question then to be asked is: What are special measures?

Section 8 (1) of the RDA provides that: "This Part [defining unlawful discrimination] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies"

The Convention is the UN CERD. In effect, the very brief RDA provision for special measures simply incorporates the CERD provision. If we want to know the meaning and scope of special measures we need to examine the jurisprudence around the CERD provision.

There is considerable authoritative discussion of special measures. In particular I would draw the attention of the Committee to the recent CERD General Recommendation No 32 of August 2009 on the meaning and scope of special measures in the Convention.

What is clear from comprehensive examination of this General Recommendation and other relevant material is that special measures relate to, and only to, positive discrimination. By positive discrimination I mean what is often termed affirmative action, or sometimes 'reverse discrimination'. Such measures are all about providing support or assistance or rights above and beyond what the rest of the society has.

Thus, to overcome historic injustice and systemic discrimination it is recognised in CERD and other places that affirmative measures may be needed for a time to provide real as well as formal equality. Such measures, provided they meet certain criteria, are not considered discriminatory even though they favour one group over others. However, it is just because they do favour one group that they should be time limited. Even positive discrimination should not become entrenched.

Examples of special measures include affirmative employment practices, and legislation such as the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Abstudy scheme – these are situations where something extra and additional is provided for Indigenous Australians, but where nothing, and I emphasise nothing, of their normal citizenship rights are subtracted.

Special measures have nothing to do with negative discrimination, that is where the rights of one group are reduced or restricted in comparison to other citizens. Special measures cannot be used to justify negative discrimination. This is so even if the intent is benign. As far as I can see, special measures have never been contemplated to apply to negative discrimination, where rights are reduced or removed.

Yet this is precisely what the claim for special measures in the NTER does. It attempts to justify a reduction of rights for Indigenous Australians against other citizens on the grounds that it is in their interest. Such measures are clearly a reduction in the integrity of the citizenship of the affected Indigenous Australians. They are no longer equal before the law in certain respects. It is a return to pre 1967 days.

This is not only claimed to be for their own good, but is paraded as being within the law and spirit of special measures. This a truly startling assertion.

Without wishing to sound unduly dramatic, I see this as a travesty of the meaning, purpose and scope of special measures whether within the RDA or its parent Convention the CERD.

But, even where special measures are legitimate, they have to meet accepted criteria, one of which is that they are not simply imposed on the supposed beneficiaries. This point has been made frequently, including in Australia by Justice Brennan in the Gerhardy v Brown 1985 decision. The guarantee against such imposition is consultation.

In this context, the Government has made much of the consultation process it undertook leading up to the current bill. However, the Government's claims for a comprehensive and meaningful consultation process merit careful scrutiny and should not be accepted at face value.

There is not the time to detail the many apparent problems with the process, but like a number of observers I believe that, without wishing to criticise the individual officers involved, there are significant doubts about the efficacy of the consultations that took place in the Northern Territory.

However, by way of example, there were four tiers to the consultation process. Tier one consisted of: *comprehensive consultations with key interest groups (stakeholders) in each of the prescribed areas. It is targeted at individuals and interest groups e.g. men, women, youth, community based organisations, families, clans, and tribes and is expected to reach up to 10 groups per community, resulting in possibly 700 consultations,* and Tier 4: *Five major stakeholder workshops – four involving the peak Indigenous organisations in the NT; and one specifically for the NT Indigenous Affairs Advisory Council*. These two tiers were simply outside the remit of the independent

consultants tasked to monitor the consultation process, CIRCA (Cultural and Indigenous Research Centre Australia). To quote from the CIRCA report:

> The observations of the Tier 1 and Tier 4 meetings were outside our terms of reference for this project, and therefore CIRCA is not able to comment on the implementation of these important components of the strategy.

So, we simply have no independent verification of the efficacy of major parts of the consultation process. Even with the tier 3 consultations, (a series of regional level consultations) which did fall within its remit, CIRCA monitored just one of these meetings. That meeting, held in Katherine, CIRCA reports was fine as far as it went. However, a number of communities in the region were not present including highly significant communities such a Lajamanu, Ngukurr and Borroloola. It is in fact not clear how comprehensive the consultation process was.

The Government's own report on the engagement process identified key themes and messages that had emerged from the process. One was:

> a pervasive feeling amongst Aboriginal people in the Northern Territory that different standards have been applied to them, compared with other Australians, and that the NTER has accentuated racial divisions in some communities and townships.

This is the gist of the situation. The NTER has been perceived widely ('pervasive' in the words of the Government's own report) to date as negative discrimination by the supposed beneficiaries. Discrimination is both an objective phenomenon and a subjective one. Felt discrimination is demoralising – it robs one of one's feeling of worth and belonging. There seems little in the proposed bill to counter this demoralising aspect. Again, this is hardly what is to be expected from 'special measures'.

Racially-based laws can always find their justification (eg apartheid) but they are never just. Even where based on the best of intentions, race-based legislation sets a dangerous precedent and introduces a moral ambivalence into the national legislative corpus.

In respect of changes to a number of provisions that are redesigned, in the words of the Minister, 'so that they are more sustainable and more clearly special measures under the Racial Discrimination Act', it does not appear that the changes achieve those goals.

For example, the proposed changes to the compulsory 5 year lease arrangements do not change this directly negative discrimination into a benign special measure. The changes include making it clear that mining and exploration are not permitted on the 5 year leases (really only a point of clarification or reassurance) and requiring that the five-year leases be administered with regard to the body of traditions, observances, customs and beliefs of Indigenous people generally or of a particular group of Indigenous people, as those traditions, observances, customs and beliefs apply in relation to the land covered by the lease. The latter commitment is vague, and pointedly makes no reference to traditional owners who, in contrast to the provisions of the ALRA, appear only to have a role in the scheme of administration of the leased areas as the Government sees fit.

In effect, the leases represent an excision of Aboriginal land held under the ALRA Act. And although the relative area of land may be small, it is where the majority of the Aboriginal population living on Aboriginal land reside.

As well, it is the clear policy intent to turn these 5 year leases into long term leases. Hence the proposed change in the bill to allow land owners to request good faith negotiations. Rather than being an improvement, this takes the measure further from being a special measure. The clear intent is that the compulsory 5 year acquisition of Aboriginal land is to be seamlessly turned into a long term arrangement.

The central human right of Aboriginal people to own, occupy, control and use their land, recognised in international law, is directly undercut by these provisions. And there is little 'voluntary' in leases in exchange for housing and other key services for people who are impoverished and living in appalling overcrowding.

Other Australians would not be treated this way. The compulsory leases only apply to Aboriginal land. The double jeopardy for the Government in respect of the compulsory 5 year leases, and their proposed transition to longer term so-called 'voluntary' leases now facilitated by the bill, is that they are clearly an example of negative discrimination, and secondly they diminish the generally recognised key right of Indigenous people to permanent recognition, title and control of their ancestral lands. A long term lease is tantamount to de facto expropriation of title. The land is being returned to reserve status.

Conclusion

It is not within the province of the Australian Government simply to determine, by words in an Act, what are and what are not special measures. This is clear from the CERD decision in respect of the so-called 10 Point Plan amendments of 1998. CERD said that notwithstanding words to the contrary in the Australian Native Title Act, that Act could no longer be considered a special measure because the legislation had been infected by racially discriminatory provisions through the 10 Point Plan amendments.

The meaning of the term 'special measures' comes into the RDA from the CERD – if they represent anything they represent international obligations.

The provisions in the NTER legislation which the Government intends to be special measures cannot reasonably be seen as such. The measures cannot hide behind the façade of the doctrine of special measures that has developed in the law of non-discrimination. To maintain that the NTER measures are special measures debases the concept for short term political comfort, and does not meet the accepted understandings of the purpose and nature of special measures as widely understood.