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The Northern Territory National Emergency Response and its implications with respect to human rights in Australia

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Sarouche Razi

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Asesor: Dr. Karen Sigmond

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Table of Abbreviations

Abbreviation	Meaning
The Anti-Discrimination Legislation	*Various Australian legislation comprising:* • *The Racial Discrimination Act 1975 (corresponding to the CERD);* • *The Sex Discrimination Act 1984 (Cth) (corresponding to the CEDAW); and* • *Crimes (Torture) Act 1988 (Cth) (corresponding to CAT); and* • *The Disability Discrimination Act 1992 (corresponding to the CRPD)* • *The Age Discrimination Act 2004.*
Board of Inquiry	*The Northern Territory Government Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*
CAT	*The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984/1987.*
CDEP	*Commonwealth Development Employment Program*
CEDAW	*The Convention on the Elimination of All Forms of Discrimination against Women 1979/1981*;
CERD	*The Convention on the Elimination of All Forms of Racial Discrimination 1966/1969.*
The Commission	*Australian Human Rights Commission.*
The Commonwealth	*The Commonwealth of Australia, the nation's federal government*
The Constitution	*Constitution of Australia 1901*
CRC	*The Convention on the Rights of the Child 1989/1990.*
CRPD	*The Convention on the Rights of Persons with*

	Disabilities 2007/2008.
GBM	*Government Business Manager, appointed by Centrelink.*
HRC Act	*The Australian Human Rights Commission Act 1986.*
ICCPR	*The International Covenant on Civil and Political Rights 1966/1976*
ICESCR:	*The International Covenant on Economic, Social and Cultural Rights 1966/1976*
The Intervention	*Northern Territory National Emergency Response, comprising:* • *the Northern Territory National Emergency Response Bill 2007;* • *the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007;* • *the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007;* • *the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008; and* • *the Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.*
LCAS Report	*R Wild, P Anderson, Ampe Akelyernemane Meke Mekarle Little Children are Sacred, Board Of Inquiry Into The Protection Of Aboriginal Children From Sexual Abuse, 30 April 2007.*
Operation Outreach	*The Australian Defence Force's support to the Northern Territory Emergency Response*

Response Act	*The Northern Territory National Emergency Response Bill 2007*
Race Power	*S51(xxvi), the Australian Constitution (1901).*
RDA	*The Racial Discrimination Act 1975*
UDHR	*United Nations Declaration of Human Rights 1948*

SYNOPSIS

'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'

B Burdekin, former Human Rights and Equal Opportunities Commissioner[1]

On the 15 June 2007, the Board of Inquiry into the Protection of Aboriginal[2] Children from Sexual Abuse, set up by the Northern Territory Government of Australia, released a report entitled *Little Children are Sacred* (**LCAS Report**). The LCAS Report was commissioned to examine claims of child sexual abuse in remote Indigenous communities in the Northern Territory. In response to the LCAS Report, on 21 June 2007, the Australian Federal Government (**Commonwealth**), surpassing the Northern Territory Government, announced the *Northern Territory National Emergency Response*, which came to be known in Australia as the Intervention. The Intervention comprised a number of measures, most dramatically on 27 June 2007, the Commonwealth called upon the Australian Defence Force to assist in an operation (**Operation Outreach**) in support of the Intervention. In addition to the deployment, the legislation enacted by the Commonwealth effected a whole host of other measures, including the provision of funding for some community services, abolishing funding for others, and most significantly, suspending race discrimination legislation.

From the outset, the Intervention was problematic for a number of reasons. Firstly, the response was demagogical- the LCAS Report had been available to the Commonwealth since April, it was an election year, and a heavy-handed approach which involved the military was popular with the electorate. Further, the LCAS Report made 97 recommendations, of which only two were addressed. The Commonwealth was more concerned with *appearing* to be effective, than actually addressing the key social problems in remote Indigenous communities.

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[1] B Burdekin, 'Foreword' in P Alston, "Towards an Australian Bill of Rights, Alston P Ed" [1995] *Australian Journal of International Human Rights* 12, at v.

[2] The first inhabitants of Australia are primarily referred to as Indigenous Australians in this paper; however, the term Aboriginal is also used by many sources.

More seriously, the Intervention was a serious encroachment of human rights. As part of the Intervention, the Commonwealth suspended *the Racial Discrimination Act 1975* (**RDA**), which disallows discrimination based on race, because the Intervention specifically targeted and discriminated against Indigenous peoples. This reflects on the ease with which Australia may suspend human rights in the absence of an entrenched human rights regime or a constitutional bill of rights.

This paper considers the Intervention, with regard to its historical precedents, the implications of Australia's failure to meet its obligations under International Law, and the impact a failure of entrenched rights in its Constitution has had on Australia.

LITERATURE REVIEW

This paper is specifically concerned with the question of human rights for Indigenous peoples in Australia. However, as this paper discusses, the question of human rights is at the crossroads of International Law, Constitutional Law, and the Rule of Law in general. For this reason, on a micro level, the paper analyses the events that took place which led to breaches of human rights in Australia. At the macro level, the paper takes an historical approach in order to reflect on the different frameworks that have given rise to Australia's current human rights scheme. With this in mind, the literature reviewed in this paper has been broad and diverse.

Chapter 1 is a basic overview of the issues that surround the Intervention, Indigenous Australians, the national legal framework, and the international legal framework. To provide this framework I have reviewed various legal instruments including the *Australian Constitution*, Australia's Commonwealth, State, and Territory legislation which affect Indigenous rights, and landmark cases such as *Mabo v Queensland (No 2)* (1992) 175 CLR 1, which have been instrumental in the Indigenous rights movement.

Chapter 2 provides an historical analysis of the varying factors which led to a mixed human rights framework in Australia. Sources reviewed include early instruments such as the *Magna Carta* and the *Peace of Westphalia.* Significantly, the various social contractualists, particularly Locke, have been considered for their impact on the rights that came with the nation-state, and how he shaped the English view of property. With respect to International Law, the paper considered the work of early colonial writers including Bartolomé de las Casas for their influence on the Indigenous question, and the early theorists on International Law, such as Grotius. In terms of the modern development of rights, this paper has referred to the various instruments that emerged from the United Nations.

Chapter 3 provides a review of the *Little Children are Sacred Report*, produced by the Northern Territory Government, the response by national and international organizations including, most significantly, the report of the UN's special rapporteur on the status of Indigenous peoples, and the Commonwealth's subsequent response. In addition, I have drawn upon interviews conducted by Paddy Gibson, who was stationed in Alice Springs in the Northern Territory from June 2008 – January 2009 and undertook first-hand research into the daily impact of the Intervention on Indigenous Australians in the Northern Territory.

Finally, Chapter 4 analyses the various questions that emerge in International Law and Constitutional law, analysing the sources referred to in previous chapters, as well as doctrines such Kelsen's *grundnorm* and what the Intervention reflects on the hierarchy of juridical norms in Australia.

METHODOLODY

This paper reflects on two instruments of executive government. First, the 2007 *Little Children are Sacred* report, released by the Northern Territory Government, which considered the incidence of child sexual abuse in remote communities in the Northern Territory. Second, the Commonwealth's *Northern Territory National Emergency Response* comprising a number of statutes as well as military intervention. For this reason, Chapter 3 of the paper is concerned with these executive instruments specifically. Chapter 1 provides the framework to understand the issues of Indigenous rights, human rights, and international law in the Australian context. Chapter 2 considers the historical precedents that led to the current human rights system in Australia. In order to do so, this the analysis considers the development of the rule of law, the formation and development of International Law, particularly in respect of indigenous peoples, and finally the development of the modern human rights framework following the creation of the United Nations. Finally, Chapter 4 analyses the issues of human rights and constitutional law that have arisen through the events of the Intervention.

To this extent, the methodology of this paper reflects the specific case study of the Intervention, it considers the historical precedents that led to the Intervention, and finally analyses how the various sources of law, disjointed and schizophrenic though they may be, together form a human rights framework.

This study is useful for anyone who has an interest in human rights, or more specifically the rights of indigenous peoples. In particular, this paper reflects on the interplay between various rights frameworks, including the Rule of Law, which is traced as far back as ancient Greece and medieval England, and the modern rights framework following the creation of the United Nations. For this reason, it is also jurisprudential in nature, and would be relevant to jurists and lawyers interested in the theory of law.

CHAPTER I: BACKGROUND

1 Introduction

The events highlighted by the Intervention took place at the crossroads of a number of historical precedents. It concerns the Indigenous peoples of Australia, the Aboriginal and Torres Strait Islander peoples. Since settlement by the British, Indigenous Australians have dealt with many issues that indigenous peoples faced the world over: disease, massacre, disenfranchisement, racial vilification, and the imposition of foreign institutions.

With British colonisation came the introduction of the Rule of Law and British systems of law and governance. These institutions were so foreign and different to the conception of governance of Indigenous people that there was an inherent clash. The rights movements of the 18th and 19th centuries were generally limited to political rights in Australia, which were often not available to Indigenous Australians. When Australia entered into nationhood in 1901, Indigenous peoples were excluded as a subject of federal lawmaking power, such was the dissonance between the emerging Australian nation and the Indigenous peoples of Australia. However, as Europe experienced the ravages of two world wars and many new nations emerged with independence movements in former colonies, a new universal rights movement swept the world. International law now provided a new source of protection and freedom for historically disenfranchised peoples.

It is under these contrasting influences of colonisation, Indigenous Australian cultures, British institutions, and Australian and International Law, that the events of the Intervention transpired. This opening chapter provides an introduction to these basic precedents.

2 Constitution of Australia

Australia became a federal parliamentary democracy on 1 January 1901 when six colonies became a federation of states, and the Commonwealth of Australia was born under the *Constitution of Australia 1901*. Before Federation, the states were separate British colonies; upon Federation, their powers were protected by the Australian Constitution. Commonwealth legislation applies to the states only to the extent permitted by the Constitution. Australia's national territories do not enjoy the same power of the states. Under the Constitution, territories are directly subject to the Commonwealth government.[3] Since 1911 the area of the Northern Territory has been administered as a Commonwealth territory. Although some territories, such as the Northern Territory, are self-administered, unlike the states Commonwealth legislation can always override territory legislation.

The Constitution is recognised as a 'Washminster' Constitution, because it contains elements of both the American and British Constitutions. The Constitution comprises both the formal document, and certain constitutional conventions. The Constitution contains no bill of rights and no comprehensive human rights mechanisms. However, there is a limited recognition of rights within the Constitution, some explicit and some implicit. These include:

- popular election of members of the House of Representatives (Section 24) and a limited "right to vote" (Sections 7 and 24, as interpreted by *Roach v Electoral Commissioner* (2007) HCA 43);
- just terms for the compulsory acquisition of property by the Commonwealth (section 51(xxxi));
- judicial review (Section 75), which through interpretation, allows the possibility of rights being read into the Constitution;
- trial by jury (Section 80);
- freedom of religion (Section 116); and

[3] S122, *Constitution of Australia 1901*.

- an implied freedom of political communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).

As a constitution, it is limited with respect to the recognition of rights, and historically, the High Court of Australia has read down the existence of rights in the Constitution. In comparison to the Bill of Rights introduced shortly after the promulgation of the American Constitution (or the Constitutions of 1856 and 1917 of Mexico), Australia's Constitution is not a rights-enabling normative document. Williams notes that "Australia is alone amongst comparable nations in not having a domestic Bill of Rights in some form."[4]

3 Common Law

Australian common law is derived from English common law, which itself forms part of the canon of the Western legal tradition. The Western legal tradition is traced to the Roman Code, the *Corpus Juris Civilus*, which in turn is derived from Christian and Greek legal principles. The common law entrenches rights by the precedents set out in previous court decisions which themselves had in place certain protections and rights. Most significantly, the writ of *Habeas Corpus*, as established by the *Magna Carta*, is available in Australia as a procedural remedy. Further, due process under the adversarial system guarantees the right to a fair trial (at least for those with the means). In addition to the common law, the law of equity has evolved as a mechanism to protect individuals from certain forms of inequitable conduct, and as an area of law it is still expanding.

Common law is not always effective because it is open to governments to pass legislation to many areas of the common law's domain. On the other hand, the Commonwealth has broadened the scope of judicial review by enacting the following legislation:

- the *Administrative Decisions (Judicial Review) Act* 1977; and
- the *Administrative Appeals Tribunal Act* 1975;

[4] G Williams, *The Australian Constitution and Human Rights: A Centenary View*, 2001 Symposium: Constitutions and Human Rights in a Global Age: An Asia Pacific Perspective, available at http://rspas.anu.edu.au/pah/human_rights/papers.html (last accessed 10 November 2010).

Further, the rights within common law are indirectly protected through the judicial review clause of the Constitution. As it will be discussed in Chapter 4, Kelsen's *Grundnorm*[5] principle holds the Constitution as the apex of the normative legal system. As long as the High Court is entrenched in its role of interpreting the Constitution, the common law will have a role in protecting rights. Brennnan J noted in *Church of Scientology v Woodward:*[6]

> *"Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."*[7]

4 Sources of International Human Rights Law

Australia's human rights obligations under international law arise through the following sources: treaties and customary law. The implementation of treaties in the Australian context has three stages: signature, ratification, and codification under domestic law.

First, at the point Australia signs a treaty, it signals its commitment, but is not bound by the treaty. However, pursuant to the Article 18 of the *Vienna Convention on the Law of Treaties,* when signing a treaty the signatory must "refrain from acts which would defeat the object and purpose of a treaty."[8] Following this, Australia becomes a 'State Party' to the treaty at ratification and under international law is obliged to observe the instrument. However, under domestic law, the treaty is still ineffective. For a treaty to be effective under domestic law, legislation must be passed by Parliament and signed by the Governor-General. This reflects the first problem with respect to the implementation of international human rights law instruments in Australia. There are many international law treaties to which Australia is a State Party, but that have not yet been incorporated into domestic law. The second problem (which is an inherent problem with international human rights more generally), is that many international human rights instruments are soft law; they provide weak remedies to breaches by State Parties, effectively being the monitoring committees of the UN Human Rights Committee and the UN Committee on

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[5] See H Kelsen, *General Theory of Law and State*, The Lawbook Exchange Ltd, New Jersey, 1999.
[6] *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25.
[7] *Church of Scientology v Woodward* [1982] HCA 78; (1982) 154 CLR 25 at 70.
[8] *Article 18, Vienna Convention on the Law of Treaties, 1969.*

Economic, Social and Cultural Rights.

5 Indigenous Australians

Before the arrival of the First Fleet in 1788, Indigenous Australians comprised some 250 nations and languages.[9] Indigenous Australians arrived on the continent somewhere between 40,000-120,000 years ago, and their culture is the oldest surviving and continuing culture in the world.[10] Various estimates suggest that at the time of first European contact, the population of Indigenous Australians was somewhere between 300,000 and 750,000.[11] By the beginning of the twentieth century the recorded population of Indigenous Australians had declined to about 93,000.[12] The 2006 Census recorded the population of Indigenous Australians to be 517,200, about 2.5% of the total population.[13]

The colonisation of Australia disenfranchised its indigenous peoples like the indigenous peoples of much of the rest of the world through both intended and unintended consequences. Australia was settled under the justification that the land was *Terra Nullius* (unoccupied land). Colonial subjugation oppressed Indigenous communities and crushed resistance. Smallpox and influenza killed many. Furthermore, treatment of Indigenous Australians was also brutal with many recorded massacres and even claims of genocide in Tasmania.[14]

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[9] See *Languages of Aboriginal and Torres Strait Islander Peoples,* Australian Bureau of Statistics, http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1301.0Feature%20Article42009%E2%80%9310?opendocument&tabname=Summary&prodno=1301.0&issue=2009%9610&num=&view= (last accessed 10 November 2010).

[10] See "When did Australia's earliest inhabitants arrive?", *University of Wollongong*, 2004, available at http://media.uow.edu.au/news/2004/0917a/index.html. (last accessed 10 November 2010).

[11] R Evans, *A History of Queensland*, Cambridge, Cambridge University Press, 2007, pp. 10–12.

[12] See *Australian Bureau of Statistics*, available at http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/8dc45512042c8c00ca2569de002139be!OpenDocument (last accessed 10 November 2010).

[13] See *Australian Bureau of Statistics 2006 Census*, available at http://www.abs.gov.au/ausstats/abs@.nsf/0/68AE74ED632E17A6CA2573D200110075?opendocument (last accessed 10 November 2010).

[14] B Madley, 'From Terror to Genocide: Britain's Tasmanian Penal Colony and Australia's History Wars', *Journal of British Studies*, vol. 47 no. 1 (January 2008), pp. 77-106.

The treatment of Indigenous Australians evolved over the 19th and 20th centuries. On arrival, the British encountered a people who they considered primitive, with no notion of land ownership. As such, Indigenous peoples were considered a nuisance and were driven further and further away from fertile and resourceful land. These frontier wars lasted into the 20th century but over the 19th century many Indigenous Australians were introduced into colonial society as a source of cheap labour. Narogin notes:

> *"...people were herded into missions on government stations. Those outside on the vast cattle runs and farms which had been carved from their homelands were exploited for their labour value. In fact, primitive laws were passed to prevent them from leaving these stations. They in fact became slaves working for rations of tea, sugar, and tobacco. While the men worked in the fields the women worked as domestics in the homestead of masters who were not averse to the soft feel of "black velvet"."*[15]

Over the course of the 18th and 19th centuries scientific racism was embedded into the empiricism of the Enlightenment to assert the superiority of the European over other peoples. This was expressed both in the scientific and philosophical discourse.[16] As Europeans came into contact with other peoples, this perspective of European superiority dominated their engagement with non-Europeans and served to legitimate oppressive conduct against non-Europeans.

The populations of Indigenous Australians so declined that legislation was passed calling for the "preservation" of Indigenous peoples, such as Queensland's *Aborigines Protection and Restriction of the Sale of Opium Act.*[17] Over the second half of the 19th century and into the 20th century a humanitarian movement emerged with the goal of "preserving" Indigenous Australians. Razi notes:

> *"The humanitarian movement "preserved" Aborigines from collective massacres, and brought about many changes in Australian society. The adherents of the humanitarian movement condemned the killing of Aborigines, but they never wavered in their belief of their own superiority of race and therefore felt that they had a duty to offer civilization and Christianity to a race considered to be heathen and children-like in their ignorance. They treated Aborigines as children of nature: they never regarded them quite as humans, but still capable of performing*

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[15] M. Narogin, *Writing from the Fringe*, Hyland House, Melbourne, 1990, p19.

[16] See for example I Kant *Observations on the Feeling of the Beautiful and the Sublime* , 1764, excerpts available at http://www.public.asu.edu/~jacquies/kant-observations.htm (last accessed 10 November 2010). Equally, philosophers such as Montesquieu, Schopenhauer, and Hegel also make claims asserting European racial superiority.

[17] *Aborigines Protection and Restriction of the Sale of Opium Act* 1897 (Qld).

simple tasks and if converted to Christianity, the incidence of disease, crime and poverty amongst them would be reduced, and they might even improve on their child like nature."[18]

6 20th Century Developments

6.1 Political Rights and Indigenous People in the Australian Constitution

In respect of political rights, Indigenous Australians struggled to have many first generation human rights acknowledged throughout much of the 20th century. Importantly, with respect to Indigenous persons, the Australian Constitution has historically been a document of exclusion. Under s.51 (xxvi) of the Constitution, the federal parliament was empowered to make 'special' laws for people for any race, *apart from Aborigines* (**the Race Power**).[19] Under Section 25, any persons disqualified by race from voting shall not have their votes counted.[20] As a result, Indigenous Australians only had federal voting rights if they were granted by their home state. Moreover, under s.127 of the Constitution, Indigenous Australians were not to be counted in the census considerations of the Commonwealth or the States.[21] This disenfranchisement is a significant consideration; for human rights to be recognised, people must first be counted. Failure of a minority population to be included in a national census is a very alarming form of oppression - it disallows public knowledge and presents an inaccurate picture of the nation.

In 1962, the Commonwealth amended the *Commonwealth Electoral Act,* which gave Indigenous Australians the right to enrol on the electoral register and vote in Commonwealth elections. As voting is compulsory in Australia, if Indigenous people enrolled to vote, then they would be obliged to vote. The 1967 referendum changed the dynamic by allowing Indigenous Australians to be counted in the census, and by affording them "equality" under the Race Power by removing their exclusion as a subject of federal legislation, but in some ways it left an even more dubious concern. Following

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[18] W Razi, *An Historical and Sociological Approach to the Topic of Racism and Migration in Australia*, MA Hons (Thesis), Macquarie University, School of History, Philosophy and Political Science, 1992, pg 14.

[19] S51(xxvi), the *Australian Constitution* (1901).

[20] S25, the *Australian Constitution* (1901).

[21] S127, the *Australian Constitution* (1901).

the 1967 referendum there was no reference at all to Indigenous people in the Constitution. Further, Williams notes, "[i]f the referendum enabled the "races power" to be used to legislate for the detriment of Aboriginal people, it would be a sad irony."[22] This is what occurred under the Intervention.

6.2 State Wards and the Stolen Generation

As seen above, Indigenous Australians were excluded from federal law for much of the 20th century. They were declared wards of the state and had very limited rights. In the period between 1869-1969 acts of state and federal parliaments instituted a system whereby children with mixed heritage of Aboriginal and Torres Strait Islander background were forcibly removed from their families and placed into the protection of government or church welfare agencies. These children came to be known as the Stolen Generation. The justification for such a policy was espoused both in terms of welfare and inherent racism and to some extent it was a process of cultural genocide.[23] Governments were acting on various inclinations: what they deemed to be child protection, motivations of providing mixed-race persons the opportunities available to a white person, and fears of miscegenation with the intention of maintaining racial segregation and white racial purity. It has been difficult for historians to gain an accurate idea of the extent of the practice, but in 1995 a federal enquiry was established, and in 1997 reported:

> Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. *In that time not one family has escaped the effects of forcible removal* (confirmed by representatives of the Queensland and WA Governments in evidence to the Inquiry). Most families have been affected, in one or more generations, by the forcible removal of one or more children.[24]

The social impact of the Stolen Generation has been devastating. In response to the report, Indigenous Australians, as part of a reconciliation process demanded a formal

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[22] G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 639, p653.

[23] See R Van Krieken, 'The `Stolen Generations' and Cultural Genocide: The Forced Removal of Australian Indigenous Children from their Families and its Implications for the Sociology of Childhood', *Childhood* August 1999 vol. 6 no. 3 297-311.

[24] *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, available at http://www.austlii.edu.au/au/other/IndigLRes/stolen/.

apology from the Commonwealth. The Commonwealth refused any such apology until a centre-left government was elected in 2007. Former Prime Minister Kevin Rudd made a formal apology to Indigenous Australians on 13 February 2008.[25]

6.3 Property Rights

Indigenous Australians had a very different conception of property that clearly did not fit Western conceptions of property that emerged from the liberal jurisprudence of the Enlightenment. For this reason, the struggle of Indigenous Australians for land rights has been one of the central human rights struggles for Indigenous Australians. The decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 empowered the land rights movement by changing the legal paradigm with respect to Indigenous land rights. The judgment rejected the concept of *Terra Nullius*. The Court created a legal fiction, and held that the Indigenous Australians held a legal interest in land that survived the acquisition of land by Great Britain. If the Indigenous group could prove the connection to the land had existed since the arrivals of Europeans in Australia, then in certain situations it would be able to make a claim of title over land. This form of title is called *Native Title.*

6.4 Social Issues facing Indigenous Australians today

There are many serious social issues facing Indigenous Australians today, reflecting a failure of government to afford Indigenous Australians the same social and economic welfare that is afforded to other Australians. A snapshot is provided below in order to gauge the significance of the divide between the Indigenous Australian and the non-Indigenous Australians.

6.4.1 Health

Health is the biggest area of concern for Indigenous Australians today. Life expectancy for Indigenous males was 59.4 years over 1996-2001 in comparison to 77 years for Australian males overall. For Indigenous females it was 64.8 years, while it was 82 years

[25] K Rudd, *Apology to Australia's Indigenous Peoples, 13 February 2008,* available at http://www.aph.gov.au/house/rudd_speech.pdf (last accessed 10 November 2010).

for Australian females overall.[26]

Indigenous Australians suffer from higher rates of cardiovascular diseases, diabetes, alcoholism, communicable diseases such as Hepatitis A, eye and ear health, and mental health problems. Some statistics are particularly startling. For example, Indigenous Australians contracted Hepatitis A at 11.7 times the rate detected in the non-Indigenous population.[27]

6.4.2 Crime

There is a gross overrepresentation of Indigenous Australians in the criminal justice system. Most alarmingly, Indigenous prisoners represented 24% of the total prisoner population (6139 males and 567 females), while they represent only 2.6% of the Australian population.[28] In addition, there is a concerning rate of Indigenous deaths in custody. Significantly, under federal legislation prisoners lose the right to suffrage if they have sentences of 3 years or more. This has a disproportionate effect on Indigenous Australians.

7 The Implementation of International Human Rights Law in Australia

At the international level, Australia is part of the soft law framework of the principle human rights treaties. The most important of these include:

- *the Universal Declaration of Human Rights 1948*;
- *the International Covenant on Civil and Political Rights 1966/1976*;
- *the International Covenant on Economic, Social and Cultural Rights 1966/1976*;

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[26] Statistics obtained from *Australian Bureau of Statistics,* available at http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/38D80D7B19C8540FCA256DEF00724AFE?OpenDocument (last accessed 10 November 2010).

[27] See statistics obtained from Appendix 2 of Human Rights and Equal Opportunity Commission, Social Justice Report 2008, http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/ (last accessed 10 November 2010).

[28] See statistics obtained from *Australian Bureau of Statistics,* available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4705.0?OpenDocument (last accessed 10 November 2010); Appendix 2 of Human Rights and Equal Opportunity Commission, Social Justice Report 2008, http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/ (last accessed 10 November 2010).

- *the Convention on the Rights of the Child 1989/1990* (**CRC**). The CRC provides children the right to protection from all forms of violence. This includes sexual abuse.[29]
- *the Convention on the Elimination of All Forms of Discrimination against Women 1979/1981* (**CEDAW**);
- *the Convention on the Elimination of All Forms of Racial Discrimination 1966/1969* (**CERD**). The CERD provides the right to protection from all forms of racial discrimination;
- *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984/1987* (**CAT**); and
- *the Convention on the Rights of Persons with Disabilities 2007/2008* (**CRPD**).

Importantly, on 13 September 2007, the General Assembly of the United Nations passed the *UN Declaration on the Rights of Indigenous Peoples 2007*, with objections from 4 states, all with significant populations of Indigenous peoples: Australia, New Zealand, Canada, and the United States. When there was a change in government in 2007 the new centre-left government formally endorsed the Declaration. The Declaration affirms amongst other rights, the rights of self-determination, equality, the maintenance of culture, the right to live free from discrimination, and the right of dignity.

In respect of these soft law instruments, some have been implemented in domestic legislation. The majority have not, which raises the issue of the legal effect of these instruments in Australia. In the case of *Dietrich v The Queen*[30] the effect of the ICCPR was considered. Chief Justice Mason and Justice McHugh noted:

> *Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision.*[31]

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[29] Article 19, *Convention on the Rights of the Child* (1989).

[30] *Dietrich v R* [1992] HCA 57 available at http://www.austlii.edu.au/au/cases/cth/high_ct/177clr292.html (last accessed 10 November 2010).

[31] Justices Mason and McHugh at 17, *Dietrich v R* [1992] HCA 57 available at http://www.austlii.edu.au/au/cases/cth/high_ct/177clr292.html (last accessed 10 November 2010).

In effect, this position reflects the doctrine of the separation of powers. The executive cannot act in its own right (by signing an international instrument) without being supported by the legislative arm of government.

In contrast to this position, in *Mabo v. Queensland (No. 2)*[32], Justice Brennan stated:

> *The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*

To this extent Justice Brennan widened the scope of the sources of the common law.

Further, in *Minister for Immigration and Ethnic Affairs v Teoh*[33] the Court supported Article 18 of the *Vienna Convention on the Law of Treaties* and held that by ratifying an international convention, the executive was creating the legitimate expectation that it would act in accordance with the convention, stating that:

> *[R]atification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention.* [34]

Equally, in *Plaintiff S157*[35] Gleeson CJ held that:

> *"Where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations."*[36]

From the above, it is evident that an international instrument to which Australia is a signatory but has not ratified may have some juridical significance, but it is weak.

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[32] Justice Brennan, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 available at http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html (last accessed 10 November 2010).

[33] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, available at http://www.law.mq.edu.au/Units/law404/MIEA%20v%20Ah%20Hin%20Teoh.htm (last accessed 10 November 2010).

[34] Chief Justice Mason and Justice Deane in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 34, available at http://www.law.mq.edu.au/Units/law404/MIEA%20v%20Ah%20Hin%20Teoh.htm (last accessed 10 November 2010).

[35] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2.

[36] CJ Gleeson, *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, at 29.

In addition to these instruments, Australia is subject to customary international law, such as the universal jurisdiction principle.

8 National Legislative Framework

As Australia is a federation, human rights are implemented at both federal and state level. Note that the Intervention took place in the Northern Territory; as a federal territory and not a state, it does not have the same law-making powers of the States, as provided in the Constitution.

8.1 Federal Level

At the federal level human rights are observed by a number of different laws. The Commonwealth determines whether the soft law international instruments become legally enforceable standards within Australia. To do so requires legislation to be enacted by the Australian Parliament. In the absence of such legislation, as noted above, there is no way to enforce those instruments in the domestic context, aside from the limited possibility of judicial review. Corresponding with certain instruments above, Australia has enacted the following legislation:

- *The RDA 1975 (*corresponding to the CERD): The RDA prohibits discrimination of a person for reasons of race, colour, descent, or national or ethnic origin. Further still, it prohibits racial vilification, particularly aimed at limiting offensive conduct;
- *Sex Discrimination Act 1984 (Cth)* (corresponding to the CEDAW);
- *Crimes (Torture) Act 1988 (Cth)* (corresponding to CAT); and
- *The Disability Discrimination Act 1992* (corresponding to the CRPD)

In addition Australia has legislated against other forms of discrimination without a corresponding international instrument including age discrimination in the *Age Discrimination Act 2004*.

(collectively, **the Anti-Discrimination Legislation)**

Pursuant to the *Australian Human Rights Commission Act 1986* (**HRC Act**), Australia has a national Human Rights Commission (**the Commission**). The Commission is responsible for conducting investigations and conciliations in respect of discrimination pursuant to the Anti-Discrimination Legislation. A complaint of discrimination may be made to the Commission either under the Anti-Discrimination Legislation, or under the HRC Act. If a complaint of discrimination is made under the Anti-Discrimination Legislation, the Commission's role is to investigate the complaint and instigate a conciliation process between the parties. If conciliation is not effective the complainant may pursue the complaint in the Federal Court of the Federal Magistrates Court. These Courts may make enforceable orders where they find breaches of the above legislation. If a complaint of discrimination is made under the HRC Act, the complainants do not have the right to pursue the matter at the Federal Court or Federal Magistrates Court. Instead, the Commission will present a report to the Federal Attorney-General who will decide how to proceed.

Finally, other pieces of legislation that are important addenda to the federal human rights legislative framework include:

- the *Freedom of Information Act* 1982; and
- the *Ombudsman Act* 1976.

8.2 State Level

State governments of Australia are similar to the Commonwealth Government in some respects. State constitutions have not been rights-enabling documents. State courts provide the same common law protections as those available at the federal level. Certain states and territories, however, have human rights legislation in force. Both Victoria and the Australian Capital Territory have human rights legislation in place. These acts protect persons within those states or territories and those protections are only for state or territory laws, not laws made by the Commonwealth. Beyond this, there are specific protections in state and territory legislation. Each state and territory has:

- equal opportunity or anti-discrimination commissions;
- state ombudsmen;

- freedom of information legislation; and
- specific legislation protecting employees, consumers and tenants.

9 Conclusion

This opening chapter has provided an introduction to certain legal, historical, and social parameters in Australia, knowledge of which is indispensable in understanding the Intervention. First, it presented an overview of Indigenous peoples in Australia. Second it provided the legislative parameters of the Intervention, occurring at the crossroads of human rights between national and international law. Finally it reflects on the human rights framework in Australia. With these three parameters, and armed with the historical framework provided in the proceeding chapter, one can best reflect on the legal and cultural issues that the Intervention provoked.

CHAPTER II: HISTORICAL CONTEXT

1 Introduction

The posture of international law towards indigenous peoples has had a number of distinct stages corresponding with the initial conquest and exploration of the Americas, the development of the nation-state, the emergence of positivism in international law, and, finally, the creation of the United Nations and the post-war period. At the national level, this has resulted in an inconsistent rights framework with erratic and differing inclinations. Firstly, the social contract that emerged from the nation-state created a rights framework between the state and the individual that does not include rights for minorities or groups. Second, the Australian constitution and the common law are heavily influenced by Diceyan positivism, which considers the rule of law sufficient for the protection of rights. Finally, and by contrast, the modern rights movement following the creation of he United Nations has provided many rights and freedoms for both individuals and groups. These differing influences have by one hand limited rights, and by the other expanded them. The Intervention is a result of this erratic rights framework. This chapter focuses broadly on two themes: the development of rights for Indigenous peoples at both the international and national level, and secondly, how these rights developed in the Australian context.

2 Indigenous peoples and International Law

International law has its precepts in the skirmishing boundaries between European nations during the Middle Ages. One can point to the Peace of Westphalia as the first modern diplomatic congress, and as a result the first real development in international law. European powers were also expanding outside of Europe in a competitive battle for hegemony, in particular the Dutch, the Spanish, the Portuguese, the French, and the English. Most significantly the colonial powers had their eyes on the lucrative trading offered following exploration and conquest.

2.1 Initial Contact and the Legitimacy of Conquest

The relationship between the European powers and indigenous peoples was an important subject of early international law. Geopolitically, Europe was fragmented, the legitimacy of sovereignty was ephemeral, and boundaries were skirmishing. For this reason, normative acts found their legitimacy through God, rather than the sovereign[37] and so jurisprudence was grounded in concepts of humanism and natural law. With conquest, the European powers sought legal grounds to justify the acquisition of new territories. They were: occupation, conquest, cession, prescription, and accretion.[38] Significantly, the indigenous person was effectively excluded as a subject of international law. Instead, under the guiding principles of natural law, the indigenous person was treated as an object and over the following centuries the doctrine of trusteeship emerged. Had the rights of indigenous peoples been recognised, then colonisers would be accountable for their conquests, slavery, indentured labour and their overall treatment of indigenous peoples.

Some scholars were notable in questioning the moral legitimacy of actions occurring under the conquest of the Americas. In particular the Dominican priest, Bartolomé de las Casas provided critical accounts of the conduct of the Spanish conquest, detailing massacres, slavery and the *encomienda* system.[39] The Spanish Dominican theologian, Francisco de Vitoria, was significant in providing grounds on which Europeans could justly acquire indigenous lands, although he did consider indigenous people as able to possess certain autonomous rights to land.[40]

The overriding question to the European jurist was, *what was the rational capacity of the indigenous person?* Vitoria posited that the indigenous person did employ some form of reason, which was made evident by their use of laws and customs. Ultimately however,

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[37] S.J Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 2000, p.11.

[38] W.R. Slomanson, *Fundamental Perspectives on International Law,* Fifth edition (Thomas, Wadsworth, 2007), p268-277.

[39] B de las Casas, Bartolomé, *Los indios de México y la Nueva España* México, ed. Porrúa, 1966, prólogo y biografía de Edmundo O'Gorman.

[40] F de Vitoria, *De Indus de Jure Belli,* c.1532, edited ca.1917 by James Brown Scott and for international publication circa 1964 by Ernest Nys. Oceana Publications Inc., Wildy & Sons LTD. New York.

Vitoria considered the American Indians "unfit to found or administer a lawful State up to the standard required by human and civil claims."[41] Although they employed some forms of reason they were considered lacking in a higher form of intelligence that the European man possessed, and therefore "in their own interests the sovereigns of Spain might undertake the administration of their country."[42] Vitoria rejected the notion that the discovery of the land could be justified on pure grounds of conquest, or by papal donation to the Spanish Monarchs, but rather, as a sort of trusteeship, which became a more entrenched principle with the colonisation of Africa in the 19th Century. When indigenous peoples frustrated the administration of their lands, then it could lead to a "just" war against them.[43]

Overall, in this early period of conquest, exploration, and the establishment of empires, the position of indigenous people in international law was in a state of flux because international law itself was still developing. However, as the concept of the nation-state catalysed with the concept of the social contract, the nature of the indigenous person in international law changed.

2.2 The Nation-State, Property and the Social Contract

The Magna Carta was the first real European development that limited sovereign power. Following the secession of the Church of England and the various reformation movements that led to the religious wars of the 17th century, the relationship between the individual and the state was scrutinised. Geopolitically, the Peace of Westphalia that resulted was perhaps the primary development which led to the modern nation-state, and to the declining political influence of the church in state affairs.

Philosophically, the events of the 17th Century resulted in the conception of the social contract. The social contractualists took the concept of the English contract, that being an agreement between two free agents where there is a 'meeting of the minds', and applied in a more metaphoric manner to man's relationship to the state. Of the contractualists,

[41] Ibid., p161.
[42] Ibid., p.161.
[43] Ibid., p.156.

the most influential on the Western legal tradition, common law, and the Anglophonic Constitution is John Locke. Locke wrote of man in a state of nature, but differently to the other contractualists such as Hobbes and Rousseau. Locke opines:

> *"The state of nature has a law to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions..."*[44]

The person who does not obey reason, has declared a war against humanity, and for this, the role of the state is to protect "life, health, liberty, or possessions." Locke asserts the individual, distinct from the state. The right to property was founded on a necessity to work and improve on the land for it to be distinguished from the land of others:

> *"As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common."*[45]

This conception of property became one of the central tenets to Western conquest of indigenous lands. Indigenous peoples have varying conceptions of property, which all to varying degrees, differed from the European perspectives. When coupled with Enlightenment views of progress, it reinforced the image of Indigenous peoples as primitive and was a basis to justify oppressive conduct.

At the same time with respect to the State, Locke says of the executive that:

> *"The use of force without authority, always puts him that uses it into a state of war, as the aggressor, and renders him liable to be treated accordingly."*[46]

For this reason, according to Locke, executive power is not absolute, but is limited to act within its authority. In this, one can see the enduring influence of the Magna Carta. However, Locke in his treatises dichotomised the operation of power to only two parties: the individual and the state. Other relationships and institutions such as the community (that were more significant in non-Western societies) did not have a formal role. By assigning clear roles, both the individual and the state grew in the power they possessed, while these other institutions were increasingly disenfranchised in Western normative

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[44] J Locke, *The Second Treatise of Civil Government,* 1690, http://www.constitution.org/jl/2ndtreat.htm (accedido 16 November 2010), Book II, Section 6 (last accessed 10 November 2010).
[45] J Locke, *Two Treatises of Government*, first published 1764, available at http://www.constitution.org/jl/2ndtr05.txt (last accessed 10 November 2010).
[46] J Locke, *The Second Treatise of Civil Government,* 1690, http://www.constitution.org/jl/2ndtreat.htm (last accessed 10 November 2010), Book II, Section 13.

systems. The two developments, the emergence of the nation-state, and the significance of the individual within that state left little room for groups that existed outside that dichotomy. Anaya notes that the dichotomy "is not alive to the rich variety of intermediate or alternative associational grouping actually found in human cultures."[47] Most importantly, given the dichotomy only operates on individual and state levels it requires social homogeneity. The social contract is disharmonious once minorities and marginalised groups appear (or are noticed). Further, social organisation between European societies and indigenous societies was substantially different.

It is in this dynamic that the law of nations formed under the jurisprudence of scholars such as Grotius and Vattel. These jurists were significant in asserting the central principles which define the sovereignty of nation-states: exclusive jurisdiction, territorial integrity, and non-intervention in domestic affairs.[48] Against this backdrop the indigenous person began to disappear from the gaze of international law. International law dictated the relationships between states. How states operated, within their own parameters, was not open to scrutiny to the extent that the state did not impose on certain basic rights such as life, liberty, and property.

This is particularly evident in the Australian context. When the First Fleet arrived in Australia in 1788, Australia was declared *Terra Nullius*. *Terra Nullius* is a principle in Roman law, which describes territory that has never been subject to sovereignty, or where a previous sovereign has clearly relinquished title. In line with Locke's perception of property, international law (and therefore sovereignty) was only available to those races that could make industry of land

As it has been discussed in the first chapter, the arrival of the English meant a conflict over resources. Since the time of European settlement, government at every level has often been pressured by farmers, miners and pastoralists to limit Indigenous rights. Notably, the demographic of the settlement of Indigenous peoples prior to European

[47] Anaya, above n37, p14.
[48] Ibid., p 15.

settlement is similar to Australia's demography today, the majority has always populated in the more fertile southeast coast. To the extent that Indigenous peoples stood against the Lockean conception of property, bound to industry and capitalism, their rights were deferred and were pushed to unfertile land.

The approach of the colonisers towards Indigenous peoples developed from outright animosity to paternalistic guardianship. The significance here with respect to the Australian context lies in the categorisation of European reason and rationality as the justification for the acquisition of territory by the Enlightenment jurist. In Australia, Indigenous Australians were not even capable of recognition, however paternalistic that recognition may have been. The non-recognition of Indigenous Australians, as neither subject not object, gave them no place in terms of rights and property ownership. This reality was heightened as positivism came to dominate legal philosophy.

2.3 Positivism in International and Constitutional Law

As the social contract came to dominate the legal discourse, legal positivism further entrenched the dualistic approach of state power and individual rights. Legal positivism assumes international law to be "the law *between* and not *above* states, finding its theoretical basis in their *consent*".[49] For this reason "States that make up international law and possess rights and duties under it make up a limited universe that excludes a priori indigenous peoples outside the mould of European civilisation."[50] The scientific racism of the 18th and 19th century gave further justification for such exclusion. In this way, states had exclusive jurisdiction and absolute title over their land, which often included indigenous territories. The English perspective reflects this. Westlake's *Chapter on the Principles of International Law* states:

> *"Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and the want of it... The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied."* [51]

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[49] Ibid., p19.

[50] Ibid., p19.

[51] J Westlake, *Chapters on the Principles of International Law* Adamant Media Corporation (December 18, 2000).

These factors lead to the full development of the trusteeship doctrine as the justification for colonial expansion. This concept solidified into a principle of international law by the end of the 19th century. This was seen in the Berlin Conference of 1884-1885 where the colonial powers settled on their colonial frontiers in Africa. Under Article VI of the Berlin Act,

> *"All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being..."*[52]

In Australia it can be seen in the humanitarian movement for the "preservation" of Indigenous Australians, and the stolen generations, as set out in the first chapter. Even on its own terms, the trusteeship doctrine fails- trustees are fiduciaries and the fiduciary relationship is the highest standard of care under both common law and equity. On this test, the colonial powers failed.

AV Dicey's *Introduction to the Study of the Law of the Constitution*[53] had a tremendous impact in the United Kingdom and Australia with respect to rights. In it Dicey contends that rights are sufficiently protected through the two pillars of the legal system: the rule of law, and the Constitution. The rule of law represents the most fundamental legal norms available in Anglophonic legal systems. Its central principle is that "no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[54] There are various precepts to this principle, but the most significant example is the Magna Carta. In addition, its other two principles are: the state may only punish the individual for a breach of law that has been proved in a court, and that the courts are available as the forum to seek remedy for the breach of any rights or liberties.[55]

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[52] Article VI, *General Act of the Berlin Conference on West Africa 1885*, available at http://africanhistory.about.com/od/eracolonialism/l/bl-BerlinAct1885.htm (last accessed 10 November 2010).
[53] A V Dicey, *Introduction to the Study of the Law of the Constitution*, ed. Roger E. Michener (Indianapolis: Liberty Fund 1982), p7.
[54] Ibid.
[55] Ibid.

Significantly, Dicey rejects a comprehensive bill of rights because it is too broad for enforcement:

> *"Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishment."*[56]

In this sense, for Dicey, a definition of rights is a *limitation of rights* because it grants the state power over the inherent freedom of man. This thinking is best elucidated in *Entick v Carrington,*[57] an 18th century decision from which the legal principle emerged that an individual is free to act as he wishes unless the law prohibits otherwise, and the state may act only by that which is prescribed by law.

The Diceyan conception of rights has been the most significant influence in interpreting human rights subsequent to the promulgation of the Australian Constitution. Although there was a period of increased activism in the 1990s, overall the High Court has been careful to read down rights in the Australian Constitution.

2.4 The Australian Constitution

The Australian Constitution came into effect on 1 January 1901. The document was drafted at three constitutional conventions held in 1891, 1897, and 1898. The Australian Constitution is primarily influenced by the Westminster form of government, but as Australia was entering into a Federation and was seeking a formal document, the British model alone would not suffice. Therefore, the framers sought inspiration from the United States, in particular because of the importance placed on the separation of powers under its federal model.

Unlike the American Constitution however, the Australian Constitution was not concerned with the protection of individual liberties and was less concerned with the complete separation of power. The framers also believed in a stronger federal government and criticized excessive power being left to the states.[58] The United States

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[56] Ibid., p135.

[57] *Entick v Carrington* [1765] EWHC KB J98

[58] See Henry Parkes, 4 March 1898, Official Record of the Australasian Federal Convention, available at

came into existence because of its antagonism to centralized power. Australia, on the other hand, was not formed out of revolution, and had an entirely different religious dichotomy (spurred by the Catholic/Anglican divide rather than by Puritan persecution). Other influences include the Swiss Constitution for the requirement of referenda for Constitutional amendments. Significantly, rather than being a popular document, it is an accord between the states on how to federalize power.[59]

As mentioned, the Constitution was from the outset rights-averse and Indigenous people were excluded from being a subject of federal legislation. The framers did not wish to implement a bill of rights, considering instead that the common law, by way of the protections offered by the rule of law, provided better safeguards. Further, the framers were concerned as to the question of race. With this concern, "[t]he *Australian Constitution* was drafted explicitly to facilitate the enactment of racially discriminatory laws"[60] which it proceeded to do. On the one hand, Indigenous Australians were excluded from being a subject of federal power, and on the other hand successive government used the Race power to implement policies to exclude non-white immigration to Australia under the White Australia Policy. Indeed one of the first bills of Parliament, the *Immigration Restriction Bill 1901* had exactly this purpose.

The framers debated the inclusion of race as a federal power because they believed that "the introduction of an alien race in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth".[61] Various states were concerned about the long-term impact of the non-European migrant workforce: indentured labour from Pacific Islanders (who at the time were referred to as Kanakas) had been working on many Australian plantations as a source of cheap labour, but were undermining local workforces. However, the framers believed the states were the more appropriate forum to deal with the issue of Indigenous Australians. Therefore, the

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http://www.aph.gov.au/senate/pubs/records.htm (last accessed 10 November 2010).

[59] JA La Nauze, *The Making of the Australian Constitution* (1972) at 190.

[60] G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643, p646.

[61] Samuel Griffith, 31 March 1897, Official Record of the Australasian Federal Convention, available at http://www.aph.gov.au/senate/pubs/records.htm (last accessed 10 November 2010).

Constitution was drafted so that the Commonwealth could make laws regarding race to the exclusion of Indigenous Australians and to exclude Indigenous Australians from the federal census.

2.5 The modern development of International Law with respect to Indigenous peoples

The modern rights era signals a very different approach to indigenous peoples in international law. The nation-state was now a model of power where former colonies now far outnumbered the former colonisers. This meant that international law could be shaped by non-European states. Those who had formerly been oppressed now controlled what were still Western institutions of power, which invariably meant International Law would be somewhat less Eurocentric.[62] Europe was shell-shocked by two World Wars of its own making, and an acceptance that its hegemony was over. At the same time, the Cold War created a new map of shifting loyalties. It is amidst these realities that the United Nations was formed, and a number of treaties were signed which reflected a new wave of rights (which were set out in the chapter above), and significantly, it sought to alter the traditional dichotomy of the social contract forged after the Peace of Westphalia. Rights until now were protected by the relationship between the state and the individual but as discussed earlier, many minority groups were not protected in this dynamic. The modern rights movement altered this dichotomy gradually. The first years following the creation of the United Nations focused on the decolonisation movement. Because the decolonisation movement was centred upon independence and therefore nationhood, new struggles emerged for minority groups who did not fit within the (artificial) state boundaries that had been drawn by the colonisers. Anaya notes that "[t]he universe of values that promoted the emancipation of colonial territories during the middle part of this century simultaneously promoted the assimilation of members of culturally distinctive indigenous groups into dominant political and social orders that engulfed them."[63] It became apparent that while nationhood liberated many people who had lived under colonial oppression, it created new struggles, and it was under this ever-shifting paradigm that the ICCPR and the ICESR were drawn as international instruments to

[62] But given the institutions were European creation, they would remain Eurocentric in nature.

[63] Anaya, above n37, p44.

reconstruct the rights dynamic beyond the individual and the state. In the 1960s the modern indigenous rights movement began, largely driven by indigenous peoples themselves,[64] and it focused on land rights, cultural rights, and rights of autonomy and self-determination. It culminated in 2007 in the non-binding *UN Declaration on the Rights of Indigenous Peoples.*

As the first peoples of their respective states, indigenous peoples have an inherent assertion to autonomy and self-determination, but this has posed a serious challenge to the nation-state. Therefore, around the world, states with indigenous peoples continue to struggle to come to terms with indigenous rights movements, and Australia has been a prime example.

3 Conclusion

As the legislative framework demonstrated in the first chapter, Australia does not have in place a bill of rights, or an entrenched codified rights system. The reason is that the Australian conception of rights emerged from the liberalism of Locke, and the positivism of Dicey. That is, rights are sufficiently protected by the current system, and any attempt to institute a rights system is a rejection of liberalism because it empowers the state to define the freedom of man. Perhaps the individual/state dichotomy that emerged from 17th and 18th century jurisprudence would be sufficient in a society that did not have disenfranchised groups. But human rights should exist to protect the weak and disenfranchised, and as the homogeneity of nation-states is being challenged, a conclusive rights system is needed.

This chapter has given historical context to the various influences that developed a piecemeal framework for rights for Indigenous peoples in Australia. The Intervention, which will be discussed below, repeated the oppressive way in which Indigenous Australians have historically been treated in Australia. First one can see the roots of the mentality of the paternalistic manner in which the Commonwealth entered into communities with a complete lack of consultation and engagement with Indigenous

[64] Ibid, p45.

peoples. Further the forced acquisition of property reasserts the failure of the indigenous person to mould within the Lockean conception of property. Third, the influence of Diceyan positivism in Australia has further restricted the ambit of rights. Rights exist to the extent that they are protected by the rule of law, and any explicit rights offered by the Australian Constitution. Although the rule of law provides certain rights, it is not sufficient to protect the disenfranchised.

On the other hand, modern developments since the creation of the United Nations have sought to empower indigenous peoples, by providing rights for autonomy, culture, and self-determination. As previously mentioned, Australia is a signatory to the principle treaties protecting these rights, and so although the Intervention reflects certain breaches of international law, the subsequent pressure of non-compliance has yielded results.

The fundamental problem however, is the hierarchical difference between those rights protected by the rule of law and the Constitution, and the rights protected by the human rights instruments of the United Nations. The former have a first-order normative value that cannot be superseded. The latter possess a lesser normative value and can be overridden by subsequent legislation, as was the case with the Intervention. This reflects on the need for a more entrenched rights system, which
will be explored further below.

CHAPTER III: THE INTERVENTION

1 Introduction

On 15 June 2007, the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, set up by the Northern Territory Government, released a report entitled *Little Children are Sacred* (**LCAS Report**). The LCAS Report was the latest commissioned by the Commonwealth to examine claims of child sexual abuse in remote Indigenous communities in the Northern Territory. On the 21 June 2007, in response to the LCAS Report, the Commonwealth, surpassing the Territory Government, announced the *Northern Territory National Emergency Response.* It comprised a number of measures. Most dramatically on 27 June 2007, the Commonwealth called in the Australian Defence Force on an operation to support the Intervention. In addition to the deployment, the legislation enacted by the Commonwealth effected a whole host of other measures, including providing funding for some community services, abolishing funding for others, and most significantly, suspending race discrimination legislation. The Intervention was met with criticism from human rights and social services groups, as well the wider international community.

This chapter reflects on the LCAS Report, the subsequent response by the United Nations, the human impact of the Intervention, and government measures that scaled back the most controversial aspects of the Intervention. Researcher Paddy Gibson was stationed in Alice Springs in the Northern Territory from June 2008 – January 2009 and undertook first-hand research into the daily impact of the Intervention on Indigenous Australians in the Northern Territory, interviewing and collecting the statements of people living under the Intervention. In Gibson's investigation he encountered widespread anger and discontent with the Intervention. This chapter draws on Gibson's interviews to consider the personal impact of the Intervention.[65]

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[65] P Gibson, *Return to the Ration Days:* The NT Intervention: grass-roots experience and resistance, June 2009, based on a series of interviews conducted from June 2008 – January 2009. http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf (last accessed 10 January 2011).

2 The Intervention

As evident from the first chapter, Indigenous Australians are the most disenfranchised group in Australia, both historically and today. They have faced a range of human rights issues which demonstrate a failure of human rights protection in Australia. The Intervention, and its implications with respect to the human rights of Indigenous people are discussed below.

2.1 Background

As a result of the overrepresentation of Indigenous Australians in the criminal justice system, there have been continuing attempts to investigate violence in Indigenous communities. The LCAS Report has many antecedents. In 1999 Dr Paul Memmott prepared a report for the Crime Prevention Branch of the Federal Attorney-General that was not released until 2001.[66] The report, entitled *'Violence in Indigenous Communities'*, aimed to identify the issues concerning violence in Indigenous communities and provide a strategic response.[67] When the report finally was released the Commonwealth did not act on the report. In 2002, the Department of Premier and Cabinet of Western Australia produced the first significant report involving child sexual abuse in Indigenous communities in Western Australia.[68] In 2003, Janet Stanley presented a report on child sexual abuse in Indigenous communities[69], as part of the Australian Institute of Family Studies (a Commonwealth statutory agency). The report outlined child sexual abuse as a significant problem for Indigenous children finding that the rate of substantiation of abuse was on average 4.3 times higher than the non-Indigenous population.[70]

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[66] See P Memmott, R Stacy, C Chambers, and C Keys, (2001) *Violence in Indigenous Communities: Full Report* [A Report for The Crime Prevention Branch of the Attorney-General's Department, Canberra], available at http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~violenceIndigenous.pdf/$file/violenceIndigenous.pdf (last accessed 10 November 2010).

[67] Ibid.,p1.

[68] S Gordon, K Hallahan, & D Henry, *Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities,* 2002, Department of Premier and Cabinet, Western Australia.

[69] J Stanley, *Child Sexual Abuse in Indigenous Communities*, National Child Protection Clearinghouse, Australian Institute of Family Studies, Presented at the Conference, Child Sexual Abuse: Justice Resolution, 1-2 May, Adelaide, available at http://www.aifs.gov.au/institute/pubs/papers/stanley4.pdf (last accessed 10 November 2010).

[70] Ibid., p1.

Significantly, Stanley noted:

> *"Present (white/mainstream) response to child abuse largely ignores all causation levels except the nature of the interaction between parent and child, that is, the cause of child abuse is seen due to the dysfunction of a parent.*
>
> ...
>
> *It would seem that this mainstream perspective, does not fit in with the reality of Indigenous child abuse, nor with the perception of many Indigenous people themselves. CSA* [child sexual abuse] *in Indigenous communities needs to be understood in the context of the broader setting of trauma, deprivation and racism, in which the problem of CSA* [child sexual abuse] *is completely entwined."*[71]

The report recommended the provision of more resources in a culturally sensitive fashion.

Finally in 2006, the Australian Broadcasting Corporation aired two reports on the issue on one of its flagship current affairs programs, *Lateline*. In the first report the Chief Prosecutor for the Northern Territory highlighted the extent of the problem, while the second report aired allegations of sexual favours from young girls in exchange for petrol. The *Lateline* reports sparked heightened media attention into the issue.

2.2 LCAS Report

Reacting to the media response, on 8 August 2006 the Northern Territory Government convened the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (**Board of Inquiry**) to conduct an investigation into allegations of sexual abuse of Indigenous Australian children.

On 15 June 2007, the Board of Inquiry released the LCAS Report. The LCAS Report is startling. The report made some key findings:

- **Significant sexual abuse of children in Indigenous communities:** It found "clear evidence that child sexual abuse is a significant problem across the Territory."[72] This included:

  male and female victims

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[71] Ibid., p6.

[72] AAM Mekarle, *Little Children are Sacred*, 15 June 2007, available at http://www.inquirysaac.nt.gov.au/ (last accessed 10 November 2010), p57.

paedophilic activity;

incest;

situational offenders; and

child and adolescent offenders.[73] The committee concluded that there was such a high rate of juvenile offenders "due to the combination of inter-generational trauma, the breakdown of cultural restraints and the fact that many of these children (if not all) have themselves been directly abused or exposed to inappropriate sexual activity (through pornography or observing others)."[74]

- **Sex in exchange for favours:** The report found many instances of sexual abuse occurring in exchange for favours. For example:

  offences were committed by both Indigenous and non-Indigenous men towards post-pubescent female Indigenous children in exchange for goods and favours, to the girls themselves, and in other instances to their families;[75]

  reliable claims were made that "a rampant informal sex trade existed between Indigenous girls aged between 12-15 years, and the non-Indigenous workers of a mining company. It was alleged that the girls were provided with alcohol, cash and other goods in exchange for sex";[76]

  offences were committed by community taxi drivers.

- **Exposure to sexual activity:** Often if children were not themselves abused, they were exposed to pornography or the sexual acts of others. To this extent, the environment children were exposed to was highly sexualised;
- **Consensual sex between children:** There were many instances of consensual sex acts occurring between children of a similar age. This had many consequences including further sexualising the environment, teen pregnancies, etc.
- **Offenders both Indigenous Australians and non-Indigenous Australians:** Offenders were both Indigenous and non-Indigenous, and had led to generational cycles of offenders.[77]
- **Cycle of abuse:** Abuse was often cyclical, with many offenders having been victims

[73] Ibid., p60.
[74] Ibid., p63.
[75] Ibid., p63.
[76] Ibid., p64.
[77] Ibid., p58-59.

themselves. The report includes the following account:

> *"When I was six my old man shot my mum, yeah fucking shot my mum, bang in the head. They had been blueing all night. He made me clean her brains off the floor. When I raped that girl I felt like all my pain was going into her, when she screamed that was me screaming, I know it sounds fucked up but that's what it felt like. I looked at my hands after, the blood on my hands and the shit, it was all slimy, I thought I was cleaning up my mum's brains again, it felt the same."*[78]

- **Substance abuse:** Substance abuse was a significant contributor in overcoming the inhibitions to offend.[79]
- **Indigenous Australian anger:** Indigenous Australians were deeply offended by their representation by the media and political commentators. This added a further barrier to addressing the issue.[80]
- **A failure to report abuse**: One of the biggest problems the report encountered was a complete failure to report abuse. This was for a number of reasons which include: fear, feelings of shame, language difficulties, a distrust of authorities, lack of knowledge, the normalisation of violence, and the cyclical and systematic nature of the abuse.

Significantly, the report provides a brief overview of marriage and sexual relations in traditional Indigenous societies. While it may not accord with modern view of human rights (in terms of arranged marriage and the age of consent), the report makes it clear that there is no real nexus between the incidences outlined by the report and traditional practices in Indigenous cultures. While cases have occurred in the popular media with respect to promised child brides (and they are certainly outside the framework of State and Territory laws) they are of a different nature from the cycle of abuse outlined in the report.

The overall conclusion of the LCAS Report was that "action must be taken to establish a new set of moral "norms" within Indigenous communities that do not fetter the freedom of choice but encourage the young to make appropriate and healthy choices in relation to

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[78] Ibid., p67.
[79] Ibid., p62.
[80] Ibid., p58.

sex and make certain behaviours socially unacceptable."[81] To this end, it made 97 recommendations based on the LCAS Report spanning over the following areas:

- **Leadership**: that Territory and Commonwealth Governments were responsible for making the issue of sexual abuse a priority and developing long-term funding programs not reliant on election cycles;
- **Government Responses:** that government agencies adopt appropriate policies to promote child safety, including appointing persons within government departments with this role, and creating a commissioner for children.
- **Family and Children's Services:** that family services maintain and broaden its role in responding to child abuse, that its bureaucracy be extended and funding increased, that child protection services increase, that more Indigenous Australians be employed, and that better support programs be established; that extended family support be provided, including family centres and youth centres;
- **Health:** that better support be provided to and by the health department; that remote communities be provided a child health service, including increasing pre-natal and maternity support; that Territory and Commonwealth Governments together with communities develop intergenerational trauma support units;
- **Police:** that the police integrate the child protection services better and its specific taskforce be extended; that more Indigenous Australians be recruited, in particular females in the police force; that ongoing and effective consultations occur with Indigenous communities; and that extensive training be provided to police.
- **Bail:** that Courts have regard to child abuse victims when considering bail applications;
- **Offender rehabilitation:** that more sex offender rehabilitation programs be instituted, including community-based programs; that the Territory and Commonwealth Governments develop with communities alternative sentencing models;
- **Prevention strategies:** that Territory and Commonwealth Governments develop prevention strategies together;
- **Education:** that the Territory and Commonwealth Governments ensure their

[81] Ibid., p71.

education policies are met in remote communities; that staff be provided training for Indigenous Australian students with respect to Indigenous culture, and issues of abuse; that schools be used as social and community centres; more weight be given to Indigenous languages and cultures;

- **Substance Abuse and gambling:** that the Territory and Commonwealth Governments consult with Indigenous communities to implement an effective substance abuse policy, including restricting the flow of alcohol in Indigenous communities, and limiting takeaway liquor in the Northern Territory; that liquor licence legislation and applications be considered carefully, taking into account its effect on local communities; that an education campaign be instituted concerning gambling including further research;
- **Community responsibility:** that community programs be established both with respect to education and obligations; that dialogue occur between government and Indigenous communities on Indigenous law and preventing abuse; that Indigenous Customary law dealing with abuse should be standardised and supported, as long as it is consistent with Northern Territory law. This may include setting up Indigenous law tribunals and giving authority to elders within the community; that violence management policies be co-ordinated between government and community groups;
- **Housing:** that housing overcrowding be alleviated by increasing housing;
- **Pornography:** that an education campaign be instituted to reduce the impact of pornography, including the prohibition of exposing minors to pornography; and
- **Cross-cultural training:** that the Territory and Commonwealth Governments introduce cross-cultural training to all government officers, and specific training with respect to Indigenous Australians.[82]

2.3 Government Response: Northern Territory National Emergency Response

The LCAS Report gained political momentum quickly. It is significant to note that 2007 was an election year and the centre-right government was unpopular, in its fourth term, and seen as recalcitrant on social issues. On 21 June 2007, the Commonwealth

[82] Ibid., *Recommendations*, pp1-13.

announced the Intervention. The Intervention comprised an Australian Defence Force deployment and a legislative reform package which consisted of the following:

- *The Northern Territory Emergency Response Act 2007* (**Response Act**);
- *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth);*
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth);*
- *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007) Cth; and*
- *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 (2007) (Cth).*[83]

2.3.1 *Northern Territory National Emergency Response Act 2007 (Cth)*

This is the primary legislation with respect to the Intervention. It places a series of measures for a period of 5 years and applies to certain prescribed areas in the Northern Territory which include Indigenous land, Indigenous community areas, town camps. and other areas as determined by the responsible Minister. These measures include:

- The prohibition of the purchase, sale, and consumption of alcohol in the prescribed areas, and for the ability to request details on any large purchases in the Northern Territory.
- The requirement that computers purchased in prescribed areas by any person or agency that receives government funding be installed with an internet filter approved by the responsible Minister. Further, that records be kept for the use and purchase of computers.
- The compulsory acquisition of leases of over 65 Indigenous communities.

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[83] Other legislation included:
Northern Territory National Emergency Response Act 2007 (Cth);
Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth);
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth);
Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007) Cth; and
Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 (2007) (Cth).

- The creation of 'Community Service Entities', which may be local government councils, incorporate associations, or Indigenous corporations. Any person or organisation within the Territory may be declared a Community Service Entity by the responsible Minister. The responsible Minister has power over assets and funding of these organisations.
- A determination that courts must not consider customary law and cultural practices as mitigating factors in bail and sentencing applications.
- The creation of a retail-licensing scheme in the prescribed areas. These stores are to provide food and groceries. The Commonwealth may require a store to obtain such a license and may strip a store of its assets if it does not obtain a license. These stores are to operate as part of the income management scheme (described below).
- The exclusion of certain legislation, most significantly:

  Part II of the *Racial Discrimination Act 1975* (Cth);

  section 49 of the *Northern Territory (Self Government) Act 1978* (Cth), and Territory law that deals with discrimination;

  section 128A of the *Liquor Act* 1978 (NT); and

  Provisions concerning the acquisition of property under section 50(2) of the *Northern Territory (Self Government) Act 1978* (Cth).

2.3.2 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*

Some of the most controversial acts imposed by the Intervention occurred under this legislation:

- The Act creates a new income management system for welfare payments. The Act withholds between 50%-100% of welfare payments for individuals in the prescribed areas, as well as individuals responsible for the care of children. The withheld funds would be used for food and groceries.
- Formerly, the Commonwealth had in place a program to assist Indigenous job seekers by the name of Community Development Employment Program (**CDEP**). The CDEP is an employment program in which the Commonwealth funded certain programs to employ Indigenous peoples and provide them with skills and training to enter into the

workforce. This legislation ends funding for CDEP but does provide a 1-year provision for a transfer period for workers on CDEP moving into the welfare system.

- The Commonwealth provides certain welfare bonuses for parents with newborn babies. The available lump-sum payment would be available in 13 monthly installments.

2.3.3 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)*

This legislation also takes particular measures, including:

- The prohibition of the supply, control or possession of pornographic materials in the prescribed areas.
- Amplifying the investigatory powers of the Federal Australian Crime Commission and the Australian Federal Police with respect to child sexual abuse and violence in Indigenous communities.
- The provision to give the Commonwealth a continuing legal interest in infrastructure projects on Indigenous land if it has a value equal to or greater than $50,000.
- Changes to the existing land permit system, allowing the Territory legislative assembly to make laws permitting entry to Indigenous land without a permit.

2.3.4 *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007) Cth and Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 (2007) (Cth).*

These two pieces of legislation were the supply bills which provided funding to implement the Intervention.

2.3.5 Aims of intervention

Altman notes that measures outlined by the Response Act broadly had three aims:

(i) **Measures that disciplined Indigenous peoples:** there were numerous controls placed upon remote communities, including:

- quarantining of welfare incomes;
- total alcohol bans on the Northern Territory Indigenous land for six months.

Further still, bans were in place over the sale, possession, transportation and consumption of alcohol and the monitoring of takeaway sales across the Territory;

- the requirement of medical examinations of all Indigenous children in the Northern Territory under the age of sixteen;
- total ban on the sale and distribution of pornography, as well as a check of all public computers;
- changes to the welfare system which included requirements for people to work for the dole on community cleanups in townships and communities;
- the enforcement of school attendance as part of family assistance welfare support;
- the provision of meals for schoolchildren with parents paying for the meals;
- a control over tenancy arrangements which would restrict modes of living;
- an increase in policing levels;
- a Commonwealth Government sexual abuse reporting desk; and
- customary law and cultural practices were removed as considerations for bail applications and sentencing within criminal proceedings.

(ii) **Measures that weakened Indigenous land rights and expanded the possibility for commercial development:** this included a compulsory acquisition of township leases which had the effect of dispossessing Indigenous landholders. Previously there had been a permit system in force, whereby non-Indigenous persons required a permit to enter Indigenous lands. The permit system was also abolished. These measures were highly contentious because it set back the Indigenous land rights movement, and the process of abolishing the permit system was already in process prior to the Intervention.

(iii) **Measures that sought to depoliticise Indigenous organisations, and impose control over townships**: the Commonwealth abolished the CDEP, and appointed government business managers who had legal rights to attend and oversee any elected organisations and with extensive powers in the townships.[84]

[84] These three factors are outlined by JC Altman, *The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?*, available at

Controversially, the Intervention was specifically targeting Indigenous people, which was a breach of the RDA and to overcome this the Commonwealth suspended the operation of the RDA with respect to the Response Act.

2.4 Initial Responses to the Intervention

There was widespread criticism and support of the Intervention, both within and outside of the Indigenous community. Significantly, both the Human Rights and Equal Opportunity Commission and the Australian Council of Social Services made submissions criticising the Commonwealth's approach.

On 10 October 2007, three UN Special Rapporteurs sent a joint communication to the Commonwealth.[85] The communication commended the effort of the Commonwealth to respond to the issue of child sexual abuse but criticised the measures that curtailed or breached international human rights standards. The Commonwealth responded to the communication on 22 November 2007, submitting that the measures were necessary for the protection of Indigenous people, particularly Indigenous women and children, and that many of the measures were a short term stopgap.

Additionally, the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, and the Committee on the Elimination of Racial Discrimination expressed concerns with the racial aspects of the Intervention.

2.5 Effect of the Intervention

The immediate impact of the Intervention commenced with Operation Outreach, the Australian Defence Force's deployment of more than 600 personnel within 73 communities to provide support for the legislative package. The response was noted as being "framed as a top–down crisis intervention...It is characterised as a short-term

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http://www.anu.edu.au/caepr/Publications/topical/Altman_AIATSIS.pdf (last accessed 10 November 2010), p8.

[85] The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

response to be followed by medium- and long-term strategies – none of which are clear at this stage".[86]

The immediate impact of the Intervention was visible in a number of areas:

- a visible presence of the military;
- the complete prohibition of alcohol in prescribed areas;
- the overhaul of the CDEP system, effectively resulting in welfare quarantining which went together with the introduction of the Basicscard;
- voluntary health checks, enforced school attendance; and
- tense relations between Indigenous peoples and officials, being principally the police, the military, and Centrelink (the federal welfare agency).

Some of the deeper social impacts of the Intervention are explored below.

2.5.1 CDEP

The Commonwealth Development Employment Program was an important stepping stone program, which provided employment opportunities for Indigenous Australians. Created by the Fraser Government in 1977, the scheme functioned to promote employment and skills training, and also invested in projects and enterprises in local indigenous communities. At the time of the Intervention approximately 7,500 people were working under the CDEP.[87] The CDEP itself was under-funded but provided many opportunities for communities that have some of the highest unemployment rates in the country. Altman notes a number of indicators to demonstrate the success of CDEP: employees were paid wages above the level of the dole, most employees worked more hours than were provided for by CDEP, and employees were able to undertake customary activities.[88]

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[86] Ian Anderson, the director of the Centre for Health & Society and Onemda VicHealth Koori Health Unit at the University of Melbourne, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html#part2 (last accessed 10 November 2010).

[87] JC Altman, *Neo-Paternalism and the Destruction of CDEP*, Centre for Aboriginal Economic Policy Research, Topical Issue No. 14/2007, available at http://www.anu.edu.au/caepr/>, p1. (last accessed 10 November 2010).

[88] Ibid., p2.

The immediate impact of the phasing out of CDEP was to push up unemployment and put more Indigenous Australians on welfare; as welfare was being rationed, it pushed people back to dependency. In the townships, residents noted the immediate impact of cutting the program:

> *"Lot's of young people are just walking around since they scrapped CDEP. They used to do everything, pick up the rubbish. Gardens everywhere. Go and check on the old people and make sure they had things".*[89]

It is entirely unclear how terminating CDEP would improve the dynamic reported by the LCAS Report. Altman refers to the act as "the single most destructive decision in Indigenous affairs policy that I have witnessed in 30 years of research and involvement in Indigenous communities."[90]

From the Intervention many problems emerged including unpaid work. Gibson noted the arrival of a Government Business Manager from Ali Curung in the town of Tara for a community program which included having locals paint houses. Town resident Nathaniel Long noted:

> *"We worked from 8am to 4pm every weekday for a month and a half. Sometimes on weekends too. They kept telling us we were going to be paid. We filled in time sheets. But we haven't been paid anything".*[91]

2.5.2 Income Management and the Basicscard

As discussed above, one of the measures was the rationing of welfare and family assistance payments. The rationed funds could only be used for basic necessities such as food and shelter. Part of the reasoning for the rationing was the poor diets of people living in Indigenous communities who, due to a number of factors, were purchasing low-nutrient, high-energy foods in place of a rounded diet. In the year prior to the Intervention, an Indigenous retail corporation won the contract to develop a food budgeting tool, a card (the FOODCard) which allowed the purchase of certain items, and restricted the purchase of other times such as those high in sugar and saturated fats.

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[89] Ibid.
[90] Ibid., p1.
[91] P Gibson, *Return to the Ration Days*, above n65, p13.

When the Intervention commenced, the Commonwealth introduced the Basicscard, which placed the quarantined welfare funds onto the card.

A study conducted by Brimblecombe[92] suggests that spending habits did not dramatically change following the introduction of the Basicscard, with no major impact recorded on the sales of food and drink, tobacco, fruits and vegetables.[93] While, for example, soft drink sales declined in the first six months of Income Management, it rose higher than pre-Income Management levels in the subsequent period. Most importantly, the study found no major increase on the purchase of food and vegetables.

Gibson notes some fundamental problems with the Basicscard. The card robbed people of one of the central moral rights that came with the human rights movement: human dignity. People, who had the autonomy to elect how they wished to spend their entitlements, now had those funds funnelled into certain expenses. This had the impact of once again disempowering Indigenous Australians and further highlighting the relationship of subsistence between centralised institutions and Indigenous peoples. Gibson interviewed Jimmy from Ti-Tree in August of 2008, who noted:

> *"Its a high mark up and a lot of embarrassment. Its downgrading people, because they want to do their own shopping. Those old women, its reminding them of when they were kids and they used to get passed out rations out on the stations."*[94]

Many were outraged that disposable income they managed were now forcibly placed onto the card. In interviewing some elderly women in the Nyrripi community, they responded, "they don't understand why... we don't drink. We know how to look after the kids"[95].

Second, while the business community was consulted, Gibson notes a basic failure to consult the local community on the card and its impact. Third, the implementation of the

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[92] JK Brimblecombe, J McDonnell, A Barnes, JG Dhurrkay, DP Thomas, and R Bailie, *Impact of income management on store sales in the Northern Territory*, Med J Aust 2010; 192 (12): 728, available at http://www.mja.com.au/public/issues/192_10_170510/bri10090_fm.html (last accessed 10 November 2010).

[93] Ibid.

[94] P Gibson, *Return to the Ration Days*, above n65, p14.

[95] Ibid., p11.

program caused many administrative problems which has a large impact on the day-to-day lives of people. For example, Gibson observed the separation of queues for those on Basicscards (all Indigenous Australians) from those with other issues. When asked whether this separation amounted to segregation, a staff member responded, "No, it's not like that at all. It's just that there's so many people come in for store cards. So they take a long time", and that ""It's quicker for them this way too."[96] People also had difficulties transferring credit onto the card. Valerie Martin, a Walpiri woman and community spokesperson noted, ""We almost used all of the credit on the phone card...[m]ore than an hour, just listening to that music, and for nothing".[97] In addition there was uncertainty as to which businesses accepted the card and which did not.

The daily effect of Government-condoned racial discrimination was startling. Gibson noted that people were forced to wait in queues for more than an hour to obtain a card. Gibson himself waited 3 hours with Interviewees trying to obtain a card. Small administrative requirements had draconian effects in remote communities. For example, the requirement of ID to access Income Managed funds was onerous because many people in remote communities did not have current or effective forms of ID.

Elders in the communities considered the Income Management scheme a return to the 'ration days' of earlier generations, where Indigenous Australians were paid in food rations for work they undertook instead of wages. The system ended with the growing Indigenous rights movement in Australian in the 1970s. One Gurindji elder at Tennant's Creek noted:

> *Roughing people [in the ration days]. Like this one now where they giving me paper for tucker still might be. Only little bit money going on the keycard - $150. I used to get $400 every fortnight. But we don't get much money now. We get paper for tucker and not much money in the keycard. Might be old day again.*[98]

[96] Ibid., p25.
[97] Ibid., p4.
[98] Ibid., p8.

Indeed, in some remote communities boxes of food were sent out in lieu of Centrelink welfare. Sometimes the food did not arrive at all, and sometimes there were long delays. In the town of Tara, Nathaniel Long noted:

> *Sometimes people just miss out, maybe they have to wait like a month or even two months for any to come in. Today they've had to leave for town, a couple of families. They can't wait any more for food. They'll spend the day travelling. Then when they get there, maybe Centrelink says come tomorrow. Then they rely on family in town to stay, to get a feed off.*[99]

In addition to the exorbitant mark-ups for these 'bush orders', there were often administrative errors also. Jimmy from Ti-Tree noted:

> *They're sending food that people don't want. They're sending the wrong food, they're sending the wrong brands. We've had problems down there with the meat going off. With detergents getting packed with edible foods. The wrong orders going to the wrong people. All sorts of problems you know.*[100]

The living standards of many people suffered appreciably because of the siphoning of money into the card. Joanne Nakamarra, another Tara resident, noted "sometimes we go to Centrelink over there and they don't know where our money went..."Its really hard to get food in the community. We don't save money any more. And see long time, until last year, we used to give that other half money to family."[101]

2.5.3 Relations with government agencies and law enforcement

As part of the compulsory acquisition of land, the Commonwealth introduced Government Business Managers (**GBM**) who were responsible for making executive decisions regarding each community. However, the relationship with the GBM in many communities was cool and in some cases, almost non-existent. For example, a local schoolteacher in Santa Teresa expressed, "We don't know him. He only came to the school once, but never came again."[102] Many recalled the former mission days or the superintendent in the 1950s and 1960s under the Native Welfare scheme where non-Indigenous persons managed the conduct and behaviour of Indigenous Australians in a paternalistic way, paying out a mix of rations and cash. Also, buildings were constructed

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[99] Ibid., p12.
[100] Ibid., p14.
[101] Ibid., p12.
[102] Ibid., p17.

for office space for the GBM often with little consideration of the space which was being taken from the people within the community.

A historically hostile relationship with the police worsened following the Intervention. Extensive police search powers resulted in many cases of police intimidation. Gibson interviewed Selma from Santa Teresa who noted that:

> *Instead of just putting them cans in the police car you know, they smash all the grog on the road. When they pull over people... smash it on the road and say, 'OK you fellas clean it up'. They got the badge, that's what's making them feel high you know. Why can't they tell people, 'take your few cans home and drive safely.*[103]

There were many incidences of intimidating police inspections. One such instance took place on 9 October 2008 when police conducted a particularly hostile raid in the Kunoth camp near Alice Springs, where police "jumped over fences to enter the camp, displayed rifles, pushed and abused residents and trained a laser on the chest of one man."[104] Such events only served to heighten the environment of fear, distrust, and paranoia against institutions that required the cooperation of Indigenous communities in order to end the violence against children.

2.5.4 Relations with non-Indigenous persons

Discrimination against Indigenous Australians in the Northern Territory, already widespread in the general community heightened following the Intervention. Valerie Martin noted that "'its getting worse now. People shout from the car at me. Our old people have had glass bottles thrown at them, just while they are sitting there."[105]

2.6 Government Response

The federal election of November 2007 resulted in the centre-left Labor party gaining power after 11 years out of office. The Labor party, while for the most part adopting the position of the previous government in support of the Intervention, took a slightly more consultative approach. Following criticism of the approach taken with the Intervention, the Commonwealth constituted the Northern Territory Emergency Review Board to

[103] Ibid., p30.
[104] Ibid., p32.
[105] Ibid., p28.

conduct an independent review of the Intervention. The Board signed off on the review on 30 September 2008. The Board highlighted that "[t]he Intervention diminished its own effectiveness through its failure to engage constructively with the Aboriginal people it was intended to help." Overall however, the Board viewed the Intervention as a flawed initiative that was beneficial overall but needed to be reformed and improved. In particular, the report commended the increased police presence, the housing projects, the efforts to stem alcohol related issues, and various aspects of Income Management. The Board made a number of recommendations to improve the delivery of the Intervention:

- Conforming with Australia's international human rights obligations as well as the RDA;
- Making Income Management voluntary for all, except on the basis of child protection and education related issues;
- Auditing and increased monitoring of the community store initiative;
- A reform of the CDEP system to provide for better skills training;
- Increased measure concerning illicit drug use;
- Increasing the police presence in Indigenous communities;
- The provision and use of more interpreters; and
- Compensation for the 5-year compulsory acquisition of property on just terms and rent.

The Commonwealth accepted the recommendations and in May of 2009 released the *Future Directions for the Northern Territory Emergency Response Discussion Paper.* The Commonwealth claimed the Intervention was a 'special measure', pursuant to the RDA and the CERD, which permitted discrimination on certain exceptional grounds. However, it also announced plans to "remove the provisions in the three pieces of legislation that exclude the operation of the RDA and the Northern Territory anti-discrimination laws"[106]

[106] *Future Directions for the NTER - Discussion Paper*, Department of Families, Housing, Community Services and Indigenous Affairs, May 2009, available at http://www.fahcsia.gov.au/sa/Indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/foreword.aspx (last accessed 10 November 2010).

3 Conclusion

The LCAS Report and the Intervention laid bare a deep crisis in remote Indigenous communities in Australia. This crisis has various elements:

- The issue of child sexual abuse in remote Indigenous communities: the cyclical abuse and violence, and the psychological impact on individuals and communities alike;
- The surrounding issues of drug abuse and pornography;
- The Commonwealth response with the Intervention and its most controversial aspects, including the freezing of the RDA and the scrapping the CDEP program;
- The continuing inability of Australian Governments to effectively address social issues regarding Indigenous peoples, and the question of how remote communities fit into the a modern liberal state;
- The political use of the Indigenous issues in federal politics; and
- The significant human cost of responding to such a deep and sensitive issue in such a Draconian fashion.

This chapter has provided an overview of the LCAS Report, the Intervention, the reaction in the national and international community, and the subsequent government response. The LCAS Report reflects on deep human rights issues for children and women in remote Indigenous communities. It is an issue that required government action and a failure to act would have itself ignited human rights issues. However, the Commonwealth's response was inappropriate and not necessarily effective. The Commonwealth failed to engage and consult with the community and in failing to do so, lost the community's support. It scrapped an effective and useful jobs program, which had been a positive program in the Indigenous community. Additionally, the Commonwealth breached international human rights standards. The Commonwealth's justification, to abrogate some human rights in order to protect other human rights is problematic and fails to recognise the very reason for the existence of human rights.

CHAPTER IV: THE INTERVENTION AND HUMAN RIGHTS ISSUES IN INTERNATIONAL LAW AND CONSTITUTIONAL LAW

1 Introduction

This chapter considers the implications of the Intervention with regard to international law and constitutional law. The earlier historical chapter reflected on how the rights system was shaped by a number of different and competing perspectives of rights: the rule of law, the nation-state, and the modern rights framework that was borne following the creation of the United Nations. The rule of law has been the principle norm of governance in the Anglo-Saxon world following the Magna Carta and its precedence in any rights system was stressed during the positivism movement over the course of the Enlightenment. The nation-state was born following the shifting sovereign alliance and the religious wars of the 17th century, which resulted in the Peace of Westphalia. As the concept of the nation-state solidified, scholars began to define the relationship between the state and the individual, and portrayed this relationship as a social contract. With this contract came rights and obligations for both parties. Although each of the contractualists espoused those rights and obligations differently, it came down to a surrender of personal freedom in consideration for a guarantee of certain rights and freedoms. Further, the modern rights era came with the creation of the United Nations, with rights being given to various marginalised groups across society. This chapter reflects on how these competing rights frameworks have interplayed with respect to the Intervention.

2 The Intervention and International Law

The LCAS Report was a significant because it earmarked failures of human rights with respect to two groups: children and Indigenous peoples. To this extent there has been a breach of a number of human rights. These include:

- **protection for children** against all forms of violence including sexual abuse;

- **the right against racial discrimination:** which was earmarked with the suspension of the operation of the RDA in relation to the Response Act;
- **the right to self-determination:** the response occurred with the compulsory acquisition of property and the absence of consultation with affected Indigenous communities;
- **the right to social security:** because social security was stripped and conditions were imposed upon receiving social security;
- **the right to freedom of movement:** the Commonwealth restricted welfare to 'basics' which only allowed the purchase of basic foods, and these cards could only be used in designated areas; and
- **Indigenous land rights**: by the Commonwealth's compulsory acquisition of Indigenous-held land under five-year leases.

Looking for a remedy within international law is complicated and not assured of delivering effective results. However, based on the above, the available remedy in international law in the absence of an effective domestic framework is the complaints procedures which may be filed with the Human Rights Committee or to the Committee on the Rights of the Child. While petitions were filed with the Human Rights Committee, it would be difficult to sustain a complaint to the Committee on the Rights of the Child because the Commonwealth would submit its response was to protect children, even though in reality it was a poor response which could be detrimental in the long term.

3 UN Response to the Intervention

In the period following the Intervention, some UN agencies criticised the various aspects of the Intervention that impinged on human rights.

In 2009 an official complaint was made to the Human Rights Committee on the grounds of a breach of the CERD. S. James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples visited Australia between 17 and

28 August 2009. His report was released with the Commonwealth's response in February 2010.[107]

3.1 Breaches of International Human Rights Law

The Rapporteur recognised the importance of addressing the issues outlined in the LCAS Report. Further, action was necessary to keep Australia in line with its obligations under the CRC and the CEDAW. However, the legislative response by the Commonwealth was "an overtly interventionist architecture, with measures that undermine Indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy."[108] Taken together, these measures clearly involved racial discrimination. Anaya noted:

> *The NTER program...in several key aspects limits the capacity of indigenous individuals and communities to control or participate in decisions affecting their own lives, property and cultural development, and it does so in a way that in effect discriminates on the basis of race, thereby raising serious human rights concerns.*[109]

The Rapporteur considered that certain measures such as the exclusion of the RDA, the control of townships and town camps, the welfare control provisions, and the compulsory acquisition of land to be interventionist, which as a result undermined self-determination, property rights, and cultural integrity.[110] These measures were an impairment of human rights, specifically:

- **The CERD:** under the Convention, racial discrimination is "any 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 human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[111] The NTER openly discriminates on the basis of race. The Convention

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[107] J Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, *Observations on the Northern Territory Emergency Response in Australia*, February 2010, available at http://www.cla.asn.au/Article/2010/NTER%20Observations%20FINAL.pdf?phpMyAdmin=YvVwtU2oZdIU7j5oZIj0Fkti0M6 (last accessed 10 November 2010).

[108] Ibid., p4.

[109] Ibid., p2.

[110] Ibid., p4.

[111] Article 1.1, *the Convention on the Elimination of All Forms of Racial Discrimination.*

in particular obliges states to prevent discriminatory treatment on the basis of race;

- **The ICCPR:** in particular those rights of self-determination, the right of equality before the law, the freedom of movement, and language and cultural rights of minorities, which are restricted under the legislative package;
- **The ICESR:** which proscribes against racial discrimination and allows the right to social security, which is limited by the income management scheme.
- **The UDHR:** which emphasises the rights of indigenous peoples to autonomy and self-determination.

3.2 Possible exceptions which allow the curtailment of rights

The international instruments above provide some exceptions where the protection of rights may be curtailed. For example the ICCPR allows the curtailment of rights under Article 4(1) but only in times of public emergency, and only to the extent that such measures cannot discriminate solely on the grounds of race. The UDHR takes a similar posture. This has clearly not been the case with the Intervention.

Notably, Article 1 of the CERD has an exclusion, which states:

> *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.*[112]

The NTER legislation identified the Intervention as a 'Special Measure', for the purposes of the CERD, which is scheduled in the RDA. The Rapporteur noted that the measures taken by the Commonwealth as part of the Intervention did not qualify as 'special measures'. Anaya notes, "it would be quite extraordinary to find, consistent with the objectives 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."[113] This presumption may be overruled only when measures are

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[112] Article 1, *the Convention on the Elimination of All Forms of Racial Discrimination.*

[113] Anaya, *Observations on the Northern Territory Emergency Response in Australia*, above n107, p8.

"proportional or necessary to the state's objectives in regard to a valid objective, and that adequate consultations have been undertaken."[114] However, given that there was no consultation before the announcement of the Intervention, the Rapporteur determined that the measures adopted were not justified by and proportionate to the aims of the Intervention. Finally, the Rapporteur noted that more than two years following the operation of the Intervention, the success of the stated objectives of the Intervention was ambiguous.[115] Given such findings the Rapporteur recommended:

- The Commonwealth continue its commitment toward addressing the issue of child sexual abuse in Indigenous communities, but adopt a more consultative and holistic approach;
- The Commonwealth reinstate the RDA and enact reforms to abide by its international human rights obligations, which have been breached in the areas of income management, the compulsory acquisitions of property, alcohol and pornography bans, and extensive control in Indigenous communities; and
- To the extent that any discriminatory measures remain, they "be narrowly tailored, proportional, and strictly necessary to achieve the legitimate objectives being pursued."[116]

3.3 Government Response

The Commonwealth responded to the Rapporteur's report and the 2008 Review Panel by proposing certain changes including:

- adherence to the RDA for all new Intervention measures;
- phasing out the aspects of the Intervention that do not adhere to the RDA by 31 December 2010;
- a more consultative Income Management scheme to be rolled out from 1 July 2010 to 31 December 2010, under which race cannot be used as a targeted category;
- engaging more effectively on substance abuse. While restrictions are to continue they are to be varied to meet the individual needs of specific communities. Certain police powers such as provisions which allowed the police to enter into private residences

[114] Ibid., p8.
[115] Ibid., p9.
[116] Ibid., p12.

freely are to be restricted;

- maintaining the five-year lease acquisitions but being more consultative of the process;
- easing the provision limiting customary law as a consideration in bail application so that it only apply as a reason to mitigate the seriousness of criminal behaviour.

Notably, the Commonwealth rejected the allegations of the Rapporteur of breaches of human rights commitments. Specifically with respect to the CERD, the Commonwealth submitted that "differential treatment of particular groups can be undertaken consistent with the principle of 'legitimate differential treatment' under international law and, if so, is not discriminatory under international law".[117]

4 Observations

The LCAS Report highlighted serious neglect of children in certain Indigenous communities in the Northern Territory. The LCAS Report also made numerous recommendations as to the ideal way to address a serious and sensitive issue. The Commonwealth's response was inappropriate for a number of reasons, but above all else, because it effected the Intervention by applying paternalistic and clearly discriminatory policies. It took a highly centralised policy as the solution to a crisis that required a flexible and decentralised approach. For a people who have faced oppressive conduct and discrimination in various forms since the arrival of the First Fleet, the Intervention became symbolic of the intrusive and offensive way in which white man imposed upon Indigenous cultures time and again. From the perspective of international law, there were clear breaches of human rights as covered by the CERD, but also other instruments such as the ICCPR, the ICESR, and the UDHR.

The United Nations human rights system has severe limitations. The greatest limitation is enforcement. From the outset of the Intervention there were clear breaches of international law, but the United Nations has been limited in its powers to respond. Upon complaint, the UN sent a Special Rapporteur to investigate the alleged breaches of human

[117] Ibid., p17.

rights, whose powers were to make recommendations and exert pressure. Ostensibly, the powers of the United Nations' are limited. However, to some extent one must observe the success of the United Nations and its international instruments. Although the soft power of the United Nations is not ideal, combined with pressure within Australia, it yielded some results. The Commonwealth has committed itself to rule out the elements of the Intervention which breach principles of racial discrimination, and more importantly, to approach the Intervention in a more consultative fashion. To this extent, while the Intervention reflects upon the shortcomings of both the international and the national system, the existence of these various instruments means there exists something in which to exert pressure to defend rights.

5 The Intervention and the Australian Constitution

Hans Kelsen's *grundnorm* doctrine is a positivist reasoning of the importance and origin of the fundamental and basic norms of society. According to Kelsen we derive the justification of the operation of norms from other norms. Kelsen notes, "[t]he reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable."[118] Therefore, there exists a hierarchy of norms from which society derives its values. In this normative system, all norms exist within a hierarchy that is traced to a first, basic norm, and all other norms derive their validity from this basic norm.[119]

In a legal system, the constitution is the founding document of a nation, the source from which all other laws derive their authority. It can be seen as the basic norm of a state, the apex of a dynamic system of norms. Every law that exists within a state will therefore derive its authority from the constitution. Kelsen notes:

> *"the question why a certain act of coercion [is a legal act]...is because it has been prescribed by an individual norm, a judicial decision...the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes."*[120]

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[118] H Kelsen, *General Theory of Law and State*, The Lawbook Exchange Ltd, New Jersey, 1999, p110.
[119] Ibid., p110.
[120] Ibid., p111.

In the Australian context one of the basic problems is that the RDA is a norm that can be easily overruled or excluded by another statute. It has no greater normative value than any other statute. It is for this reason that the RDA was excluded from operation so easily. At the higher normative level, the Constitution of Australia is not a rights-enabling document. Influenced by Diceyan positivism, it is considered that the rule of law sufficiently protects rights. Although there have been legislative attempts to broaden the scope of human rights and soft law commitments to entrench a more inclusive human rights framework, when the basic norm of the state is a document that was made to the exclusion of Indigenous peoples, then all inferior legal norms will struggle to implement a more just human rights framework. Constitutional reform is necessary to give Indigenous Australians recognition for their unique and important role within the Australian nation-state.

It should be noted that there is currently a movement to take the issue of recognition of Indigenous Australians to referendum. Pushed by the Australian Greens political party, there is an in-principle agreement to pursue a referendum which recognises Indigenous Australians in Australia's Constitution.

6 Conclusion

As discussed earlier, the Intervention occurred in a system where three distinct frameworks for rights emerged: the rule of law, the rights that came from the creation of the Nation-State and the social contract, and the modern rights framework that emerged with the creation of the UN. Importantly, each respective rights framework has amplified the rights available to individuals and groups. However, each subsequent framework has normative inferiority to the preceding frameworks. Herein lies the fundamental problem that emerged from the Intervention. The Intervention exposed breaches of basic rights because those rights did not have sufficient normative protection.

CONCLUSION

Social problems are seen as a manifestation of a lack of real control, and the absence of any sense of control, among local people. The smothering of Aboriginal values and priorities by overlying non-Aboriginal structures generates a sense of inadequacy and powerlessness.[121]
Richard Trudgen, Why Warriors Lay Down and Die

This paper has focused on the implications of a series of measures by the Commonwealth which responded to a report produced on the incidence of child sexual abuse in remote communities in the Northern Territory. The report signalled alarming levels of abuse stemming from the breakdown of community and social structures. This breakdown has occurred over a long period of time and the continuing neglect in the relationship between Indigenous peoples and the state is one of the causes of this breakdown. The LCAS Report highlighted 97 recommendations which were concerned with increasing funding, and health, education, and police services to these communities. Most importantly, the LCAS Report stressed the importance of community involvement and consultation.

The Commonwealth responded to the LCAS Report with a series of measures that came to be known as the Intervention. The Intervention was a series of measures designed to impose control over remote communities in the Northern Territory, with little or no consultation with local communities. Some elements were particularly alarming:

- the freezing of the RDA;
- the compulsory acquisition of Indigenous law;
- the ending of the CDEP program, pushing all people employed under CDEP onto welfare; and
- the implementation of Income Management and the Basicscard.

Of the 97 recommendations made by the LCAS Report, the Intervention only responded to 2 of those recommendations, such was the disparity between the LCAS Report and the

[121] R Trudgen, *Why warriors lie down and die*, Aboriginal Resource and Development Services Inc, Darwin, 2001, p218.

Intervention. Further, the success of the Intervention in improving the conditions in remote communities to reduce the incidence of child sexual abuse has proven inconclusive. Such a centralised, interventionist approach did not help a problem that reflected an entrenched breakdown in the community structures and values that exist in Indigenous cultures. Therefore, the Intervention was a wrong-headed approach to a serious social issue. It was particularly wrong-headed because it sought to protect certain rights by breaching others, which is a deeply flawed conception of human rights.

How is it that rights were so easily breached? The answer lies at the normative value of the various juridical sources of human rights and how they have operated with respect to the Intervention. Chapter 2 of the paper focused on the historical context of the development of the Australian human rights framework. The sources of rights in Australia emerge from the rule of law, the Constitution, and federal and state laws. However, the most entrenched of these sources, the rule of law and the Constitution failed to protect the rights of Indigenous Australians. The rule of law is made up of certain basic rights which form the foundation of the English legal tradition: that everyone is subject to the law; that the state may own punish an individual for a proven wrong, and that the courts are the forum to seek remedy.

However, as the concept of the social contract emerged new political rights became available. The Australian Constitution is a document that provides the normative protection of the rule of law and certain basic political rights. It does not have an extensive bill of rights. This is because the legal positivism that emerged over course of the Enlightenment considered the rule of law to be the sufficient protector of individual rights. However throughout Australia's history, Indigenous Australians have been treated terribly with respect to human rights, such that one can easily conclude that the basic normative principles of Australia, the rule of law, and the Australian Constitution, do not adequately protect Indigenous Australians. The rights under which Indigenous Australians may seek protection occur at the level of international law, which is protected only by an inferior norm, statute. Therefore, as was the case with the Intervention, those rights may be easily repealed by subsequent legislation. The most important step in

protecting Indigenous rights is recognition of Indigenous Australians in the Constitution, and ideally, the recognition of certain basic rights of dignity, autonomy, culture, and self-determination. As the Australian Constitution is such a rights-averse document dramatic constitutional reform is unlikely.

Although the Intervention reflected a flawed human rights framework in Australia, on one view, the various human rights frameworks did function to some extent. Despite the fact that the Commonwealth clearly breached human rights, pressure by the national and international community saw the Commonwealth agree to phase out the aspects of the Intervention that were racially discriminatory.

In this way, although there is no one solution to prevent another type of government action like the Intervention, it is in the interplay of the protections on offer in the various human rights frameworks where one can look to for reform. This suggests a multi-pronged approach, which includes:

- **At the constitutional level:** the lobbying for Constitutional recognition for Indigenous Australians and possibly implementing entrenched rights;
- **At the federal level:** continued legal reform to implement a bill of rights as an act of parliament; a less centralised approach to socially marginalised groups; the continued provision of social services; and above all else, consultation with local communities;
- **At the territory level:** continued legal reform to implement a bill of rights as an act of parliament; the continued provision of social services; and consultation with local communities;
- **At the institutional level:** continue pressure from social groups on Indigenous rights; the implementation of cross-cultural training and awareness of Indigenous culture and society; continued pressure from international organisations as to Australia's compliance with its human rights obligations.

In the absence of drastic change, the most important recommendation is continued pressure and influence for law reform at all levels to make lawmakers improve the human rights framework of Australia.

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- *Mabo v Queensland (No 2)* (1992) 175 CLR 1
- *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2
- *Roach v Electoral Commissioner* (2007) HCA 43
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3 Legislative Instruments

3.1 Bi-lateral, Regional, or Multilateral

- *the Convention on the Elimination of All Forms of Discrimination against Women 1979/1981*
- *the Convention on the Elimination of All Forms of Racial Discrimination 1966/1969*
- *the Convention on the Rights of Persons with Disabilities 2006/2008*
- *the Convention on the Rights of the Child 1989/1990*
- *the International Covenant on Civil and Political Rights 1966/1976*
- *the International Covenant on Economic, Social and Cultural Rights 1966/1976*
- *the Universal Declaration of Human Rights 1948*
- *UN Declaration on the Rights of Indigenous Peoples 2007*
- *United Nations Charter 1945*
- *Vienna Convention on the Law of Treaties, 1969*
- *General Act of the Berlin Conference on West Africa 1885*

3.2 Australia

- *Administrative Decisions (Judicial Review) Act* 1977
- *Age Discrimination Act 2004*
- *Australian Human Rights Commission Act 1986*
- *Commonwealth Electoral Act 1918*
- *Constitution of Australia 1901*
- *Crimes (Torture) Act 1988 (Cth)*
- *Disability Discrimination Act 1992*
- *Northern Territory National Emergency Response Act* 2007

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- *Liquor Act* 1978 (NT)
- *Aborigines Protection and Restriction of the Sale of Opium Act* 1897 (Qld)

3.3 United Kingdom

- *Magna Carta 1297*