SPECIAL MEASURES IN INDIGENOUS WELFARE REFORM:

EXAMINING THE CAPE YORK TRIAL

by Colleen Smyth

The Cape York Welfare Reform ('CYWR') trial was due to expire at the end of 2011. In October 2011, the Queensland Government voted to extend the trial until the end of 2013.[1] In November 2011, the Federal Minister for Indigenous Affairs announced changes to the *Social Security (Administration) Act 1999* (Cth) that will extend another similar welfare reform, the School Enrolment and Attendance through Welfare Reform Measure ('SEAM'), throughout other parts of Australia.[2] This article examines the CYWR with reference to the *Racial Discrimination Act 1975* (Cth) ('RDA'), using the data available in the publications from the Family Responsibilities Commission ('FRC').It finds no clear evidence that the reforms have been effective in improving social conditions thus far and, as such, serious concerns as to whether the CYWR breaches the RDA.

The CYWR trial is a program in the Indigenous communities of Aurukun, Coen, Hope Vale and Mossman Gorge that makes access to welfare payments conditional upon meeting certain indicators of social order. The *Family Responsibilities Commission Act 2008* (Qld) ('FRCA') gives Queensland operation to the CYWR and its administrative body, the FRC. The Act sets out four instances in which persons will become the subject of a notice to the FRC (Notices):

1. A parent's (or responsible person's) child is not enrolled at school or has accumulated three unexplained absences in one school term.
2. A person becomes the subject of a child safety notification.
3. A person is convicted of an offence in the Magistrates Court.
4. A person breaches a State-owned housing tenancy agreement.[3]

Upon receiving a Notice of any of the above, the FRC can attach conditions to welfare payments, the most extreme of which is Compulsory Income Management ('CIM'). Federal legislation[4] and the FRCA empower the FRC to direct Centrelink to issue a 'basics card' in lieu of a large portion of welfare payments. This card can only be used at particular stores and for payment of approved items, typically essential items such as rent, utilities and food.

BACKGROUND

In May 2007, the Cape York Institute for Policy and Leadership ('CYI')[5] released the *From Hand Out to Hand Up*[6] report. The report represented years of work by CYI regarding 'passive welfare'[7] during which CYI lobbied the Government to enact welfare reform. In June of the same year, only six days after the Northern Territory Government's release of the *Ampe Akelyernemane Meke Mekarle - Little Children are Sacred* report into child abuse, the Howard Government announced, without any apparent consultation with the authors of the report, a hastily packaged response – the Northern Territory Emergency Response ('NTER').[8] The legislative framework enacted in respect of the NTER also contained provisions for the commencement of the CYWR trial,[9] prompting some to suggest the NTER was based on CYI's work and subject to little, if any, consultation with any other group.[10]

The NTER legislation enabled Government acquisition of Aboriginal lands, alcohol and pornography bans, compulsory child health checks and removed the rights of traditional owners to control access to their land. It also imposed CIM on all welfare recipients in 73 Aboriginal communities.[11]

The NTER and the CWYR both aimed to increase school attendance and decrease child neglect and social dysfunction and shared the founding premise that welfare management can prompt behavioural change.[12]

The NTER has been criticised by Indigenous leaders,[13] United Nations Committees[14], academics, major health authorities,[15] the Australian Human Rights Commission,[16] United Nations rapporteurs[17] and has failed to meet its stated objectives.[18] The CYWR promised to be a more sophisticated tool than the NTER in that it was subject to consultation with community members and aspired to informality, fairness and flexibility.

Notably, income management is conditional in that a stepped scale of interventions applies to those individuals that are found to have breached FRC rules, favouring referral to social services and financial or parenting coaching over CIM.

RACIAL DISCRIMINATION

The RDA ratifies some components, particularly Article 5,[19] of the *International Covenant on the Elimination of Racial Discrimination* ('ICERD').[20] Sections 9 and 10 of the RDA prohibit discrimination on the basis of race. Section 10 pertains specifically to the operation of laws (as opposed to discriminatory acts by persons), that have the practical effect of creating unequal rights between different racial groups.[21] If persons of a particular race do not enjoy a right, or enjoy a right to a lesser extent than persons of another race, s 10 requires that right to be extended to the race that does not enjoy it.[22]

Prima facie, the FRCA limits the rights of four communities of Aboriginal people by placing conditions on access to welfare benefits that are not imposed on the broader population.

Originally, legislation[23] suspended the operation of the RDA where it pertained to the FRCA. To overcome the possibility that the suspension was unlawful whilst the RDA was still in force, the legislation instead deemed the reform a 'special measure' and therefore an exception to discrimination under s 8. A review initiated by the Rudd Government,[24] repealed this exclusion.[25]

To determine if the FRCA is contrary to s 10 of the RDA, it must be established that:[26]

- the persons in the group are of a particular race, colour or national and ethnic origin;
- by the impugned law the group does not enjoy some right to the same extent as persons of another race; and
- the FRCA is not a 'special measure'.

PERSONS OF A PARTICULAR RACE

Anti-discrimination laws appropriately recognise that many individual nations comprise Indigenous Australia, which are identifiable and distinguishable from each other. That is, Indigenous Australians in the collective sense form a race for the purposes of the RDA, as do each of the Indigenous nations within that collective.[27]

Technically all persons, regardless of Aboriginality, are subject to the FRCA. However, the CYWR outlined that the reforms were intended for Indigenous peoples.[28] Further, Aurukun's population is 91.6% Indigenous and Hope Vale's is 93.1% Indigenous. This is against a backdrop where Indigenous persons comprise just 2.5% of the Australian population.[29]

Fortunately, in order to circumvent the inevitability of such issues, s 10 applies even if a small number of non-Indigenous people are captured by the law in question;[30] it is sufficient that the laws have the *practical* effect of nullifying a right for a racial or ethnic group. The alternative would be contrary to the broader intentions of the RDA .[31]

THE PROTECTED RIGHTS

Courts have confirmed the view expounded in *Gerhardy,*[32] that Article 5 of ICERD is not a comprehensive statement of the rights that the RDA protects,[33] and that rights and freedoms are to be interpreted liberally.[34] Article 5 does not exhort countries to introduce all rights outlined in these instruments, rather, insofar as rights exist, they must be enjoyed 'on equal footing' by everyone.[35]

By operation of FRCA, residents in the welfare reform communities do not, on the same basis as other Australians, enjoy:

- The rights to social security and improvement of social conditions and security without discrimination.[36]
- Right to equal participation in cultural activities[37] and practice of traditional customs.[38]
- Equal treatment by the law.[39]
- Access to goods and services.[40]

SOCIAL SECURITY

Social security is a right enshrined in international instruments.[41] Under Australian law, unemployed residents have access to welfare benefits, with some conditions. However, extra conditions have been placed on the CYWR community members.

PARTICIPATION IN CULTURAL ACTIVITIES

As a party to the *International Covenant on Civil and Political Rights*, Australia generally protects rights of association, assembly, communication and religion. However, there are suggestions that the CYWR has affected participation in cultural activities in a variety of ways.

An example of this has been the attitude towards attending funerals. As life expectancy for Indigenous people is significantly lower than non-Indigenous people, Indigenous children are more likely to have funerals interrupt school than non-Indigenous students. Sorry

business is of great cultural significance for Indigenous people. Missing a funeral may contravene Aboriginal customary law[42] and result in social isolation. Sorry business can require protracted absences, as ceremonies only start after sometime disparate community members have gathered.[43]

The FRC Commissioner is on record as saying "the old days of saying...'we've been to a funeral' won't be accepted"[44] as an explanation for school absence for the purposes of a Notice. Further, the Implementation Review of the FRC provided evidence to suggest some residents under a CIM order have been unable to use their welfare benefit to pay for travel to attend funerals.[45]

Denying Indigenous people the right to attend a funeral because they may breach the FRCA's rules or are unable to attend because of CIM, is tantamount to a breach of their right to participate in cultural activities.

EQUAL TREATMENT BEFORE THE LAW

If the CYWR community members are dissatisfied or concerned about a decision of the FRC, they do not have the same administrative appeal rights as other Australians. Appeals from a decision of the FRC are limited to a question of law and must be made to the Queensland Magistrate's Court.[46] It is unlikely that affected community members have adequate procedural knowledge or financial means to properly institute such an appeal. The Parliament's reasoning for removing appeal rights was that it considered the FRC would only be making decisions that were of benefit to clients.[47] It is not clear that the affected community members share this view. Certainly, the removal of appeal rights within the NTER has been criticised by affected community members.[48]

ACCESS TO GOODS AND SERVICES

Access to goods is a right explicitly recognised in the RDA,[49] and has been defined broadly, covering access to casinos[50] and purchase of alcohol.[51]

Given the way basics cards operate, persons under CIM are unable to buy goods of their choice. The Implementation Review found they have been left at the mercy of unscrupulous vendors' prices (as basics cards can only be used in certain stores) and have been unable to travel for medical care and buy essential medicines.[52]

A SPECIAL MEASURE

The RDA does not apply to 'special measures' designed to secure the advancement of a racial group.[53] That is, inequality in the law and the breach of rights outlined above will be tolerated where the objective is to achieve some greater good for the group discriminated against.[54] For differential treatment to be a 'special measure' it must:

- be based on race, colour, descent, or national or ethnic origin;
- confer a benefit on some or all members of a class;
- be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;
- be necessary, appropriate and adapted to the purpose; and
- cease when it has achieved its objectives.[55]

CONFER A BENEFIT

Measures found to be a 'benefit' include enhanced social security payments,[56] land grants[57] and employment positions reserved for Indigenous peoples.[58] Section 8 has generally, but not entirely,[59] been concerned with affirmative action measures. The CYWR benefit is ostensibly an improved social situation. However, in order to achieve that, the disadvantaged group has had adverse conditions imposed on it. In these situations, the costs, disadvantages and benefits borne by the community must then be weighed to determine if the law is a 'special measure'.[60]

THE PURPOSE

There is no doubt that the legislature intended to improve what was, objectively speaking, a disadvantage.[61] Whether rights are subject to 'legitimate interference' to meet the purpose is a 'question of degree'[62] of whether the community accepts the measure and what the discrimination seeks to achieve.

Firstly, the wishes of the beneficiaries must be considered.[63] Unanimous consent is not required; the legislature has a role to decide in the interests of the population, so long as it does so after due consideration and consultation.[64] The CYWR measures were subject to consultation,[65] albeit contested.[66]

Secondly, the purpose must be balanced with the rights that are infringed.[67] No one argues that the social benefits the FRCA seeks to achieve are not fundamental rights at least as important as the rights eroded by the FRCA.

APPROPRIATE AND ADAPTED TO THE CAUSE

This element requires the 'special measure' to match the need identified and have a genuine likelihood of achieving its aims. It is not sufficient that the measures

are "fancifully referable"[68] to an objective, or that there is "an ostensible public purpose but [it is] in truth, discriminatory".[69]

The FRCA encourages the use of least restrictive coercive measure such as referral to wellbeing centres, budgeting support and advice, case management, addiction treatment, and parenting or education classes.[70] Practically, these measures are underutilised because they are unavailable, seasonally impossible or culturally unsafe.[71] Referrals have been on a linear downward trend over the life of the CYWR. The latest Annual Report showed that, despite 31% increase in notifications since the beginning of the trial (from 2,791 in 2008 to 3,669 in 2011), referrals to social support (374) are 35% below the previous year (583) and 38% below target (600).[72] Orders to attend support services in 2010-11 were 51% lower than the first year of the trial and 77% below expectations. The FRC states this is due to very few actual referral options having materialised, leaving community members "exasperated by promises..." and "vulnerable... without support".[73] The Commission has recognised that unavailability of services make it impossible for clients to comply with their case plans.[74]

The corollary has been an increasing reliance on CIM, contrary to the stated intentions of the FRC. The numbers of CIM orders per quarter have increased over the trial period, and were 61% and 12% above expectations in the 2009-10 and 2010-11 years respectively.[75] Since the first year of the CYWR, CIM orders have increased by 150%. This suggests the CYWRs are neither appropriate nor proportional to the need.

NECESSITY

In order to be special measures, discriminatory laws must be carefully scrutinized to ensure they meet their goals.[76] There is now three years of evidence (from July 2008 to June 2011) that suggests otherwise. The FRC considers school absences, Magistrates Court convictions, housing notifications and child safety notifications the indicators of social order. Other than a decrease in child safety notifications, socially unacceptable behaviour has increased. [77]

SCHOOL ATTENDANCE

The most lauded part of the policy, improving school attendance, has produced disappointing results. Quarterly school absentee notifications have trended upward over the program. School absence notifications are now nearly double what they were in the first year of the trial's operation and 29% above the 2010-11 target.

The FRC's most recent Quarterly Report points to Mossman Gorge's 18.6% increase in school attendance over the trial.[78] However, this community's population is 99, meaning the result is statistically insignificant, a fact acknowledged by the FRC.[79] In the case of Coen and Hope Vale, it is unclear how improvements to school attendance are considered a useful measure of social order, as these communities demonstrated school attendance rates above or very close to the Queensland average of 90% before the CYWR trial commenced.[80] These rates have remained stable.[81]

Aurukun has experienced a marked increase in reported school attendance.[82] This improvement has coincided with measures unrelated to the CYWR such as new models of teaching, including cultural knowledge and traditional language.[83] The Education Department and Implementation Review credit increasing attendance to changes in school meals, pathways to employment and improved teacher recruitment and retention.[84]

CRIMINAL CONVICTIONS AND TENANCY BREACHES

Magistrate's Courts convictions and tenancy breaches have also trended upward. Court convictions have increased 24% over the trial and were 51% above the 2010-11 target. The FRC highlights that there have been some positive developments, such as a reduction in offences against the person in Aurukun,[85] while the Implementation Review attributed this outcome to other unrelated measures, such as alcohol restrictions.[86]

Housing notifications (for tenancy breaches) remain higher than at the commencement of the trial. However, due to the low overall numbers there was some volatility in the data and it should be interpreted with caution.

CHILD SAFETY

Child safety notifications have decreased over the course of the CYWR. This data should be interpreted with caution. The Implementation Review suggested underreporting may be occurring for fear of reprisal, and the FRC reported that community members are underreporting child safety concerns due to the new methods by which the Child Safety Services Far North Regional Intake Service receives complaints.[87]

DISCUSSION AND CONCLUSION

While post-*Bropho*[88] the Courts may lean away from formal equality to legitimise discrimination if it serves the greater good, the law does not accept paternalistic programs that negatively discriminate against Indigenous peoples if the measures fail to genuinely advance the

group. There is no convincing independent evidence that linking welfare to social outcomes, produces positive results,[89] and the CYWR trial does not provide these findings. The CYWR is not meeting its aims to reduce social dysfunction and the parts of the program that offer supportive social services have not been realised. As such, it is arguably not a special measure and is likely to breach RDA and Australia's international obligations.

The literature relied on by the CYI in designing the CYWR demonstrated that welfare sanctions alone do not improve school attendance. [90] The literature showed there was limited evidence of some improvement in enrolment (but not attendance) when combined with supportive case management and other incentives. It also concluded that attendance based welfare restrictions require disproportionate monitoring resources for what are, at best, "marginal gains".[91]

There is obvious need for greater attention and investment in many Indigenous communities, but efforts should focus on delivering incentives and social supports to encourage residents to meet welfare obligations.[92] In 2011, Federal Government interviews with Aboriginal communities demonstrated that interviewees believed education is essential for children and proffered many alternatives to reduce absenteeism. An analysis of the consultations described the Government's conclusion that communities sought CIM as "remarkable". The authors claim no single community member raised CIM as a solution, but that strong themes emerged around bilingual learning, access to full-time qualified teachers, support for Aboriginal teachers, assistance with transport and culturally relevant curriculums as ways to enhance educational access and performance.[93] The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2009 report also expounded the benefits of bilingual learning.[94]

The existing punitive systems only serve to remove choice and reinforce the disempowerment of Indigenous people before the law. Interviews with women affected by CIM reported shame associated with the use of a basics card and frustration that the implication is that the State is better at managing the affairs of Aboriginal people than Aboriginal people themselves.[95]

The financial practicality of the model must be seriously considered in the face of these outcomes. The CYWR was budgeted for and spent close to $14.6m over the three-year trial period. The combined population of the four communities at the end of 2009 was 1,666.[96] This equates to $7,743 per capita spending in pursuit of this trial (or $2,581 per annum). Although economies of scale may be realised in expanding the program, it is ultimately reliant on human resource intensive activities, such as case conferences, training and case management. The Queensland Government Opposition Party has raised questions about the lack of clear outcomes considering these high costs[97] and similar questions are being asked about SEAM in the absence of any evaluation.[98] Linking welfare to school attendance suggests that parents are solely responsible for getting children to school, where multiple factors influence truancy, including the quality of teaching, the school environment, availability of transport and the health of the child. There may be more prudent uses of program funds to improve school attendance.

Although there may be individual cases of satisfaction and success under the reforms, at a population level, the program has failed. These findings, along with the breach of racial discrimination legislation and high costs, provide reason for ceasing or considerably modifying the CYWR trial and other similar models within Australia.

In the absence of unequivocal and independent forensic evidence of improvements in the lives of Indigenous people, there can be no justification for racially discriminative measures tying welfare payments to particular behaviour or outcomes. This article recommends that the Commonwealth and Queensland Governments should only pursue welfare management policies where the following are assured:

- CIM is abolished and welfare management is offered on a voluntary basis only;
- welfare management offers *positive* incentives for residents that meet mutual responsibility welfare criterion;
- where social dysfunction persists, primary investment and focus should be given to minimally restrictive interventions, such as provision of culturally appropriate family social support services, case managers and education programs; and
- that all decisions of Government agencies concerning Indigenous peoples are subject to genuine community consultation and standard administrative appeals processes.

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Prison Tree & Chained Men 2006
Jack Dale

Natural ochres & acrylic on cotton
1460mm x 1760mm