CROCODILE TEARS

by Desmond Manderson

A NEW CRISIS

Five years ago, when I was last in Australia, there was a crisis in Indigenous affairs. This crisis led to the Northern Territory Emergency Response legislation, often called 'the Intervention'.[1] Now I have returned to Australia to a new crisis in Indigenous affairs. Unlike the last one, this crisis is not being stage-managed by politicians; it is taking place behind the scenes. But I fear that this stealth crisis will set back Aboriginal lives for generations. The Australian Parliament is soon to pass the 'Stronger Futures Bills'.[2] These laws will continue the policies of the Intervention and in some cases extend them. It will mark an even greater surveillance and control over Aboriginal lives. In relation to one draconian provision, mandatory school attendance, for example, non-compliant parents may find their welfare entitlements—in many cases the family's only income—suspended for up to twelve weeks.[3]

The crisis to which I refer is not, however, the enactment of these laws. It is in some ways worse; it is a crisis of faith. The passage of these laws has been marked by such bad faith on the part of Government that many fair observers may begin to wonder whether the Government has any sincere interest in working with Aboriginal people on the very great problems that remote communities face. As many people have written, disengagement is one of the 'weapons of the weak'.[4] This appears to be the option increasingly, and despairingly, adopted by Aboriginal people in the Northern Territory ('NT'). To heal such a rift between governors and governed will take generations if it happens at all.

THE OBLIGATION TO CONSULT

The principle of genuine consultation with respect to laws concerning Indigenous people is by now a well-established legal obligation in national and international law. The *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') allows governments to take 'special measures' that would otherwise be discriminatory. Article 1(4) 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...[5]

In 2009, CERD issued *General Recommendation 32* ('GR 32'), an authoritative interpretation of the meaning of 'special measures'. Amidst a very detailed dissection of the elements of Article 1(4) was the following provision:

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[6]

The *UN Declaration on the Rights of Indigenous Peoples* (the 'Declaration'), endorsed by the General Assembly that same year, states that governments must obtain their 'free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.[7]

Australia signed the CERD in December, 1975, and endorsed the Declaration on 3 April, 2009. The *Racial Discrimination Act 1975* (Cth) was passed in order to give effect to CERD. The Act authorises racially discriminatory laws only if they are 'special measures to which paragraph 4 of Article 1 of the Convention applies',[8] thus binding Australian law to the well-established jurisprudence of GR 32. As early as the 1985 High Court case of *Gerhardy v Brown*, Justice Brennan had already explicitly recognised 'the wishes of the beneficiaries' as forming 'relevant legal criteria' for determining the *bona fides* of special measures.[9]

THE STRONGER FUTURES CONSULTATIONS

The question is whether the Federal Government has in any way satisfied these legal obligations. In June, 2011, the Federal Government released its *Stronger Futures Discussion Paper* ('Discussion Paper') and rapidly organised a large number of consultations across the NT: 378 'open-door' meetings between individuals and officials, 101 'whole of community' meetings, five public meetings in towns and cities, and several additional meetings between government members, stakeholders, and experts.[10] All this would be very impressive indeed if there were any

evidence that they made, or were intended to make, the slightest bit of difference to Government policy or legislation. There is none. So hasty was the process that any influence on policy seems improbable. The Discussion Paper was released in June and was often made available to community members only at the door of the meeting. But consultations were complete by August and a glossy Report (the 'Report') on the consultation process released in October.[11] By late November, hundreds of pages of complex new legislation had been introduced to Parliament.[12] The Stronger Futures Bills closely parallel the policy directions and proposals foreshadowed in the Discussion Paper released before the 'consultations' took place. It is as if they only confirmed what the Government already knew.

Listening But Not Hearing,[13] an independent report on the Government consultations, reveals a fundamentally flawed process which never allowed community members to comment on specific proposals, nor gave them the freedom to 'design and implement' their own agenda. Instead, consultations were channelled into areas already identified by the Government as critical to their future legislative plans, but without providing specifics that would have allowed real feedback to occur. The question of what these consultations were for and what outcomes they might produce seems never to have been asked:[14]

> The most egregious failure of the consultation process was the total lack of clarity in relation to the ultimate purpose of the process or expected outcomes....The Stronger Futures Discussion Paper does not detail the purpose of the consultations at all. As only a marginal improvement, the Government's report on the Stronger Futures Consultations describes the purpose of the consultations in the most general terms... [15]

Instead what seems to have taken place was a free-for-all. Meeting facilitators were neither professional nor independent but rather federal public servants from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) ('FaHCSIA'), who had been given a two-day training course to prepare them for their role. Several comments were made about the efforts of at least some of these officials to steer discussion to convenient areas and in some cases they were directly accused of adopting an inappropriately defensive tone in the face of criticism of Government policy.[16]

Yet by and large we are forced to rely on FaHCSIA's meeting notes, made according to their own individual judgment as to what was interesting or important. No transcripts were made by FaHCSIA. Their summaries were not subject to any feedback as to their accuracy from those present at the meetings. These notes, themselves highly problematic, then went through a further process of redaction before finally seeing the light of day in the Report on consultations issued by the Government last October. We have no means of independently assessing the accuracy or fairness of this summary of summaries.

The Report offers nothing but an eclectic *bouillabaisse* of quotes and opinions extracted from many hundreds of discussions, selected according to criteria never articulated and presented without any context. No attempt was ever made to evaluate the strength or support given to particular opinions in the meeting or to indicate in any way the 'priority of topics discussed, the level of participation and the extent to which comments reflected a commonly held view'.[17] Neither does the Report accurately reflect or even attempt to reflect the mood or general sentiment of these meetings. These were in many cases characterised by anger, frustration, or confusion. You would not know it if you read the Government's own Report.

But there is one piece of evidence that might shed some light. An independent group did in fact record ten community meetings. These transcriptions, the only ones we have, paint a very different picture of the Government's consultations. Let us take one of the most contentious issues, the suspension of welfare payments to the parents of children who do not attend school. The Government's Report claims:

> Respondents commented relatively frequently that parents should have part of their welfare or Centrelink payments withheld or their payments reduced if they did not send their children to school. Fewer respondents said parents should not have their payments withheld or be fined. A few said parents should be fined for not sending their children to school.[18]

Yet at the recorded meetings for which we have actual evidence significant hostility to this proposal was aired. The *Listening But Not Hearing* Report concludes that 'there were *no* expressions of support for the measure'.[19] Certainly SEAM (Improving School Enrolment and Attendance through Welfare Reform Measure), which has already begun on a trial basis in the NT, has encountered some hostility and opposition and shows scant evidence of quantifiable success. Nonetheless, the relevant Minister, Jenny Macklin, continues to blithely assert that 'the message loud and clear from Aboriginal people, from parents and grandparents, is that they want this'.[20]

On the contrary, community members spoke instead about the substance and nature of education in remote communities, specifically highlighting the roll-back of

bilingual education in the NT over several years.[21] In many communities, the predominant use by teachers of English, many Aboriginal children's third or fourth language, was seen as a critical barrier to improving educational outcomes and motivation. Indeed the importance of bilingual education is not just about children. It goes directly to the question of community and family commitment to their education.[22] Many Aboriginal parents in the NT do not speak English either. How are they to be involved in their children's education in a language that they don't understand? Yet this issue, so clearly and forcefully raised in the transcribed meetings, is not even mentioned in the Government's Report. Instead the question of education—in the Discussion Paper, the Report, and now the legislation—is consistently reduced to a matter of 'school enrolment' and 'school attendance'. The Report asks only 'what are the key factors in getting children and young people in remote communities to go to school regularly?'[23]—as if *turning up* was somehow unrelated to the nature of the education being provided, its curriculum, language and relevance.

The Report seems tailored to fit the outcomes that the Government already had in view, and would present as legislation within a matter of weeks. I do not know whether FaCHSIA facilitators misconstrued what they were told. Perhaps some of them were so attuned to the Government's position that they heard and set down only what they wanted to hear. Or perhaps it is the summary and organisation of the material into the final Report by senior departmental officials that is responsible for what appears to be serious misrepresentations or omissions. As a genuine consultation with Aboriginal people on measures that will profoundly affect their lives, the Government orchestrated an elaborate charade. The consultation process did not provide relevant information to communities about legislative change. It did not genuinely consult them. And it certainly did not take the feedback provided into account in developing or modifying Government policy in any way.

> It's okay for you to have this consultation, but at the end of the day, is there going to be any changes? Because, I've been over-consulted, I've been poked, I've been probed, I've met (inaudible) I've had ministers in my house for coffee, I've been making scones, you know, I've tried to do all those (inaudible) and the message is not really getting through. So I see this as another way for the government to come in and tell us how to live our lives and how to do what we're going to do whether we like it or not.[24]

Neither this participant's remark—nor anything remotely critical of the Government's efforts—made it into the Government's Report.

KABUKI CONSULTATION?

What then was this elaborate mime of consultation *for*? In my previous research I tried to make sense of the contradiction between the Government's earnest advocacy of the rule of law to Aboriginal people while simultaneously treating them as 'wanton savages' to be corralled and controlled.[25] I particularly struggled with the paradox that emerges throughout our history between governments strongly declaring their commitment to equal treatment under the law for Aboriginal people, while acting in quite the opposite fashion.[26] I well remember the response that one US historian made to my research. She said to me that, at least when it came to the history of nineteenth-century Van Diemen's Land, the Colonial Government's pious statements about the rule of law might have been made *to* the Tasmanian Aborigines, but perhaps they were not really *for* them. They might instead have been designed to reassure the Colonial Office, in far-away London, of the good intentions of the Government. The high-minded statements of the Colonial Government did not express a policy, she suggested: they formed a paper-trail.

At the time this struck me as overly cynical. Now I am less sure. Is that not exactly what the current crisis demonstrates?—that consultation with Aboriginal people is merely a *performance* in which Aboriginal people in the NT are themselves co-opted in order to satisfy an audience elsewhere. This audience does not live in the towns and camps of the NT, but in the swinging electorates of Sydney and Melbourne, in Canberra where the High Court of Australia will one day rule on whether the 'Stronger Futures Acts' satisfy the *Racial Discrimination Act 1975* (Cth), or in Geneva where the Committee on the Elimination of Racial Discrimination sits. In *Gerhardy v Brown,* Justice Brennan said the High Court's power in this area is limited:

> When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment.... The court does not have to decide a political question; at most it must decide the limits within which a political assessment might reasonably be made.[27]

So what is required according to the High Court is *not* an assessment on whether there has been a genuine consultation, or whether the Government's 'special measures' are really in the interests of Indigenous people, but only its credible simulacrum. The law, in the end, does not require consultation but something which looks sufficiently like it. In short, a paper trail. And that the Federal Government has no doubt achieved brilliantly.

Yet people in the NT can hardly be unaware of the way in which they have been used. This insincere manipulation on the part of the Federal Government is at the heart of the current crisis. It is not a crisis of child abuse or of poverty. It is a crisis in our relations with Aboriginal people. Each new law only intensifies our arrogant paternalism and their dependence, now increasingly not just a welfare dependency but a criminal dependency. Each new step exacerbates Aboriginal disengagement from the very processes that are probably most important for their future. And each new law further demonstrates the unwillingness of political actors to take the necessary steps—equality, consultation, co-operation—the real things and not just the simulacrum of them—that would be needed to make any inroads into the very problems over which are now wept crocodile tears.

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1 *Northern Territory National Emergency Response Act 2007* (Cth) No. 129; *Family, Community Services, Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) No. 128; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act* 2007 (Cth) No. 130; See Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29 *Arena* 1-54.

2 Stronger Futures in the Northern Territory Bill 2012 (Cth); Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2012 (Cth); Social Security Legislation Amendment Bill 2012 (Cth).

3 Social Security Legislation Amendment Bill 2012 (Cth), Schedule 2, Division 3A, ss 124NA – NG.

4 James C Scott, *Weapons of the Weak* (New Haven: Yale University Press, 1985).

5 *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 1 (4) (entry into force 4 January 1969) <http://www2.ohchr.org/english/law/pdf/cerd.pdf>; See Michael O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 171.

6 Committee on the Elimination of Racial Discrimination, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [18].

7 *United Nations Declaration on the Rights of Indigenous People*, General Assembly Resolution 61/295 (2009), Art 19.

8 *Racial Discrimination Act 1975*(Cth, No. 52), s. 8.

9 *Gerhardy v Brown* (1985) 159 CLR 70 (High Court of Australia) per Brennan J, 133.

10 Australian Government, *Stronger Futures in the Northern Territory—Discussion Paper* (June 2011) <http://www.Indigenous.gov.au/wp-content/uploads/2011/06/s_futures_discussion_paper.pdf>; see also Australian Government, *Stronger Futures in the Northern Territory—Report on Consultations* (October 2011), 14-15, Appendix 2.11.

11 Commonwealth of Australia, *Stronger Futures in the Northern Territory—Report on Consultations* (Canberra: AGPS, 2011).

12 Stronger Futures Bills, above n 2.

13 Alastair Nicholson, Nicole Watson, Alison Vivian, Craig Longman, Terry Priest, Jason De Santolo, Paddy Gibson, Larissa Behrendt and Eva Cox, *Listening But Not Hearing: A response to the NTER Stronger Futures Consultations* (Research Unit, Jumbunna House of Learning) (University of Technology Sydney, 2012).

14 Ibid, 72-8.

15 Ibid, 76-7.

16 Quoted in ibid, 114.

17 Cultural & Indigenous Research Centre Australia (CIRCA), *Report on Stronger Futures Consultation 2011: Final Report* (September 2011) 24; see <http://www.indigenous.gov.au/no-category/stronger-futures-in-the-northern-territory/>.

18 *Stronger Futures in the Northern Territory—Report on Consultations,* above n 11, 23.

19 *Listening But Not Hearing,* above n 13, 71.

20 ABC Interview quoted in Michele Harris and Rosa McKenna, *Cuts to Welfare Payments for School Non-Attendance* (October 2011) 13.

21 Harris and McKenna, ibid, 9-10; *Listening Not Hearing,* above n 10, e.g. at 44, 142, 1222-3.

22 Mick Dodson, Personal Communication, 9 May 2012.

23 *Stronger Futures in the Northern Territory—Report on Consultations,* above n 10, 20.

24 *Listening Not Hearing, ,* above n 13, 58.

25 Proclamation, *Hobart Town Gazette*, 2 October 1830 <www.law.mq.edu.au/sctas/html/1830cases/Notice7,1830.htm>; see also Archdeacon Broughton, Report to Governor Arthur, quoted in Nicholas Blomley, *The Aboriginal/Settler Clash in Van Diemen's Land* (Hobart, Queen Victoria Museum, 1992) 9. 26 Manderson, above n 1, 44-6.

27 *Gerhardy v Brown* (1985) 159 CLR 70 (High Court of Australia) per Brennan J, 132-3.