Tuesday, 1 March 2022

Queensland Human Rights Commission
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Review of Queensland's Anti-Discrimination Act

The Foundation for Aboriginal and Islander Research Action (FAIRA) welcomes the review of the legislation addressing racial discrimination in Queensland.

Please find attached our submission regarding anti-discrimination legislation laws in Queensland. We present our submission with the authority derived from our role and history in addressing Queensland laws and policies that have breached the rights of the 'First Peoples'.

FAIRA trusts that the Commission is able to adopt a firm, objective stance towards the recognition of human rights of the Aboriginal and Torres Strait Islander Peoples and that, in its role and relationship with the Queensland government, will encourage the parliament of Queensland to take the important steps to achieve equality for our Peoples in law and practice.

Respectfully

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FAIRA SUBMISSION

1 March 2022

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ABOUT FAIRA

The Foundation for Aboriginal and Islander Research Action (FAIRA) is founded in Queensland. FAIRA was created by Aboriginal and Torres Strait Islander delegates from the many and isolated reserve communities first established throughout Queensland early in the twentieth century. These community delegates decided to establish a functional organisation to campaign for their human rights, including the termination of the 'Black Acts.'

The Black Acts originated in 1897 and continued until well into the 1970s, when FAIRA was formed. Now almost 50 years in existence FAIRA still continues to fight for equality, having ended the 'Black Acts' in 1984 when the former reserves became autonomous self-governing and land-holding communities in Queensland.

FAIRA has campaigned for rights of the Aboriginal and Torres Strait Islander Peoples at the national and international levels. FAIRA was one of the first Indigenous Peoples organisations of the world to present formal submissions to the International Committee on the Elimination of Racial Discrimination. In this pursuit FAIRA has constantly engaged with CERD to critique Australia's reports on the implementation of the race convention in Australia. FAIRA also has close engagement with other international human rights treaty bodies.

FAIRA has been to the forefront of the establishment of the UN Declaration on the rights of Indigenous Peoples. We participated in the drafting meetings at the UN and campaigned strongly in the final stages to have the Declaration adopted by the UN General Assembly. Since the Declaration was adopted FAIRA has given priority attention to Australia's pledges to implement the Declaration. We are pleased that the Queensland Government has acknowledged important rights in its Human Rights legislation, but believe further effort is required to realise those rights.

Our main purpose is to have the rights of Indigenous Peoples recognised and respected in Australian law. One of our key priorities is to have strong anti-racism laws and fair systems of adjudication for disputes between Australian governments and the Aboriginal and Torres Strait Islander Peoples.

INTRODUCTION

Australia was occupied by the British in 1788, with the initial intention to establish a penal colony, following the American War of Independence. This initial settlement expanded is size to become territory for free settlement, then a source for primary produce for Great Britain. Australia saw rapid expansion through squatters, gold rushes and European immigration. By the late 1800s the territory had expanded to claim the entire continent, controlled by six

colonies. In 1900 the British government legislated the Australian constitution bill to form the new nation in the southern hemisphere.

This attention to the early history is important because during this period of colonisation and since federation there was no regard for the indigenous population and any recognition of equality or rights to territory and resources. While some despair was echoed over the inhumanity of treatment of the indigenous population the governments of the colonies and state did not affirm any residual rights held by the first peoples of Australia. Aboriginal and Torres Strait Islander Peoples were held captive in a legislative and political web while their lands, territories and resources were acquired without regard to legal rights, or consent or compensation.

Queensland, as a colony and then a state, ignored any inherent, concrete rights of the Aboriginal and Torres Strait Islander populations, to their lands territories and resources, and set about with policies to ameliorate the sufferings of the supposed 'dying race', through acts of segregation. These policies were advanced by various christian churches in the first instance and then institutionalised in 1897 under Queensland's *Bill to make Provision for the better Protection and Care of the Aboriginal and Half-caste Inhabitants of the Colony, and to make more effectual Provision for Restricting the Sale and Distribution of Opium*. The legislation led to forced removals of the First Peoples, and administration of population control on designated reserve lands.

In the first 70 years after federation Queensland was regarded as having advanced policies and laws, designed to assimilate 'caste' Aboriginal and Torres Strait Islander people whilst under 'protection'.

Queensland, since first established as a penal settlement, has not provided appropriate recognition of and respect for Aboriginal and Torres Strait Islander Peoples rights. There has been not effort to remedy the past misgivings, regarding major acts of racial discrimination, systemic or otherwise. Contemporary law-making has been fixated upon dealing with problems stemming from administration of the Aboriginal and Torres Strait Islander population, rather than long overdue recognition of identity and rights of the First Peoples. Even the *Aboriginal Land Act* 1991 and the Aboriginal and Torres Strait Islander Cultural Heritage laws do not constitute adequate protection or remedy for the Aboriginal and Torres Strait Islander Peoples, when viewed in terms of the Declaration on the rights of Indigenous Peoples, or the International Convention on the Elimination of All Forms of Racial Discrimination.

RIGHTS OF AUSTRALIA'S FIRST PEOPLES

The UN Declaration on the Rights of Indigenous Peoples has been adopted as the global human rights standards for Indigenous Peoples. The Australian government did not initially accept the Declaration as a standard, having voted against its adoption at the UN General Assembly in Year 2007. However now it can be considered that Australia has accepted the standard and seeks to respect the rights. However there is little evidence that the human rights of Indigenous Peoples are to the forefront of political consideration, and law-makers may be more influenced by the colonial attitude to Aboriginal and Torres Strait Islander Peoples rights, than attempting to face and implement the significant changes required to regard the First Peoples as 'peoples' holding collective rights.

The political approach to anti-discrimination continues to rely upon 'sameness', such as treating individuals Aboriginals or Torres Strait Islanders as the same as any other persons, but disregarding the right of the people to collectively govern their own interests. This approach is entrenched in the fabric of the nation, relying upon constitutions and laws developed when the First Peoples were regarded as non-entities. For example, the Mabo case of the High Court, determined two important principles.

The first of these principles was that the Constitution of Australia prevents the High Court from recognising and acknowledging Aboriginal / Torres Strait Islander sovereignty. Overlooked at the time, this simple but fundamental 'fact' remains a bedrock in the jurisprudence in Australian law. This determination by the High Court, it could be argued, means the nation is committed to discriminate against the Aboriginal and Torres Strait Islander population if they seek to be regarded as 'peoples' with the right to self-determination.

The second of these important principles was that the rights of Aboriginal and Torres Strait Islander peoples held under Common Law have been continuously breached since British colonisation in 1788. But such breaches cannot are not illegal in Australian law until 1975 when the Commonwealth *Racial Discrimination Act* 1975 ratified Australia's international treaty obligations.

Queensland's history entails systemic racial discrimination against the Aboriginal and Torres Strait Islander Peoples. In recent decades there has been an enlightenment, in part at least, of the rights of Aboriginal and Torres Strait Islander Peoples. New laws have been made and, at variance to previous policies, these new laws have sought to provide a human rights approach to Aboriginal and Torres Strait Islander interests. It is important that law-makers understand and respect the human rights standards however in doing so, the lawmakers will have a challenge to overturn historical discrimination and disadvantages that are embedded in the legal and political system

ANTI-DISCRIMINATION AND REFORMING AUSTRALIAN LAWS

Australian anti-discrimination laws are consistent in terms of meeting Australia's obligation under the International Convention on the Elimination of All Forms of Racial Discrimination (the race convention). For the most part the laws are effective in ensuring that rights under the Universal Declaration on Human Rights are understood and enjoyed in the community. FAIRA is strongly in favour of these laws and the determined approach to have differences respected and equality maintained.

However FAIRA seeks to have the anti-discrimination laws amended to ensure that systemic racism against the Indigenous Peoples of Australia are addressed. This will require a lot of discussion and education but in this submission we bring attention to the need to give more definition in Australian law to 'Special Measures'. FAIRA urges the Queensland Parliament to examine the issues of Special Measures and ensure that the laws in Queensland adopt the required standard to meet the needs and expectations of the Aboriginal and Torres Strait Islander Peoples.

FAIRA calls upon the Queensland Government to enact new legislation, to amend the Anti-Discrimination Act, to improve the understanding of racial discrimination and 'special measures'.

We believe that 'Special Measures' should establish the guidelines for enacting laws that address Aboriginal and Torres Strait Islander Peoples either directly or indirectly. There should be no ambiguity or doubt when a law is enacted as to whether or not it is racially discriminatory. If it is not a special measure and does not meet the criteria for a special measure then it should be clearly understood that it serves a discriminatory purpose, and that Aboriginal and Torres Strait Islander Peoples are disadvantaged by the law.

UNDERSTANDING SPECIAL MEASURES

Australia signed the International Convention on the Elimination of All Forms of Racial Discrimination in 1966, and ratified the Convention in 1975. The treaty recognises that special measures are important for advancement of equality and affirms that such measures shall not be deemed racial discrimination. (Article 1.4 of ICERD).

Article 2.2 of the Convention states that 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".

Thus if the Queensland Government enacts legislation to control the liquor consumption on Aboriginal communities it is either racial discrimination, or a special measure to advance the enjoyment of human rights in the community. This responsibility exercised by the lawmakers needs to be transparent and accountable, not least of all to the community that is deemed to benefit from the legislation.

The Committee on the Elimination of Racial Discrimination has prepared General Recommendation No.32 (see Attachment A) on the provisions for special measures to elaborate on the meaning of special measures and to assist governments to discern important distinction between laws that are racially discriminatory and laws that benefit the target group.

It should be noted that the Racial Discrimination Act 1975 does not reflect the CERD criteria for defining special measures and that the High Court has taken a somewhat different definition of special measures based upon Section 8.1 of the RDA.

FAIRA does not consider the current definition of special measures being applied to laws are adequate and may fit the definition of racial discrimination. FAIRA provides the Guidelines for Special Measures as prepared by the Australian Human Rights Commission in 2011. (see Attachment B) These guidelines interpret special measures, as taken by the judiciary in a broader and less accountable manner, missing the important elements contained in the CERD General Comment No.32.

Our submission supports the criteria for special measures as prepared by the National Congress of Australia's First Peoples in 2011, in relation to the Northern Territory's Intervention Laws (see Attachment C). Congress identified 10 criteria which should be addressed by lawmakers to avoid racial discrimination. These criteria give clarity to the role of special measures to have specific purpose to achieve an outcome which is considered by the

target group to benefit them and have their consent. The criteria also ensure the measures are temporary measures which are monitored and assessed during the term of the measure.

It is unfortunate for Aboriginal and Torres Strait Islander Peoples that under the Constitution of Australia their lives and futures are destined to be controlled by an alien system of government never integrated with the Aboriginal / Torres Strait Islander societies, and that the alien government is deemed to be infallible in its lawmaking prowess. In other terms, the parliament cannot be held to account for racial discrimination in lawmaking. It is therefore important that the parliament holds itself to be accountable to the Aboriginal and Torres Strait Islander Peoples, and be amenable to a process that allows scrutiny and consent from Aboriginal and Torres Strait Islander Peoples to special measures to promote and protect the rights of the Aboriginal and Torres Strait Islander Peoples.

INCORPORATING STANDARDS AND GOALS

Prior to Year 2007, governments were unclear about obligations at the international level to the Indigenous Peoples. The Declaration on the rights of Indigenous Peoples set the stage for all states to be held accountable for the human rights of Indigenous Peoples.

The Declaration establishes that Indigenous Peoples

are free and equal to all other peoples… and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity"

and Indigenous Peoples

have the right to self-determination [and to] freely determine their political status and freely pursue their economic, social and cultural development.

Careful examination of the Declaration will confirm that states need to clarify the right to self-determination where previous policies and laws had not established the rightful status of the Indigenous Peoples.

In Queensland the historical path to present day policies does not provide solid ground on which to build good relationships with the Aboriginal and Torres Strait Islander Peoples. The anti-discrimination laws are not currently in a form which builds engagement on the terms of self-determination and the rights to development.

FAIRA recommends that the Queensland Human Rights Commission builds partnership with the Aboriginal and Torres Strait Islander Peoples, in conjunction with governments at all levels. This will be difficult to achieve given that the Aboriginal and Torres Strait Islander population are engaged variously across a number of portfolios of government, however it is important that human rights be an essential component of engagement between government and Indigenous Peoples, and that the Declaration be understood in a better context than the 'protection' policies and practices emanating from the colonial past.

The human rights goals for the Aboriginal and Torres Strait Islander Peoples need to be integrated into the myriad of communications across government portfolios. In order to achieve a human

rights outcome FAIRA considers the definition of special measures to be an important step toward the future, and parliament is the right place to build a new relationship and to end systemic racism.

FAIRA recommends the criteria for special measures to be based on the following points.

1. That laws applied to Aboriginal and Torres Strait Islander people that are deemed 'special measures' must be designed within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination, if they set out to overcome disadvantages faced by the Aboriginal and Torres Strait Islander population.

2. 'Special measures' must have the sole purpose of ensuring equal human rights.

3. 'Special measures' must be designed and implemented through prior consultation with the people concerned.

4. There must be clarity in regards to the results to be achieved from the 'special measures'.

5. 'Special measures' must be accountable to the people concerned.

6. 'Special measures' must be appropriate to the situation to be remedied and grounded in realistic appraisal of the situation to be addressed.

7. There must be justification for the proposed 'special measures' including how they will obtain the perceived outcomes.

8. Government should obtain the prior, informed consent of the Aboriginal and Torres Strait Islander peoples before implementing 'special measure' laws.

9. 'Special measures' must be temporary and only maintained until disadvantage is overtaken.

10. There must be a system for monitoring the application and results of 'special measures'.

ADJUDICATION OF DISPUTES

The Declaration has many important elements which need to be understood in order to gauge the direction for future engagement between Indigenous Peoples and governments, particularly in the settler states like Australia. Unfortunately the Australian Constitution and the history of the legal system derived from Britain are impediments to new partnerships with the First Peoples of Australia. Perhaps the 'Truth and Treaty' approach will open new doors for communication and negotiation.

However Article 40 of the Declaration brings forward a right not often cited in disputes from Indigenous Peoples.

"Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all

infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

The key words in this resolution are "just and fair procedures" with a particular mention of disputes with states. Perhaps some example of questionable procedures can be found in the disputes over mining, and the negotiations for consent agreements under Native Title legislation. These dispute procedures are anything but just and fair, particularly in the reliance upon courts and the laws of Queensland or Australia. Obviously they courts and laws favour the state and Aboriginal claims for justice are buried in legal process of the other parties.

The importance of monitoring laws and policies is further emphasised in Article 27 of the Declaration. The Article calls for a fair, independent, impartial, open and transparent process.

"States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

FAIRA recommends that any special measures undertaken in Queensland incorporate the institution and resources required to monitor and measure progress according to the disclosed criteria for that special measure.

CONCLUSION

We submit this submission with the intent that laws which have an impact upon Aboriginal and Torres Strait Islander people in particular are enacted only with the free, prior and informed consent of the people targeted by the laws, and that relevant criteria for special measures are provided and monitored from the outset.

ENDS

From: Les Malezer [redacted]
Subject:
Date: 24 August 2010 12:34:50 PM

Committee on the Elimination of Racial Discrimination
Seventy-fifth session, August 2009

General Recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination

I. Introduction

A) Background
1. At its 71st session, the Committee on the Elimination of Racial Discrimination (the Committee) decided to embark upon the task of drafting a new General Recommendation on special measures, in light of the difficulties observed in the understanding of such notion. At its 72nd session, the Committee decided to hold at its next session a thematic discussion on the subject of special measures within the meaning of articles 1(4) and 2(2) of the Convention. The thematic discussion was held on 4 and 5 August 2008 with the participation of States parties to the Convention, representatives of the Committee on the Elimination of Discrimination against Women (CEDAW), the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and non-governmental organizations. Following the discussion, the Committee renewed its determination to work on a general recommendation on special measures, with the objective of providing overall interpretative guidance on the meaning of the above articles in light of the provisions of the Convention as a whole.

B) Principal Sources
2. The General Recommendation is based on the Committee's extensive repertoire of practice referring to special measures under the Convention. Committee practice includes the concluding observations on the reports of States parties to the Convention, communications under Article 14, and earlier general recommendations, in particular General Recommendation 8 on Article 1, paragraphs 1 and 4 of the Convention, as well as General Recommendation 27 on Discrimination against Roma, and General Recommendation 29 on Article 1, paragraph 1, of the Convention (Descent), both of which make specific reference to special measures.

3. In drafting the recommendation, the Committee has also taken account of work on special measures completed under the aegis of other UN-related human rights bodies, notably the report by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights,[1] and General Recommendation 25 of the Committee on the Elimination of Discrimination against Women on 'temporary special measures'. [2]

C) Purpose
4. The purpose of the General Recommendation is to provide, in light of the Committee's experience, practical guidance on the meaning of special measures under the Convention in order to assist States parties in the discharge of their obligations under the Convention, including reporting obligations. Such guidance may be regarded as consolidating the wealth of Committee recommendations to States parties regarding special measures.

D) Methodology
5. The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context for the present recommendation includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards on the principles of non-discrimination and special measures. Context-sensitive interpretation also includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. The nature of the Convention and the broad scope of the Convention's provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, such variations must be fully justifiable in light of the principles of the Convention.

II. Equality and Non-Discrimination as the Basis of Special Measures

A) Formal and de facto Equality
6. The International Convention on the Elimination of All Forms of Racial Discrimination is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.

B) Direct and Indirect Discrimination
7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect.

Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences.

8. On the core notion of discrimination, General Recommendation 30 of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'[3] As a logical corollary of this principle, General Recommendation 14 observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.[4] The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

C) Scope of the Principle of Non-Discrimination
9. The principle of non-discrimination, according to Article 1.1. of the Convention, protects the enjoyment on an equal footing of human rights and fundamental freedoms 'in the political, economic, social, cultural or any other field of public life.' The list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party. The reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in light of provisions in the Convention mandating measures by States parties to address racial discrimination 'by any persons, group or organization.'[5]

10. The concepts of equality and non-discrimination in the Convention, and the obligation on States parties to achieve the objectives of the Convention, are further elaborated and developed through the provisions in Articles 1.4 and 2.2 regarding special measures.

III. The Concept of Special Measures

A) Objective of Special Measures: Advancing Effective Equality
11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.

B) Autonomous Meaning of Special Measures
12. The terms 'special measures' and 'special and concrete measures' employed in the Convention may be regarded as functionally equivalent and have an autonomous meaning to be interpreted in light of the Convention as a whole which may differ from usage in particular States parties. The term 'special measures' includes also measures that in some countries may be described as "affirmative measures", "affirmative action" or "positive action" in cases where they correspond to the provisions of articles 1(4) and 2(2) of the Convention, as explained in the following paragraphs. In line with the Convention, the present recommendation employs the terms 'special measures' or 'special and concrete measures' and encourages States parties to employ terminology that clearly demonstrates the relationship of their laws and practice to these concepts in the Convention. The term 'positive discrimination' is, in the context of international human rights standards, a contradictio in terminis and should be avoided.

13. 'Measures' includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include as required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed to specific sectors in light of the range of human rights referred to in Article 5 of the Convention, as well as through plans, programmes and other policy initiatives referred to above at national, regional and local levels.

C) Special Measures and Other Related Notions
14. The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.

15. Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men.[6] Such rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures. [7]

D) Conditions for the Adoption and Implementation of Special Measures
16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural [8]status and conditions of the various groups in the population and their participation in the social and economic development of the country'.

18. 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.

IV. Convention Provisions on Special Measures

A) Article 1, paragraph 4

19. Article 1, paragraph 4 of the Convention stipulates that "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".

20. By employing the phrase 'shall not be deemed racial discrimination', Article 1, paragraph 4 of the Convention makes it clear that special measures taken by States parties under the terms of the Convention do not constitute discrimination, a clarification reinforced by the travaux préparatoires of the Convention which record the drafting change from 'should not be deemed racial discrimination' to 'shall not be deemed racial discrimination'. Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.

21. In order to conform to the Convention, special measures do not amount to discrimination when taken for the 'sole purpose' of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures, and the instruments designed to put the measures into effect. The reference to 'sole purpose' limits the scope of acceptable motivations for special measures within the terms of the Convention.

22. The notion of 'adequate advancement' in Article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove 'historic' discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.

23.The term 'protection' in the paragraph signifies protection from violations of human rights emanating from any source, including discriminatory activities of private persons, in order to ensure the equal enjoyment of human rights and fundamental freedoms. The term 'protection' also indicates that special measures may have preventive (of human rights violations) as well as corrective functions.

24. Although the Convention designates 'racial or ethnic groups or individuals requiring … protection' (Article 1, paragraph 4), and 'racial groups or individuals belonging to them' (Article 2, paragraph 2), as the beneficiaries of special measures, the measures shall in principle be available to any group or person covered by Article 1 of the Convention, as clearly indicated by the travaux préparatoires of the Convention, as well as by the practice of States parties and the relevant concluding observations of the Committee.[9]

25. Article 1, paragraph 4 is expressed more broadly than Article 2, paragraph 2 in that it refers to individuals 'requiring … protection' without reference to ethnic group membership. The span of potential beneficiaries or addressees of special measures should however be understood in light of the overall objective of the Convention as dedicated to the elimination of all forms of racial discrimination, with special measures are an essential tool, where appropriate, for the achievement of this objective.

26. Article 1, paragraph 4 provides for limitations on the employment of special measures by States parties. The first limitation is that the measures 'should not lead to the maintenance of separate rights for different racial groups'. This provision is narrowly drawn to refer to 'racial groups' and calls to mind the practice of Apartheid referred to in Article 3 of the Convention which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.

27. The second limitation on special measures is that 'they shall not be continued after the objectives for which they have been taken have been achieved'. This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved.[10] The length of time permitted for the duration of the measures will vary in light of their objectives, the means utilised to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned.

B) Article 2, paragraph 2

28. Article, paragraph 2 of the Convention stipulates that "States parties shall, when the circumstances so warrant, take, in the social,

economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved".

29. Article 1, paragraph 4 of the Convention is essentially a clarification of the meaning of discrimination when applied to special measures. Article 2, paragraph 2 carries forward the special measures concept into the realm of obligations of States parties, along with the text of Article 2 as a whole. Nuances of difference in the use of terms in the two paragraphs do not disturb their essential unity of concept and purpose.

30. The use in the paragraph of the verb 'shall' in relation to taking special measures clearly indicates the mandatory nature of the obligation to take such measures. The mandatory nature of the obligation is not weakened by the addition of the phrase 'when the circumstances so warrant', a phrase which should be read as providing context for the application of the measures. The phrase has, in principle, an objective meaning in relation to the disparate enjoyment of human rights by persons and groups in the State party and the ensuing need to correct such imbalances.

31. The internal structure of States parties, whether unitary, federal or decentralised, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralised States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.

32. Whereas Article 1, paragraph 4 of the Convention uses the term 'special measures', Article 2, paragraph 2 refers to 'special and concrete measures'. The travaux préparatoires of the Convention do not highlight any distinction between the terms and the Committee has generally employed both terms as synonymous.[11] Bearing in mind the context of Article 2 as a broad statement of obligations under the Convention, the terminology employed in Article 2, paragraph 2, is appropriate to its context in focusing on the obligation of States parties to adopt measures tailored to fit the situations to be remedied and capable of achieving their objectives.

33. The reference in Article 2, paragraph 2 regarding the objective of special measures to ensure 'adequate development and protection' of groups and individuals may be compared with the use of the term 'advancement' in Article 1, paragraph 4. The terms of the Convention signify that special measures should clearly benefit groups and individuals in their enjoyment of human rights. The naming of fields of action in the paragraph - 'social, economic, cultural and other fields' - does not describe a closed list. In principle, special measures can reach into all fields of human rights deprivation, including deprivation of the enjoyment of any human rights expressly or impliedly protected by Article 5 of the Convention. In all cases it is clear that the reference to limitations of 'development' relates only to the situation or condition in which groups or individuals find themselves and is not a reflection on any individual or group characteristic.

34. Beneficiaries of special measures under Article 2, paragraph 2 may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals. The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.

35. Provisions on the limitations of special measures in Article 2, paragraph 2, are in essence the same, mutatis mutandis, as those expressed in Article 1, paragraph 4. The requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing, system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal. States parties should also carefully determine whether negative human rights consequences would arise for beneficiary communities consequent upon an abrupt withdrawal of special measures, especially if such have been established for a lengthy period of time.

V. Recommendations for the preparation of reports by States parties

36. The present guidance on the content of reports confirms and amplifies the guidance provided to States parties in the Harmonized Guidelines on Reporting to the International Human Rights Treaty Monitoring Bodies,[12] and the Guidelines for the CERD-specific document to be submitted by States parties under Article 9, paragraph 1 of the Convention.[13]

37. Reports of States parties should describe special measures in relation to any articles of the Convention to which the measures are related. The reports of States parties should also provide information, as appropriate, on:

- The terminology applied to special measures as understood in the Convention;
- the justifications for special measures, including relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen, and the results to be expected from the application of measures;
- the intended beneficiaries of the measures;
- the range of consultations undertaken towards the adoption of the measures including consultations with intended beneficiaries and with civil society generally;
- the nature of the measures and how they promote the advancement, development and protection of groups and individuals concerned;
- the fields of action or sectors where special measures have been adopted;
- where possible, the envisaged duration of the measures;
- the institutions in the State responsible for implementing the measures;
- the available mechanisms for monitoring and evaluation of the measures;
- participation by targeted groups and individuals in the implementing institutions and in monitoring and evaluation processes;

- the results, provisional or otherwise, of the application of the measures;
- plans for the adoption of new measures and the justifications thereof;
- information on reasons why, in light of situations that appear to justify the adoption of measures, such measures have not been taken.

38. In cases where a reservation affecting Convention provisions on special measures is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time-frame. In cases where States parties have adopted special measures despite the reservation, they are invited to provide information on such measures in line with the recommendations in paragraph 37 above.

[1] 'The Concept and Practice of Affirmative Action, final report by special rapporteur, Mr. Marc Bossuyt, E/CN.4/Sub.2/2002/21.
[2] Adopted at the thirtieth session of the Committee, A/59/38, Annex I (2004).
[3] General Recommendation No. 30, paragraph 4.
[4] A/48/18, chapter VIII B.
[5] Article 2.1. (d); see also Article 2.1. (b).
[6] See CEDAW General Recommendation 25, paragraph 16.
[7] See for example paragraph 19 of CEDAW General Recommendation 25, and paragraph 12 of the Recommendations of the Forum on Minority Issues on rights to education, A/HRC/10/11/Add.1 (2009).
[8] Article 2.2. includes the term 'cultural' as well as 'social' and 'economic'.
[9] See also paragraph 7 above.
[10] CESCR General Comment No. 20, paragraph 9.
[11] The UN declaration on the Elimination of All Forms of Racial Discrimination referred, in Article 2.3. to 'special and concrete measures'. See also paragraph 12 above.
[12] HRI/MC/2006/3.
[13] CERD/C/2007/1.

ATTACHMENT B

2011

Guidelines to understanding 'Special measures' in the *Racial Discrimination Act 1975* (Cth)

. . . . . .

Implementing 'special measures' under the *Racial Discrimination Act 1975* (Cth)

1 Introduction

1. The *Racial Discrimination Act 1975* (Cth) (RDA) prohibits racial discrimination under sections 9 and 10 of the Act but allows for 'special measures' to be taken to advance the human rights of certain racial or ethnic groups or individuals under section 8 of the Act.

2. The Australian Human Rights Commission has prepared these guidelines to provide assistance to those designing and implementing 'special measures' to ensure that measures intended to be 'special measures' meet the requirements of the RDA and are consistent with human rights principles.[1] The guidelines are based on international laws[2] and policies that provide guidance on how to implement special measures and on the Commission's extensive experience and expertise in the administration of the RDA and other discrimination and human rights laws.

2 The concept of equality and the role of 'special measures'

3. In order to understand the scope and meaning of the term 'special measure' it is helpful to consider the concept of 'equality' that underpins the RDA. The right to equality and non-discrimination are fundamental human rights. These rights are central to the RDA and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), which the RDA implements.[3] Equality can be formal (treating all people identically) or substantive (treating equally what are equal and differently what are unequal). Formal equality cannot address inequities caused by existing injustices and disadvantages.

4. The concept of special measures is generally understood to apply to positive measures taken to redress historical disadvantage and confer benefits on a particular racial group, so that they may enjoy their rights equally with other groups; special measures are designed to ensure the equality of outcomes for disadvantaged groups.

5. Special measures, then, are essentially differential treatment between racial groups which are identified as necessary in order to address an existing inequality[4] or disadvantage. Special measures are an essential component to achieving substantive equality and eliminating racial discrimination. Under international human rights law, special measures operate in two contexts:

    - as a positive obligation on states to take action to ensure that minority racial groups are guaranteed the enjoyment of all human rights and fundamental freedoms; and

    - as an exception to the definition of discrimination.

2.1 The positive obligation to take special measures

6. Article 2(2) of ICERD imposes a *positive obligation* on parties to take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.

2.2 Special measures: an exception to the definition of discrimination

7. Article 1(4) of ICERD provides that special measures will be considered not to constitute racial discrimination. Specifically, 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, 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 to have been achieved.

8. Special measures are a feature of the principle of non-discrimination in customary international law. Legal academic Warwick McKean notes:

> It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared. Such measures must be strictly compensatory and not permanent or else they will become discriminatory. It is important that these measures should be optional and not against the will of the particular groups affected, and they must be frequently reconsidered to ensure that they do not degenerate into discrimination.[5]

9. Accordingly, the concept of special measures is generally understood to apply to positive measures taken to redress historical disadvantage and create more favourable conditions or confer benefits on a particular racial group. The expression 'special measures' is often used interchangeably with expressions such as 'affirmative action'.[6] In this sense, special measures protect things done to benefit a disadvantaged group from being challenged as discriminatory by non-members of the group who do not receive the benefit.

3 Special Measures in the RDA

10. The RDA is the primary instrument through which Australia implements its obligations under the ICERD. The expression 'special measure' is not defined in the RDA and it takes its meaning in s. 8(1) RDA, which provides that the RDA prohibition on racial discrimination does not apply to 'special measures', directly from, and by reference to, article 1(4) of ICERD.

11. Accordingly, the effect of s.8(1) in the RDA is that if a measure is a law, program or action in an area that is covered by the RDA and can be characterised as a special measure, it will not be racially discriminatory under the RDA.

3.1 Criteria for 'special measures'

12. The Australian courts have considered what can be characterised as a 'special measure' under section 8(1) of the RDA.

13. It is clear that to meet the requirements of a special measure, a measure must comply with the following criteria:

    1. the measure must confer a **benefit;**

    2. on some or all members of a **class of people** whose membership is based on race, colour, descent, or national or ethnic origin;

    3. the **sole purpose** of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

    4. the protection given to the beneficiaries by the measure must be **necessary** for them to enjoy and exercise their human rights equally with others; [7] and

    5. the measure must **not have yet achieved its objectives** (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).[8]

3.2 Explaining the criteria

3.2.1 Benefit

14. In understanding the benefit criterion, it is necessary to consider how a program or action may advance some or all members of the target group so that they can enjoy their human rights equally with others. In *Gerhardy v Brown*[9], Brennan J considered how to define advancement. His Honour stated:

> *A special measure must have the sole purpose of securing advancement, but what is 'advancement'? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The*

> *dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them*.[10]

15. The wishes of the beneficiaries identified by Brennan J are fundamentally tied with the right to self-determination recognised in the International Covenant on Civil and Political Rights (the ICCPR)[11] and the International Convention on Economic, Social and Cultural Rights (the ICESCR).[12] The Committee on the Elimination of Racial Discrimination has stated:

> 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.[13]

16. Furthermore, the Committee has called upon parties to ICERD to:

> ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.[14]

17. Moreover, the Declaration on the Rights of Indigenous Peoples has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' in dealings with Indigenous peoples. Article 19 states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

18. With regards to construing what constitutes a benefit, then, effective and appropriate consultation is fundamental if Australia is to meet its International human rights obligations. However, since *Gerhardy v. Brown*, the Courts have not been unanimous in the weight to be accorded to the wishes of the beneficiaries in determining whether a measure is taken for the purpose of securing their advancement.

19. In *Bropho v Western Australia*[15] Nicholson J held that the whole of the *Reserves (Reserve 43131) Act 2003* (WA) was a special measure pursuant to s 8 of the RDA.[16] Nicholson J noted the dicta of Brennan J in *Gerhardy v Brown* that 'the wishes of the beneficiaries of the measure are also of great importance in satisfying the element of advancement'. However he held that 'that dicta was not supported by the other justices and is not consistent with the general principles expressed in the case.' He went on to note that a large number of the women living on the Reserve did *not* agree with the enactment of the Reserves Act and had made their objection known in an open letter to the Premier of Western Australia.[17] However, Nicholson J concluded that the dicta of Brennan J in *Gerhardy v Brown* 'in this respect has no apparent judicial support'[18] and declined to place weight on that aspect of his reasoning. On appeal, the Full Federal Court found it was unnecessary to consider whether this aspect of Nicholson J's reasoning was correct.[19]

20. In contrast, in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the* Department *of Treasury*[20], McMurdo P rejected the Applicant's argument that legislative provisions in question were not a special measure because they did not reflect the wishes of indigenous people in the communities although she granted that there was 'considerable force' in Brennan J's statement in *Gerhardy* that the 'wishes of the beneficiaries are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'. In particular, McMurdo P considered that this approach was consistent with Indigenous peoples' 'right to self- determination'. However, she found that the material before the Court suggested that there was 'a strong body of informed support within the appellants' communities for the impugned provisions and the scheme of which they form part'.[21]

21. Lastly, in *Morton v Queensland Police Service*,[22] the Queensland Court of Appeal supported consultation with intended beneficiaries, describing meaningful consultation as 'highly desirable' and important in ensuring that the measure is appropriately designed and effective in achieving its objective.[23] The Court stopped short, however, of making the process of consultation and consent a mandatory requirement for a valid special measure. In the Court's view, there are legitimate reasons for not doing so, including potential difficulty in reconciling competing views within a group affected by the measure,[24] and that some beneficiaries, perhaps for age, infirmity or cultural reasons, may have difficulty in expressing an informed and genuinely free opinion on the proposed measure.[25]

22. In Australia, then, while the Courts have, on balance, recognised that the wishes of the intended beneficiaries are of importance in establishing whether the measure is a special measure - describing meaningful consultation as 'highly desirable' and important in ensuring that the measure is appropriately designed and effective in achieving its objective - the Courts have stopped short of making the process of consultation and consent a mandatory requirement for a valid special measure, especially where there are legitimate reasons for not consulting. Further, where there are competing views within a group, it may be sufficient that there is a strong body of informed support within that group.

3.2.2 Class of people

23. The benefit must apply to some or all members of a class of people whose membership of that class is based on race, colour, descent, or national or ethnic origin.

3.2.3 Sole purpose

24. In Gerhardy *v Brown*, Justice Deane explains sole purpose as:

> What is necessary for characterization of legislative provisions as having been "taken" for a "sole purpose" is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable

> by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are the appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.[26]

25. Special measures should have a specific and clear aim in correcting the situation where members of a racial or ethnic group have experienced inequality. Special measures should be proportional to the degree of disadvantage experienced by the target population. Where the disadvantage is: not widely entrenched, does not apply to the group as whole or does not have consequences that affect the broader community, then measures should be less intrusive. A measure must be appropriate and adapted to achieving its stated purpose. This point relates to the requirement of both sole purpose and necessity.

26. The principle of proportionality requires a precise balancing of the impact of a measure with the stated intent of the measure. Is the proposed measure the only one, or the least restrictive one, which will achieve the stated intent of the measure? While it is appropriate to consider the effect of legislation as a whole when determining whether it is a 'special measure', it is still necessary for its parts to be 'appropriate and adapted' to this purpose.[27]

27. In Vanstone *v Clark*[28] Justice Weinberg rejected the submission that once it is accepted that a particular provision of an act is a special measure, the different elements of the provision cannot be separately attacked as discriminatory. Justice Weinberg stated that such a proposition:

> involves a strained, if not perverse, reading of s8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.[29]

28. Both the notion of proportionality and appropriateness can be understood in relation to references to discrimination in international law. Brownlie states:

> The principle of equality before the law allows for factual differences such as sex or age and is not based on a mechanical conception of equality. The distinction must have an objective justification; the means employed to establish a different treatment must be proportionate to the justification for differentiation; and there is a burden of proof on the Party seeking to set up an exception to the equality principle.[30]

3.2.4 Necessity

29. To qualify as necessary, a law, program or action must be required to enable the target group to enjoy their human rights equally with other members of society. The measures should be capable of being reasonably considered to

be appropriate and adapted to achieving the purpose of securing an objective set out in ICERD article 1(4). In other words, the law, program or action must address the actual disadvantage of the targeted group and there must be a demonstrable link between the measure and its stated objective.

30. To establish a demonstrable link a proposed measure must be supported by a reasonable evidence base that includes recent and reliable quantitative and qualitative data which establishes that the proposed measure is justifiable as necessary to achieving the stated intent of the proposed measure and enable the equal enjoyment of human rights, has a clear intent, effectively addresses the actual disadvantage of the target group and will have the intended impact/outcomes.[31]

31. Pieces of legislation or policy may include aspects that are special measures and all parts of a 'special measure' must be 'appropriate and adapted' to the relevant purpose for them to be necessary. That is, just because some aspect of a measure is a special measure, it does not mean that all aspects of that measure are immune from challenge.

3.2.5 Must stop once objectives are achieved

32. Though the duration of special measures may be significant in some circumstances, the measures must be discontinued when they have achieved their stated purpose. Accordingly, it is imperative that special measures are subject to a periodic and comprehensive assessment/evaluation both by government and key stakeholders to monitor progress and to determine whether or not the measure has achieved its purpose. Significantly, a measure which satisfies the first four criteria will not be a special measure if the final criterion, that the special measure must stop once its purpose has been achieved, is not also met.

4. Case example illustrating a special measure

33. In *Bruch v Commonwealth,*[32] a non-indigenous Australian student claimed that the Commonwealth had unlawfully discriminated against him because he could not claim ABSTUDY rental assistance benefits. McInnis FM held that the ABSTUDY rental assistance scheme did not cause the Commonwealth to contravene the RDA because it constituted a 'special measure' for the benefit of Indigenous people within the meaning of s 8(1) of the RDA.

34. McInnis FM found that the five criteria identified by Brennan J In *Gerhardy v. Brown* were satisfied because:

- the ABSTUDY rental assistance scheme conferred a benefit on a clearly defined class of natural persons made up of Aboriginal and Torres Strait Islander people;

- that class was based on race;

- the sole purpose of the ABSTUDY rental assistance scheme was to ensure the equal enjoyment of the human rights of that class with respect to education;

- the rental assistance component of the ABSTUDY scheme was necessary to ensure that the class improved its rate of participation in education and, in particular, tertiary education; and

- the objectives for which the ABSTUDY rental assistance scheme was introduced had not been achieved.

5. Conclusion

35. These guidelines are not legally binding and do not alter the operation of the RDA. However, the Guidelines have been developed to provide guidance about the operation of special measures in the RDA.

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[1] The guidelines have been prepared in the exercise of the Commission's function under s 20(d) of the RDA, which provides for the Commission to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of the operative provisions of the RDA.

[2] See, for example, (International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Art 1(4)), which provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.

Also, article 21 of The Declaration on the Rights of Indigenous Peoples provides that:

> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
> 2. *States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions*. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities (emphasis added).

[3] Australia is a party to ICERD which Australia ratified on 30 September 1975.

[4] That is, equality may require treating 'equally what are equal and unequally what are unequal' .See *South West Africa Case (Second Phase)* [1966] ICJR, 305-6 (Judge Tanaka); see also Committee on the Elimination of Racial Discrimination, *General Recommendation 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, [8]. UN Doc A/64/18 (Annex VIII). At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 11 October 2011).

[5] Warwick McKean, *Equality and Discrimination under International Law* (1983) 288, cited by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 130.

[6] Committee on the Elimination of Racial Discrimination, *General Recommendation 32*, above n 4, [12]; see also Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *Am J. Int'l Law* 283 at 305; Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1980), 32.

[7] *Gerhardy v Brown* (1985) 159 CLR 70,133 (Brennan J).

[8] *Gerhardy v Brown* (1985) 159 CLR 70, 139-140 (Brennan J).

[9](1985) 159 CLR 70

[10](1985)159 CLR 70, 135 (Brennan J).

[11] ICCPR, 1976. At: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (viewed 22 July 2011).
[12] ICESCR, 1976. At: http://www.unhchr.ch/html/menu3/b/a_cescr.htm (viewed 22 July 2011).
[13] Committee on the Elimination of Racial Discrimination, *General Recommendation 32*, above n 4, [18];
[14] *General Recommendation No. 23: Indigenous Peoples : 18/08/1997,* [4(d]*. At http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument* (viewed 11 October 2011).
[15] [2007] FCA 519.
[16] [2007] FCA 519, [579]-[580].
[17] [2007] FCA 519, [570].
[18] [2007] FCA 519, [570].
[19] *Bropho v State of Western Australia* [2008] FCAFC 100. Note that the submissions of the Commission as intervener argued that Nicholson J's reasoning was in error on this issue: see <http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html>
[20] [2010] QCA 37.
[21] Keane JA observed that the views expressed by Brennan J in *Gerhardy* as to the possibility crucial importance of the wishes of the beneficiaries of a measure to its characterisation as a special measure commands great respect but nevertheless, as was noted in *Bropho*, that view has 'no apparent judicial support'.
[22] [2010] QCA 160, [31] (McMurdo P),
[23] [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J, with Holmes J agreeing).
[24] [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J, with Holmes J agreeing).
[25] [2010] QCA 160, [31] (McMurdo P).
[26] *Gerhardy v Brown* (1985) 159 CLR 70, per Deane, p149.
[27] Gerhardy v Brown (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J)).
[28] [2005] *FCAFC 189*
[29] Weinberg J., at 208-209.
[30] Ian Brownlie, *Principles of Public International Law* (6th ed, 2003), 547, footnotes omitted.
[31] To this end, Community views on the likely success of the measure should be taken into account formally as part of the evidence base.
[32] [2002]FMCA 29

ATTACHMENT C

NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES

The Making of Race-Based Laws by the National Parliament

The National Congress of Australia's First Peoples expects that the Government of Australia will comply with its human rights obligations in making laws for Aboriginal and Torres Strait Islander peoples in Australia.

The concepts of equality and non-discrimination have been well established in Australia since 1975 when the Racial Discrimination Act was passed by the Parliament.

Until very recently all people in Australia have been comforted with the knowledge that they will not be treated as second class citizens based upon their race or ethnic origin.

The Northern Territory intervention laws introduced in June 2006 have destroyed that protective cover and have given rise to some ill-conceived opinions regarding 'race management' as was prominent in the State legislatures before 1975.

For us, as Aboriginal and Torres Strait Islander people, it can no longer be tolerated that we be made subject to race-based laws that separate our rights and status from the rest of the Australian population.

The damage caused by such laws is extensive and long lasting. Evidence can already be seen, through increased discriminatory attitudes and behaviours from people and institutions all over Australia.

The Government of Australia will introduce new laws into the Parliament next week to replace the Northern Territory intervention laws.

This event presents an opportunity for the Government to recount its obligations under international human rights law.

Now is the time for Parliament to reminded of its responsibility to the peoples of Australia, based upon the rule of law and human rights standards.

The Parliament must engage more directly with the Aboriginal and Torres Strait Islander peoples who are the ones always affected by these race-based laws.

The making of race-based laws in Australia must be undertaken in a responsible and accountable way.

Congress calls upon the Government of Australia to abide the attached basic 10 principles when considering laws which affect the interests of Aboriginal and Torres Strait Islander peoples.

10 PRINCIPLES

TO BE APPLIED TO THE

NORTHERN TERRITORY INTERVENTION

1. The new law/s for the Northern Territory must be deemed 'special measures', in the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, if they set out to overcome disadvantages faced by the Aboriginal people.

2. 'Special measures' must have the sole purpose of ensuring equal human rights.

3. 'Special measures' must be designed and implemented through prior consultation with the people concerned.

4. There must be clarity in regards to the results to be achieved from the 'special measures'.

5. 'Special measures' must be accountable to the people concerned.

6. 'Special measures' must be appropriate to the situation to be remedied and grounded in realistic appraisal of the situation to be addressed.

7. There must be justification for the proposed 'special measures' including how they will obtain the perceived outcomes.

8. The Government should obtain the prior, informed consent of the Aboriginal peoples before implementing 'special measure' laws.

9. 'Special measures' must be temporary and only maintained until disadvantage is overtaken.

10. There must be a system for monitoring the application and results of 'special measures'.