

NOTES

FIFTY THOUSAND YEARS OLD AND STILL FIGHTING FOR RIGHTS: THE CONTINUING STRUGGLE OF AUSTRALIA'S INDIGENOUS POPULATION

*Emily Hart Cobb**

TABLE OF CONTENTS

I.	INTRODUCTION	376
II.	HISTORY OF AUSTRALIA'S ABORIGINES AND RACIAL DISCRIMINATION	377
III.	THE "INTERVENTION": THE NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE ACT	381
	<i>A. What Started It All: The "Little Children Are Sacred"</i> <i>Report</i>	381
	<i>B. The Intervention</i>	382
	<i>C. Substantive Provisions of the NTNERA</i>	384
	<i>D. Suspension of the RDA</i>	386
IV.	THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES	389
	<i>A. Australia's Initial Rejection of the DRIP</i>	389
	<i>B. The Road to Endorsement of the DRIP</i>	392
	<i>C. Australia's Official Change of Position</i>	393
V.	STEPS TOWARD TOMORROW: WHERE AUSTRALIA SHOULD GO FROM HERE	396
	<i>A. Reinstate the RDA and Put a Halt to the Intervention</i>	396
	<i>B. A New Representative Body</i>	398
VI.	CONCLUSION	402

* J.D., University of Georgia School of Law, 2010; B.A., Wake Forest University, 2007.

I. INTRODUCTION

“The Government doesn’t make it easy for you to change your life,” says Rosemary. “They should help us more.”¹ Rosemary Maraltadj is an Aboriginal Australian teenager living in the remote village of Kalumburu.² She realized that she would face a dead-end future if she remained at home, so she sought the help of the Australian Army Assistance Program, one of several initiatives that serve to better the lives of Australia’s indigenous population.³ A staff member found Rosemary a decent job and training in a metropolitan area,⁴ but other indigenous Australians have not been so lucky. This underrepresented sector of Australia’s population faces “entrenched indigenous disadvantage”⁵ as a result of the discrimination and disenfranchisement that has continued from the time Australia was first settled.⁶

This Note considers the history of Australia’s indigenous population and the recent suspension of Australia’s Racial Discrimination Act (RDA), a move that effectively legalized race-based discrimination. The RDA was suspended as part of a government “Intervention” into the Aborigine communities in Australia’s Northern Territory.⁷ This Note further addresses Australia’s recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (DRIP),⁸ and recommends that Australia act in accordance with the principles in the DRIP and reinstate the RDA by repealing those parts of the Intervention legislation that violate the suspended law.

¹ Natasha Robinson & Lauren Wilson, *At Last, Rosemary Maraltadj Gets Taste of ‘Real Life,’* AUSTRALIAN, Oct. 3, 2008, at 1, available at <http://www.theaustralian.news.com.au/story/0,25197,244391,58-5013172,00.html>.

² See *id.* (Kalumburu is a remote village in northwestern Australia).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Ian J. McNiven, *Colonial Diffusionism and the Archaeology of External Influences on Aboriginal Culture*, in *THE SOCIAL ARCHAEOLOGY OF AUSTRALIAN INDIGENOUS SOCIETIES* 85, 88 (Bruno David et al. eds., 2006) (“Unilinear evolutionary models of the nineteenth and early twentieth century, for example, presented by anthropologists and archaeologists . . . have largely served to preserve the status quo; to keep Aboriginal Australians and Tasmanians in their place—as dependent, ‘conquered’ peoples, largely divorced from land, society, economy and their past.”).

⁷ KIRSTY MAGAREY & PAULA PYBURNE, DEP’T OF PARLIAMENTARY SERVICES (AUSTL.), FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (EMERGENCY RESPONSE CONSOLIDATION) BILL 2008, at 4 (Bills Digest No. 82, Mar. 14, 2008), available at <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd082.pdf> (citing “concerns regarding . . . the overturning of provisions of the *Racial Discrimination Act 1975* (the RDA)” as part of the Northern Territory National Emergency Response Act).

⁸ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/68, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter DRIP].

Part II focuses on the history of indigenous discrimination in Australia and its continuing effects on today's Aborigines. Part III considers the discriminatory effects of the Intervention legislation, known as the Northern Territory National Emergency Response Act (NTNERA), and recommends that Australia repeal the NTNERA and reinstate the RDA. Part IV discusses the DRIP's implications and shows how the recent adoption of this international declaration should positively impact Australia's indigenous population, if and when further implemented. Part V discusses the additional actions the Australian government must take to conform its existing laws to the DRIP, and the broader consequences of adopting an international solution to a national problem.

II. HISTORY OF AUSTRALIA'S ABORIGINES AND RACIAL DISCRIMINATION

The indigenous population of Australia is thought to be more than 30,000 years old,⁹ although more recent discoveries suggest that humans first arrived on the continent 50,000—or even as many as 60,000—years ago.¹⁰ Diseases brought to the continent by European settlers caused Australia's native population to dwindle, and displacement of indigenous peoples continued until the 1850s.¹¹ The indigenous population hovered around 93,000 when the Australian Constitution was enacted in 1901, compared to the non-indigenous population of 3.8 million at that time.¹²

⁹ Peter Veth, *Social Dynamism in the Archaeology of the Western Desert*, in *THE SOCIAL ARCHAEOLOGY OF AUSTRALIAN INDIGENOUS SOCIETIES* 242, 242 (Bruno David et al. eds., 2006) (“A review of sites from [Australia's] Western Desert covering the last 30 000 years . . . inevitably leads to the conclusion that [indigenous] societies have been anything but conservative and unchanging.”); Australian Explorer, *Australian History*, http://www.australiaexplorer.com/australian_history.htm (last visited Mar. 5, 2010) (“The first settlers are thought to have arrived around 50,000 years ago.”).

¹⁰ See JOHN MULVANEY & JOHANN KAMMINGA, *PREHISTORY OF AUSTRALIA* 1–2 (2d ed., 2d prt. 1999) (stating that by 1973, “[t]he earliest known occupation [of Australia] exceeded . . . 40,000 years” and that today, “new [carbon] dating techniques hint at 60,000 years or more since people first stepped ashore”). However, these most recent approximations “remain hints to be authenticated.” See also Richard G. Roberts et al., *Thermoluminescence Dating of a 50,000-Year-Old Human Occupation Site in Northern Australia*, 345 *NATURE* 153, 153–56 (1990), available at <http://www.nature.com/nature/journal/v345/n6271/abs/345153a0.html> (stating that researchers “now report thermoluminescence (TL) dates that suggest the arrival of people between 50 and 60 [thousand years ago] in northern Australia”).

¹¹ Austrl. Gov't, Dep't of Foreign Affairs & Trade, *Australia in Brief: Ancient Heritage*, <http://www.dfat.gov.au/aib/history.html> (last visited Mar. 5, 2010).

¹² *Id.*

The enormous disparity between the two populations may help to explain why the Constitution granted very few rights to Aborigines at the time. Aborigines were not considered Australian citizens until 1967, when a national referendum granted them citizenship and the right to vote.¹³ The 1967 referendum also changed the constitutional provision that had, until that point, required the government to pass laws that would affect Aborigines and other Australians differently.¹⁴

Today, Australian Aborigines are commonly referred to as the “Stolen Generation”¹⁵ or the “Lost Children”¹⁶ due to the widespread practice of taking (predominantly female) Aboriginal children away from their families and forcing them into domestic service.¹⁷ This government-supported practice continued until 1969.¹⁸

Aborigines faced immense race-based discrimination throughout the twentieth century.¹⁹ In 1934, Australia enacted the Aborigines Act, under which Aborigines could be “removed” at will to a “reserve” or “aboriginal institution,” and refusal to comply was a violation of law,²⁰ punishable by fine or imprisonment.²¹ For those who chose to “assimilate” it was not until 1949 that they were given the right to vote in federal Commonwealth elections, and

¹³ Bain Attwood & Andrew Markus, *Representation Matters: The 1967 Referendum and Citizenship*, in *CITIZENSHIP AND INDIGENOUS AUSTRALIANS: CHANGING CONCEPTIONS AND POSSIBILITIES* 118, 118 (Nicolas Peterson & Will Sanders eds., 1998).

¹⁴ See State Library of Victoria, *The 1967 Referendum*, http://www.slv.vic.gov.au/ergo/the_1967_referendum (last visited Mar. 5, 2010) (quoting Section 51, paragraph xxvi of the Australian Constitution, which stated, “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race, other than the aboriginal people in any State, for whom it is deemed necessary to make special laws”).

¹⁵ See, e.g., Danielle Celermajer, *The Stolen Generation: Aboriginal Children in Australia*, 12 *HUM. RTS. DIALOGUE* 13, 13 (2005), available at http://www.cceia.org/resources/publications/dialogue/2_12/section_1/5142.html (explaining Australia’s “government policy” of assimilation).

¹⁶ Inara Walden, *To Send Her to Service: Aboriginal Domestic Servants*, 5 *INDIGENOUS L. BULL.* 12 (1995), available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1995/52.html>.

¹⁷ *Id.* (“Under a scheme devised by the New South Wales Aborigines Protection Board and lasting from the 1880s until 1969, many hundreds of Aboriginal girls were indentured into servitude for wealthy families in Sydney and effectively cut off from their own communities.”).

¹⁸ *Id.*

¹⁹ See, e.g., Racism No Way, *Key Dates*, <http://www.racismnoway.com.au/library/history/keydates/index-1900s.html> (last visited Mar. 5, 2010) (stating that in 1936, under the amended Western Australia Aborigines Act, the government could take Aborigines “into custody without trial or appeal and prevent them from entering prescribed towns without a permit”). Further, segregation of schools, hospitals, and theaters continued until the 1960s. *Id.*

²⁰ Aborigines Act, 1934, § 17 (Austl.).

²¹ *Id.* § 49.

not until 1962 that the vote was extended to all Aborigines.²² In 1975, Australia passed the Racial Discrimination Act (RDA), prohibiting discrimination on the grounds of “race, colour, descent or national or ethnic origin.”²³ Until now, the most recent governmental attempt at facilitating administrative protections for Aborigines emerged in the form of the Aboriginal and Torres Strait Islander Commission (ATSIC), a national representative body for Aborigines created in 1989.²⁴

The Parliament of Australia initially formed ATSIC in response to complaints that existing Aboriginal representative bodies “did not go far enough in giving decision-making power in Aboriginal affairs to Aborigines.”²⁵ ATSIC, a government-funded organization, acted “to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation[;] to promote indigenous self-management and self-sufficiency[;] to further indigenous economic, social and cultural development[;] and to ensure co-ordination of Commonwealth, state, territory and local government policy affecting indigenous people.”²⁶ The ATSIC was to carry out these objectives by advising the Australian government on indigenous issues, advocating for indigenous rights, and administering government-funded indigenous programs and services in the areas of health, education, and employment.²⁷

²² See *Introduction, in* CITIZENSHIP AND INDIGENOUS AUSTRALIANS: CHANGING CONCEPTIONS AND POSSIBILITIES, *supra* note 13, at 14 (stating that in 1949, the Commonwealth Electoral Act was amended to give voting rights to “Aboriginal people who had served in the military and those who had the right to vote in State elections”). The Commonwealth Electoral Act was again amended in 1962 to extend the federal vote to all Aboriginal people. *Id.*

²³ Racial Discrimination Act, 1975, § 9(1) (Austl.).

²⁴ Aboriginal and Torres Strait Islander Commission Act, 1989, § 6 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/num_act/aatsica1989478/. The Strait Islanders are the indigenous inhabitants of the “Torres Strait Islands [, which] are part of the Australian state of Queensland.” *Charting the Pacific, Places, Torres Strait Islands*, http://www.abc.net.au/ra/pacific/places/country/torres_strait_islands.htm (last visited Mar. 5, 2010) (noting that the Strait Islanders share much of the same history as the mainland Aborigines). *But see* A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia 22 n.1, <http://learnline.cdu.edu.au/tourism/uluru/downloads/HREOC%20Social%20Justice%20site.pdf> (last visited Mar. 5, 2010) (“It is acknowledged that Aboriginal and Torres Strait Islander peoples are not a homogenous group. The term ‘Indigenous peoples’ is used to reflect this diversity.”).

²⁵ INFORMATION & RESEARCH SERVICES, DEP’T OF PARLIAMENTARY LIBRARY, CURRENT ISSUES BRIEF NO. 29, MAKE OR BREAK? A BACKGROUND TO THE ATSIC CHANGES AND THE ATSIC REVIEW 5 (2003), available at <http://www.aph.gov.au/library/Pubs/cib/2002-03/03cib29.pdf> (citing academic Will Sanders’ comments on success of previous advisory bodies).

²⁶ See *id.* at 8 (citing the ATSIC Act, § 3).

²⁷ *Id.*

Though the blueprint for ATSIC was promising, problems arose within the first few years of its existence; the organization was criticized for a lack of accountability in relation to funding and management, as well as corruption amongst its leaders.²⁸ Further, Aborigines themselves viewed the agency as a body with no real control, imposing no significant improvements on the lives of Australia's indigenous population.²⁹

Because ATSIC positions were limited to those candidates on the Australian electoral ballot, and not the separate Aborigine ballot, many Aborigines did not see this body as their own.³⁰ As a result, many Aborigines declined to vote in ATSIC elections.³¹ H.C. Coombs, a member of the Council of Aboriginal Affairs³² (ATSIC's predecessor body) reported in 1996 that "[t]he formation of ATSIC has also not offered any significant transfer of authority or improvement in indigenous political and economic power or bargaining capacity. ATSIC has no access to information, knowledge, research capacity or objective advice except through the existing bureaucracy which is responsible to, and controlled by, the government."³³ ATSIC was finally dissolved in 2004 when it was "scrapped by the [Australian Prime Minister John] Howard government,"³⁴ becoming "merely the latest policy fiasco in a long history of similar failures."³⁵

Based on such failures of the past, problems still abound for Aborigines today, and the Australian government must determine how best to combat these

²⁸ See *id.* at 14 (noting that "[i]t is often assumed that ATSIC is unaccountable, that its processes are not transparent, that its funds are subject to mismanagement, and subsequently, that ATSIC is both inefficient and incompetent" and also that ATSIC's "culture is one of 'waste, corruption and nepotism'").

²⁹ See Gary Foley, *ATSIC: Flaws in the Machine*, (Nov. 15, 1999), http://www.kooriweb.org/foley/essays/essay_4.html (stating that "ATSIC is almost universally known in indigenous communities as 'Aborigines Talking Shit In Canberra'").

³⁰ *Id.*

³¹ See JOEL WRIGHT, SUBMISSION TO SENATE SELECT COMMITTEE ON THE ADMINISTRATION OF INDIGENOUS AFFAIRS 2, 4 (2004), available at http://www.aph.gov.au/senate/committee/in_digenousaffairs_ctte/submissions/sub207.pdf (noting that "ATSIC elections were in essence, elections to determine local, regional and national representatives to manage the delivery of supplementary welfare services and not necessarily the political representatives of Indigenous people," and that "up to 60% of Indigenous eligible voters did not vote at ATSIC or general elections for the decade after ATSIC was established").

³² SHOOTING THE BANKER: ESSAYS ON ATSIC AND SELF-DETERMINATION, at iv (Patrick Sullivan ed., 1996).

³³ H.C. Coombs & C.J. Robinson, *Remembering the Roots: Lessons for ATSIC*, in SHOOTING THE BANKER: ESSAYS ON ATSIC AND SELF-DETERMINATION, *supra* note 32, at 1, 12.

³⁴ Patricia Karvelas, *Critic to Draw up 'Another ATSIC'*, AUSTRALIAN, Dec. 17, 2008, at 3, available at <http://www.theaustralian.news.com.au/story/0,25197,24811984-2702,00.html>.

³⁵ Foley, *supra* note 29.

issues. The Australian Democratic Labor Party recently conceded that “[t]he lack of indigenous representation and the absence of indigenous voices from public debates are a serious concern.”³⁶ Aborigines remain at a disadvantage compared to other Australians in terms of life expectancy³⁷ and face a higher incidence of sexual abuse and incarceration,³⁸ problems that are likely linked to the poverty that widely affects these communities.³⁹ Findings of sexual abuse among the Northern Territory’s indigenous population led the Australian government to pass its most controversial legislation in recent years: the Northern Territory National Emergency Response Act (NTNERA).⁴⁰

III. THE “INTERVENTION”: THE NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE ACT

A. *What Started It All: The “Little Children Are Sacred” Report*

On August 21, 2007, the Parliament of Australia enacted the NTNERA in response to a government-sponsored report⁴¹ entitled “Little Children Are

³⁶ Australian Democrats, *Self-Determination & Representation* (Aug. 24, 2007), http://www.democrats.org.au/docs/ActionPlans/Indigenous_SelfDetermination_2007.pdf.

³⁷ A 2006 report showed that 70% of Aboriginal adults die before the age of sixty-five, as compared to only 20% of non-Aboriginal Australians. Roger Maynard, *Bleak Picture of Aboriginal Life Expectancy*, GUARDIAN (U.K.), June 21, 2006, <http://www.guardian.co.uk/world/2006/jun/21/australia>. The study cited possible causes as “[o]vercrowded housing, unsafe drinking water and poor sanitary conditions,” as well as “poor nutrition, obesity, smoking, alcohol and substance abuse” among Aborigines. *Id.*; see also Oxfam Australia, *Close the Gap*, <http://www.oxfam.org.au/explore/indigenous-australia/close-the-gap> (last visited Mar. 6, 2010) (advertising the current national campaign in Australia to “close the gap” between life expectancy rates for Aborigines and other Australians).

³⁸ Jenna Gruenstein, Comment, *Australia’s Northern Territory National Emergency Response Act: Addressing Indigenous and Non-Indigenous Inequities at the Expense of International Human Rights?*, 17 PAC. RIM L. & POL’Y J. 467, 467–68 (2008).

³⁹ See Tyson Woorama, *Aboriginal Poverty Statistics: Indigenous Community Dysfunction, Facts and Figures*, SUITE 101, July 22, 2006, http://aboriginalrights.suite101.com/article.cfm/aboriginal_poverty_statistics (stating that 72% of Aborigines live in poverty).

⁴⁰ Northern Territory National Emergency Response Act, 2007 (Austl.).

⁴¹ REX WILD & PATRICIA ANDERSON, N. TERR. BD. OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM SEXUAL ABUSE, *LITTLE CHILDREN ARE SACRED* (2007) [hereinafter *LITTLE CHILDREN ARE SACRED REPORT*], available at http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf. In 2006, allegations of child sexual abuse among Aborigines led Australia’s Northern Territory to create the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (the Board). *Id.* at 5. A year later, the Board issued this report, explaining that “[t]here is nothing new or extraordinary in the allegations of sexual abuse of Aboriginal children in the Northern Territory. What is new, perhaps, is the publicity

Sacred" (the Report).⁴² The Report uncovered previously unreported incidents of sexual abuse among Aborigines and made recommendations for immediate government action.⁴³

The Report explains that child sexual abuse is not an isolated issue, but is instead a "symptom[] of a breakdown of Aboriginal culture and society."⁴⁴ It also states, "the cumulative effects of poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor education and housing and general disempowerment lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children."⁴⁵ The Report communicates a general tone of urgency, which may help to explain why the government responded so quickly and with such an extreme measure as the NTNERA:

Unless a firm commitment to success is undertaken immediately, a further generation is likely to be lost.

. . . .

We make a special plea for prompt consideration and acceptance of the principal tenets of the report as a matter of extreme urgency.

. . . .

It is necessary that this process of recovery begin NOW.

. . . .

. . . It's time for some brave action.⁴⁶

B. The Intervention

In response to the Report, the NTNERA legislation (NTNERA or Intervention) is targeted at preventing sexual abuse of indigenous children by indigenous adults.⁴⁷ The NTNERA is part of a "legislative package" that also

given to them and the raising of awareness of the wider community of the issue." *Id.*

⁴² Northern Territory National Emergency Response Act, 2007, § 2 (Austl.); *see also* Jenny Blokland, Remarks at the National Indigenous Legal Conference: Current Legal Issues in the Northern Territory Concerning Indigenous People and the Criminal Justice System 1 (Aug. 31, 2009), available at <http://www.nilcsa2009.com/JennyBlokland.pdf> (discussing "the 'Little Children Are Sacred' (2007) report . . . and the subsequent measures of both a legislative and executive character under the Federal Intervention, or now often referred to as the Emergency Response").

⁴³ LITTLE CHILDREN ARE SACRED REPORT, *supra* note 41, at 5.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

⁴⁷ Gruenstein, *supra* note 38, at 468.

includes other acts, such as the Families, Community Services & Indigenous Affairs & Other Legislation Amendment (NT Emergency Response & Other Measures) Act of 2007, and the Social Security & Other Legislation Amendment (Welfare Payment Reform) Act.⁴⁸

The Report was published in April 2007, and the government enacted the NTNERA on August 21 of the same year.⁴⁹ One author commented, “The quick passage of the [NTNERA] ensured that there was little room for discussion or opportunity for indigenous peoples to participate in developing the proposed legislation,”⁵⁰ arguing at the time that the NTNERA likely violated the UN’s International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) because of its hasty passage without informed consent⁵¹ from Australia’s Aborigines. Since then, at least one UN official has confirmed that the suspension of the RDA is, in fact, discrimination in violation of the Convention.⁵²

It is important to note that even the authors of the Report disapprove of the Australian government’s response in what they see as an overreaching NTNERA.⁵³ Critics stated that the Howard administration, responsible for the Intervention, “[i]gnor[ed] nearly all of the reports’ [sic] suggestions and suspend[ed] the Racial Discrimination Act of 1975 (RDA) that protects against racially biased legislation, . . . impos[ing] paternalistic restrictions on Northern Territory Aboriginal communities.”⁵⁴

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 480.

⁵¹ *Id.* at 480–81.

⁵² See Natasha Robinson, *Howard Ministers Dismiss UN Criticism of Indigenous Intervention*, AUSTRALIAN, Aug. 29, 2009, at 2, available at <http://www.theaustralian.news.com.au/story/0,25197,25996772-5006790,00.html> (quoting James Anaya, UN Special Rapporteur on Indigenous Rights, who stated that the Intervention measures “overtly discriminate against Aboriginal peoples, infringe on their right of self-determination and stigmatise already stigmatised communities”).

⁵³ See DEP’T OF PARLIAMENTARY SERVICES (Austl.), NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE BILLS 2007, at 4–5 (Interim Bills Digest No. 18, Aug. 7, 2007) [hereinafter Interim Bills Digest No. 18], available at <http://www.aph.gov.au/library/Pubs/bd/2007-08/08bd018.pdf> (stating that “the authors of the report have indicated their discontent with the federal Government’s response [in the form of the NTNERA],” and that while “there appears to be very little overlap between the 97 recommendations of the [Little Children Are Sacred] report and the [NTNERA] . . . [t]he Federal Government has said that it is responding to the issue raised in the [Little Children Are Sacred] report, not to its recommendations”).

⁵⁴ Luke Caldwell, *The Changing Winds of Civilization: The Aboriginal and Sovereignty Between the Desert and the State*, 10 INTERSECTIONS 115, 137 (2009), available at http://depts.washington.edu/chid/intersections_Spring_2009/Luke_Caldwell_The_Changing_Winds_of_Civilization.pdf.

C. Substantive Provisions of the NTNERA

One controversial provision of the NTNERA is the ban on alcohol and pornography in Aborigine areas as opposed to all other areas, and the compulsory government “leases” (takings) of Aborigine lands.⁵⁵ The NTNERA prohibits the sale and consumption of alcohol in certain “prescribed areas” (i.e., indigenous communities) in the Northern Territory,⁵⁶ the area with the most highly concentrated indigenous population,⁵⁷ and allows the government to take five-year leases over indigenous lands.⁵⁸

The land-lease provisions of the NTNERA are reminiscent of early-twentieth century legislation setting aside lands for use as indigenous reserves and for indigenous institutions.⁵⁹ The current provisions allow the federal government to “carry out any activity on or in relation to the leased land consistent with fulfillment of the object of the [NTNERA].”⁶⁰ The above measures are discriminatory because they apply exclusively to indigenous people and not to all Australians.⁶¹

Another controversial provision of the NTNERA is compulsory income management, or “quarantining” the welfare of Northern Territory Aborigines.⁶²

⁵⁵ See Gruenstein, *supra* note 38, at 471 (noting that the provisions banning alcohol and pornography and authorizing compulsory leases are likely to violate the Racial Discrimination Convention).

⁵⁶ Northern Territory National Emergency Response Act, 2007, § 2(12)(2) (Austl.) (outlawing the import, possession, or consumption of alcohol within an “area”); see also Gruenstein, *supra* note 38, at 468.

⁵⁷ Norimitsu Onishi, *Facing a Crisis, Aborigines Stage Interventions of Their Own*, N.Y. TIMES, July 5, 2009, at A6.

⁵⁸ ABORIGINAL & TORRES STRAIT ISLANDER SOCIAL JUSTICE COMM’R, AUSTRALIAN HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, NATIVE TITLE REPORT 2007, at 188 (2007) [hereinafter 2007 NATIVE TITLE REPORT], available at http://www.hreoc.gov.au/social_justice/nt_report/ntrreport07/pdf/ntr2007.pdf.

⁵⁹ Aborigines Act, 1934 §§ 14–16 (Austl.).

⁶⁰ 2007 NATIVE TITLE REPORT, *supra* note 58, at 192.

⁶¹ See Press Release, Oxfam Australia, Thousands of Australians Call for Reinstatement of Racial Discrimination Act in the Northern Territory (Sept. 18, 2008), <http://www.oxfam.org.au/media/releases/campaigns-and-advocacy?p=1947> [hereinafter Thousands of Australians] (explaining that “provisions [in the NTNERA] such as the quarantining of welfare payments are applied solely on the basis of the race of the welfare recipient”). The property law implications of such provisions are beyond the scope of this Note. Instead, these provisions are addressed in terms of their discriminatory effects and their invalidity under the DRIP.

⁶² See Gruenstein, *supra* note 38, at 491 (quoting a speech by the Minister for Families, Communities and Indigenous Affairs stating that the Intervention legislation “allow[s] the government to withhold ‘[a] substantial slice of welfare payments [to] be quarantined for food and other necessities’ ”).

This includes a policy of linking monetary incentives to school attendance, so that Aborigine parents who do not send their children to school will face a cut in welfare income.⁶³ Another main component of the welfare provisions limits Aboriginal welfare recipients (not any other Australian welfare recipients) to certain merchants who will take their funds, ostensibly to limit the purchase of alcohol.⁶⁴ Some Aborigines see this as overreaching, in that this new rule is not commensurate with the evil sought to be cured, and punishes all Aborigines for the sins of a few.⁶⁵ “The basis of it, that because you’re black you need to have your welfare quarantined, is not a fair policy,” said Clare Martin, Chief Executive of the Australian Council of Social Service, “[a]nd there are many Aboriginal people in the [Northern] Territory who have been managing their money very well for all their lives.”⁶⁶

Such unequal treatment epitomizes race-based discrimination under Australia’s existing international obligations.⁶⁷ The UN International Convention on the Elimination of All Forms of Racial Discrimination provides that welfare (financial assistance) is one of the fundamental civil rights to be enjoyed by all, regardless of race.⁶⁸

Critics of the NTNERA claim it is disproportionate to the problem of child sexual abuse and that the goal of protecting children is a guise for harsh, discriminatory measures.⁶⁹ It is easy to see why critics of the NTNERA call it overreaching since many of the above provisions bear little connection to the problem of sexual abuse among Aborigines.⁷⁰

⁶³ Patricia Karvelas, *Martin to Fight Rudd on ‘Unfair’ Welfare Quarantine Policy*, AUSTRALIAN, Nov. 4, 2008, at 6, available at <http://www.theaustralian.news.com.au/story/0,25197,24598550-5006790,00.html>.

⁶⁴ See Onishi, *supra* note 57 (“Welfare recipients suspected of child neglect can have 70 percent of their benefits restricted to paying for essentials like food, rent and utilities, a strategy intended to reduce their purchase of alcohol.”).

⁶⁵ See Thousands of Australians, *supra* note 61 (explaining that “[b]ecause of the blanket approach to welfare quarantining, many indigenous people are deeply humiliated at requirements placed on them such as being compelled to use store cards in lieu of cash”).

⁶⁶ Karvelas, *supra* note 63.

⁶⁷ Gruenstein, *supra* note 38, at 490–91.

⁶⁸ See International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e), Mar. 7, 1966, 660 U.N.T.S. 195 (naming, among many others, the right to “protection against unemployment . . . [and to] public health, medical care, social security and social services”).

⁶⁹ See Gruenstein, *supra* note 38, at 468, 483 (stating that the NTNERA “goes well beyond directly targeting the high levels of sexual abuse of children in the [Northern Territory]” and that “it is arguable whether the Howard administration was acting in good faith when it disguised the far-reaching reforms [of the NTNERA] as an effort to combat sexual abuse of children”).

⁷⁰ *Id.* at 468 (arguing that “[w]hile . . . Prime Minister [Howard] relied on the [Little Children Are Sacred] report to justify the legislation, there is little correlation between the

D. Suspension of the RDA

The NTNERA is controversial for infringing upon basic human rights of Aborigines; for example, it arguably limits the “fundamental right to racial equality.”⁷¹ Perhaps most disturbing, the overall NTNERA initiative, commonly referred to in Australia as the “Intervention,” contains multiple provisions allowing for the exemption of any NTNERA actions from Australia’s Racial Discrimination Act of 1975 (RDA).⁷² This exemption effectively suspends the RDA as it relates to Aborigines.⁷³ Thus, if enacted in the name of the NTNERA, racially discriminatory actions are currently valid under Australian law. The suspension of the RDA has allowed for measures targeted only at Aborigine communities, and not the rest of the Northern Territory.⁷⁴ This unequal treatment presents a frightening prospect for an already underrepresented and marginalized minority population.

The NTNERA explains how it can implement discriminatory regulations, citing a loophole in the RDA for “special measures,” those that draw lines based on race yet are “legitimate to promote the position of members of a particular race when that race is disadvantaged.”⁷⁵

This Note argues that the suspension of the RDA is not a legitimate “special measure” in that it does more harm than good to the disadvantaged Aborigine minority, and is thus a discriminatory action under international agreements

report’s recommendations and the [NTNERA]).

⁷¹ HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE ON THE NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE LEGISLATION ¶ 5 (Aug. 10, 2007) [hereinafter SUBMISSION TO SENATE], available at http://www.hreoc.gov.au/legal/submissions/2007/NTNER_Measures20070810.html.

⁷² KRISTY MAGAREY ET AL., DEP’T OF PARLIAMENTARY SERVICES (Austl.), NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE BILL 2007, at 22 (Bills Digest No. 28, Aug. 13, 2007) [hereinafter Bills Digest No. 28], available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/18YN6/upload_binary/18yn611.pdf;fileType%3Dapplication%2Fpdf (“[T]his package of legislation suspends part of the operation of the RDA. The part suspended is Part II—Prohibition of racial discrimination (subclause 132(2)).”).

⁷³ SUBMISSION TO SENATE, *supra* note 71, ¶ 5.

⁷⁴ See Patricia Karvelas, *Radical Rethink on Northern Territory Intervention*, AUSTRALIAN, May 22, 2009, at 1, available at <http://www.theaustralian.com.au/news/radical-rethink-on-nort-her-territory-intervention/story-e6frg6n6-1225714534146> (noting that the “intervention [applies to] languishing Aboriginal communities” but stating also that “the Rudd Government . . . [expressed] a desire to reinstate the Racial Discrimination Act, which was controversially suspended to allow the intervention to occur”).

⁷⁵ See Bills Digest No. 28, *supra* note 72, at 22–23 (noting that “[s]pecial measures are also referred to as ‘affirmative action’ or ‘positive discrimination’ ” and that such measures “are generally kept in place until the group affected has been able to reach ‘substantive’ equality with other members of the community”).

such as the DRIP. The NTNERA is explicit in acknowledging its implementation of discriminatory measures, though it couches those measures in terms of “indirect discrimination.”⁷⁶

Special measures, while perhaps legitimately needed, bring with them the risk of unlimited authority and discrimination. The potential for such abuse is evident through statements that the NTNERA is to be immune from judicial scrutiny.⁷⁷ “The provisions of this Bill will preclude judicial scrutiny of the question as to whether the measures qualify as a special measure.”⁷⁸ Further, in suspending the RDA, the NTNERA also includes discriminatory provisions not classified as special measures, thus reducing the accountability of the government for its discriminatory acts.⁷⁹ There is similarly no limit imposed by the Australian Constitution: it contains no bill of rights or anything comparable.⁸⁰ The Australian government has been less than diplomatic in its response to cries of discrimination: soon after the suspension of the RDA, then-Prime Minister John Howard admitted that the government’s plan “does push aside the role of the territory to some degree” but suggested that the goal of

⁷⁶ *Id.* at 22. “The proposed Act treats people differently on the grounds of race (the reliance on geographic location as the feature differentiating among Australian residents would fall within the definition of prohibited ‘indirect discrimination’—i.e. the geographic feature will predominantly affect members of a particular race.” *Id.*

⁷⁷ Northern Territory National Emergency Response Act, 2007, §§ 132–133 (Austl.) (“The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the Racial Discrimination Act 1975, special measures The provisions of this Act are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as it would otherwise apply.”). The only exception offered is that these provisions “do not apply to a law of the Northern Territory so far as the Minister determines, by *legislative instrument*, that the law is a law to which [these provisions] do not apply.” *Id.* § 133 (emphasis added). Thus, the NTNERA does not provide a role for the courts in evaluating the legitimacy of this legislation.

⁷⁸ Interim Bills Digest No. 18, *supra* note 53, at 22; *see also* Gruenstein, *supra* note 38, at 491 (stating that Australia’s “government acknowledges that the provisions [of the NTNERA] are discriminatory but it attempts to preempt judicial scrutiny by claiming that they are ‘special measures’ for the purposes of Australia’s Racial Discrimination Act”).

⁷⁹ *See* Interim Bills Digest No. 18, *supra* note 53, at 24 (“In this Bill the government is not relying on the proposed Act’s definition of itself as containing only special measures. It is also suspending the central operative provision of the RDA prohibiting race discrimination.”).

⁸⁰ *See* Al-Kateb v. Godwin (2004) 219 C.L.R. 562, 594 (Austl.) (“Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring — and many would say a just — criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.”).

protecting children was more important than the “constitutional niceties” involved.⁸¹

The United Nations eventually took action to reprimand Australia for such human rights violations, giving it a negative report card in May of 2009:

The Committee [on Economic, Social and Cultural Rights] remains concerned that some of the Northern Territory Intervention measures adopted by [Australia] in response to the 2007 *Little Children are Sacred* report, are inconsistent with the Covenant rights, in particular with the principle of non-discrimination, and have a negative impact on the realisation of the rights of indigenous peoples. The Committee notes with regret that the Northern Territory Intervention measures were adopted without sufficient and adequate consultation with the indigenous peoples concerned.⁸²

Further, in August 2009, the United Nations' Special Rapporteur on indigenous rights, Professor James Anaya, completed an eleven-day visit to Australia to assess Aboriginal needs.⁸³ At the beginning of the visit, when “[a]sked if the suspension [of the RDA] was ‘undeniably discriminatory’ Prof [sic] Anaya said . . . : ‘On its face, yes. But I’m not expressing a conclusion about whether or not that’s justified at this time’⁸⁴ At the end of his visit, Professor Anaya gave Australia what some called, “[b]y United Nations standards[,] a flogging of colonial proportions.”⁸⁵

Australian Aborigines are currently calling for the reinstatement of the RDA.⁸⁶ One group of Aborigines have requested that they be granted

⁸¹ Patricia Karvelas, *Crusade to Save Aboriginal Kids from Abuse*, AUSTRALIAN, June 22, 2007, at 1, available at <http://www.theaustralian.com.au/news/nation/crusade-to-save-aboriginal-kids-from-abuse/story-e6frg6nf-1111113800672>.

⁸² U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, ¶ 15, U.N. Doc. E/C.12/AUS/CO/4 (May 22, 2009).

⁸³ *RDA Bypass Discriminatory: UN Indigenous Expert*, NAT'L INDIGENOUS TIMES (Austl.), Aug. 20, 2009, available at <http://www.nit.com.au/news/story.aspx?id=18482>.

⁸⁴ *Id.*

⁸⁵ Chris Graham, *Facing up to Our Racism: A UN Perspective on the Northern Territory Intervention*, NAT'L INDIGENOUS TIMES (Austl.), Aug. 28, 2009, available at <http://www.nit.com.au/news/story.aspx?id=18509>.

⁸⁶ See, e.g., Press Release, Paddy Gibson, Stop the NT Intervention, NT Communities to Protest Opening of Parliament 2009 (Dec. 22, 2008), <http://stoptheintervention.org/facts/press-releases/nt-communities-protest-opening-parliament-09> (stating, “[p]eople from NT Aboriginal communities are preparing to take their protest directly to the federal government on the first day

“refugee” status by the UN, based on the discrimination they have faced under the Intervention.⁸⁷ Though there have been promises to reinstate the RDA in the 2010 spring legislative session, the government has already placed limitations on that promise.⁸⁸ The Australian government needs to reinstate the RDA, without limitations, and needs to follow through with its current plans to support the formation of a new representative body for Aborigines.⁸⁹ Further, the Australian Parliament should amend the RDA to do away with the “special measures” provision, a loophole that has proven more harmful than helpful.

Just as the NTNERA almost certainly violates the UN International Convention on the Elimination of All Forms of Racial Discrimination,⁹⁰ it likely stands in violation of the DRIP now that Australia has adopted this document.⁹¹ Australia should, in keeping with its recent covenants with the UN, protect its minority citizens by ceasing the discriminatory measures contained in the NTNERA and reinstate the RDA.

IV. THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A. Australia's Initial Rejection of the DRIP

Following a long road to adoption, the UN Declaration on the Rights of Indigenous Peoples (DRIP) was passed by the United Nations on September 13, 2007.⁹² While Australia had actively participated in its

of parliament, February 3 2009”).

⁸⁷ Phoebe Stewart, *Aboriginal People Seek Refugee Status*, ABC NEWS (Austl.), Aug. 26, 2009, <http://www.abc.net.au/news/stories/2009/08/26/2667066.htm?site=news>.

⁸⁸ See Julian Drape, *UN Says Indigenous Intervention is Discriminatory, Racism Entrenched in Australia*, NEWS (Austl.), Aug. 27, 2009, <http://www.news.com.au/breaking-news/un-says-indigenous-intervention-is-discriminatory-racism-entrenched-in-australia/story-e6frku0-1225766843131> (stating “[t]he Rudd government has promised to introduce legislation to reinstate the [RDA] in the Spring session of parliament, but wants to continue many of the compulsory measures”).

⁸⁹ See *infra* Part V.B (discussing plans for a new council of Aborigine leaders).

⁹⁰ See sources cited *supra* notes 82–85 and accompanying text (discussing the negative report card given to Australia by the UN).

⁹¹ DRIP, *supra* note 8, art. 2 (“Indigenous peoples and individuals are free and equal to all other peoples and individuals 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.”).

⁹² *Id.*

drafting,⁹³ it ultimately voted not to endorse the DRIP, along with Canada, the United States, and New Zealand—the only other UN member states to do so.⁹⁴

The DRIP requires informed consent from indigenous people, which includes consultation with these groups before a member state passes legislation affecting them.⁹⁵ At the time the DRIP was ratified by the UN, the Australian government under then-Prime Minister John Howard feared the informed consent provision would amount to a “veto” power in the hands of its Aborigines.⁹⁶

Despite the final UN vote, both the Australian Democratic Party as well as the Green Party voiced their support of the DRIP at the time.⁹⁷ Once it became clear that Australia would likely vote against the DRIP at the UN, many Democrats spoke out, reprimanding their fellow statesmen:

Australia as a nation has failed its Indigenous peoples terribly over centuries That is our legacy, that is our record This covenant provides an opportunity for the Australian government to say, in conjunction with the global community, ‘We recognise these as fundamental rights for indigenous peoples and we will seek to commit to them.’⁹⁸

On the other hand, Australian lawmakers opposing the DRIP pointed to its “rushed” implementation, referring not to the two-decade UN drafting process,⁹⁹ but instead to the limited period of time between presentation of the

⁹³ See Senator Marise Payne, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES (Austl.), Sept. 10, 2007, at 53 (noting, “in the development of the declaration itself, which has been in play now for over a decade, Australia has been intimately and constructively involved in that process”).

⁹⁴ See International Work Group for Indigenous Affairs, Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw248.asp> (last visited Mar. 6, 2010) (noting there were “only 4 negative votes cast (Canada, Australia, New Zealand, United States)”).

⁹⁵ See DRIP, *supra* note 8, art. 19 (“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.”).

⁹⁶ Payne, *supra* note 93, at 53–54.

⁹⁷ Senator Andrew Bartlett, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES, *supra* note 93, at 51.

⁹⁸ *Id.* at 52.

⁹⁹ See Senator Rachel Siewert, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE:

final draft and the final UN vote.¹⁰⁰ Marise Payne, a senator from New South Wales, identified her “key concerns” regarding the substantive provisions of the DRIP as it would apply to Australia.¹⁰¹ Among Payne’s concerns was the idea of indigenous self-determination and the potential that this would be misconstrued, leading indigenous groups to believe they would not be subject to the government of their state.¹⁰² Conservatives and Senator Payne also opposed the DRIP’s policies on prior informed consent, as it “implied to some readers” that indigenous people would have a “right of veto” over any federal matters affecting them.¹⁰³ Conservative Australians also feared the provisions of the DRIP would place “customary [Aborigine] law in a superior position to national law.”¹⁰⁴

As one pro-DRIP Senator stated, however, the DRIP “does not actually bind any country of the world to take particular action. What it does is bind countries to look within their own programs of law to respect and acknowledge the rights of indigenous people.”¹⁰⁵

At the time Australia initially declined to endorse the DRIP, some lawmakers reprimanded their nation for the negative message this move sent to the international community and to Australia’s indigenous people. One DRIP supporter, Senator Trish Crossin, stated:

[T]he government’s response is disappointing but not unexpected. Essentially, what they are saying is that they will not be supporting this declaration because it does not line up with their policy on Indigenous affairs. We have seen that unfold quite dramatically in the last three months in relation to the Northern Territory.¹⁰⁶

PARLIAMENTARY DEBATES, *supra* note 93, at 57 (citing an Amnesty International ad addressed to the Australian leadership).

¹⁰⁰ Payne, *supra* note 93, at 53–54.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 54.

¹⁰⁴ Senator Mathias Cormann, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES, *supra* note 93, at 63.

¹⁰⁵ Senator Claire Moore, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES, *supra* note 93, at 60–61.

¹⁰⁶ Senator Trish Crossin, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES, *supra* note 93, at 64.

Senator Ursula Stephens, from New South Wales, similarly characterized Australian opposition to the DRIP as “another very shameful moment for Australia,”¹⁰⁷ in which DRIP opponents “continue . . . to point out worst-case scenarios rather than interpreting the provisions of the draft declaration in good faith.”¹⁰⁸

B. The Road to Endorsement of the DRIP

In September of 2007, the same month that saw Australia’s negative vote on the DRIP, Australian political candidate Kevin Rudd declared to the UN General Assembly that he would lead Australia in supporting the DRIP if he came to power.¹⁰⁹ Rudd was sworn in as Australia’s new prime minister shortly thereafter, on December 3, 2007.¹¹⁰ However, it took until April of 2009 for Rudd to follow through on his promise.¹¹¹

For the first two years of the Rudd administration, change came in the form of public apologies¹¹² for past wrongs such as the forcible taking of Aborigine children from their parents¹¹³ and state-sponsored “assimilation” practices.¹¹⁴

¹⁰⁷ Senator Ursula Stephens, Speech During Matters of Urgency Debate Concerning United Nations Draft Declaration on the Rights of Indigenous Peoples, in SENATE: PARLIAMENTARY DEBATES, *supra* note 93, at 55.

¹⁰⁸ *Id.* at 57.

¹⁰⁹ See Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELBOURNE J. INT’L L. 439 (2008), available at <http://www.austlii.edu.au/au/journals/MelbJIL/2008/17.html> (noting that the Rudd administration promised to promote the DRIP “in its election platform: ‘Labor will endorse the UN Declaration on the Rights of Indigenous Peoples and be guided by its benchmarks and standards’”).

¹¹⁰ *Rudd Sworn in As New PM*, ABC NEWS (Austl.), Dec. 3, 2007, <http://www.abc.net.au/news/stories/2007/12/03/2107619.htm>.

¹¹¹ See *Australia to Support UN Indigenous Rights Declaration*, ABC NEWS (Austl.), Mar. 26, 2009, <http://www.abc.net.au/news/stories/2009/03/26/2527177.htm> (stating that Australia would change its position on the DRIP on April 3, 2009, and that the “decision to support the declaration . . . was part of the Rudd Government’s election promises”).

¹¹² Kevin Rudd, Prime Minister of Austl., Apology to Australia’s Indigenous Peoples (Feb. 13, 2008) (transcript), available at http://www.aph.gov.au/house/rudd_speech.pdf (proposing the creation of a “joint policy commission” for Aborigine affairs, and recommending, “[i]f this commission operates well . . . [to then] work on the further task of constitutional recognition of the first Australians”).

¹¹³ *Id.* (“To the Stolen Generations, I say the following: as Prime Minister of Australia, I am sorry.”).

¹¹⁴ See *id.* (admitting that the forcible taking of Aborigine children from their families was a policy “taken to such extremes by some in administrative authority that the forced extractions of children of the so called ‘mixed lineage’ were seen as part of a broader policy of dealing with

Rudd's apology in February 2008 was especially momentous in light of the fact that former Prime Minister Howard had refused to make such an apology during his eleven years in office.¹¹⁵ However, without actions to back up the apology, "sorry" seemed like an empty word.¹¹⁶

In February 2008, Australian Foreign Affairs Minister Stephen Smith stated there was a chance the government would reverse its position on the DRIP.¹¹⁷ How this change would take effect, however, was still unclear, as Smith stated a reversal might be as easy as "simply let[ting] our view be known."¹¹⁸ Despite these words of hope, however, the Australian Senate voted down a motion in September 2008 that would have changed Australia's position to one of support for the DRIP at the UN General Assembly meeting in October 2008.¹¹⁹

C. Australia's Official Change of Position

Despite the set-backs in late 2008, Australia finally decided to change its stance, choosing to endorse the DRIP after its initial decline to do so. This about-face came on April 3, 2009,¹²⁰ on the heels of international criticism of Australia's human rights policies, including a scathing March 2009 review by

'the problem of the Aboriginal population' ").

¹¹⁵ Samantha Maiden, *Rudd Apology Sorry to Aboriginal Stolen Generations*, AUSTRALIAN, Feb. 13, 2008, <http://www.theaustralian.news.com.au/story/0,25197,23205437-601,00.html>.

¹¹⁶ See Noel Pearson, *Contradictions Cloud the Apology to the Stolen Generations*, AUSTRALIAN, Feb. 12, 2008, <http://www.theaustralian.com.au/news/features/when-words-arent-enough/story-e6frg6z6-111115528371> ("Who will be able to move on after tomorrow's apology? Most white Australians will be able to move on (with the warm inner glow that will come from having said sorry), but I doubt indigenous Australians will. Those people stolen from their families who feel entitled to compensation will never be able to move on."); see also Thalia Anthony, *Indigenous Rights Declaration Just the Start*, ABC NEWS (Austl.), Apr. 14, 2009, <http://www.abc.au/news/stories/2009/04/14/2541995.htm> (noting that, despite its public apology, "the Australian Government continues to oppose consecutive bills for Stolen Generations' reparations before the federal Senate").

¹¹⁷ See Interview with Stephen Smith, Australian Minister for Foreign Affairs, Meet the Press (Feb. 17, 2008) (transcript), available at http://www.foreignminister.gov.au/transcripts/2008/080217_mtp.html (stating, on the issue of changing Australia's opposition to the DRIP, "we're currently giving consideration" to it).

¹¹⁸ *Id.*

¹¹⁹ Parliament of Austl., Journal of the Senate No. 30, ¶ 17 (Sept. 16, 2008), available at http://parlinfo.aph.gov.au/parlInfo/download/chamber/journals/2008-09-16/toc_pdf/jnlF_030.pdf;fileType=application%2Fpdf#search%22chamber/journals/2008-09-16/0017%22 (showing the vote, 5–55 against a "statement of support" for the DRIP).

¹²⁰ Emma Rodgers, *Aust Adopts UN Indigenous Declaration*, ABC NEWS (Austl.), Apr. 3, 2009, <http://www.abc.net.au/news/stories/2009/04/03/2534210.htm>.

the UN Committee for the Elimination of Racial Discrimination.¹²¹ Reports further indicated that the DRIP endorsement was part of the Rudd Administration's goal of fulfilling its campaign promises.¹²²

Though no immediate changes took place as a result of Australia's support of the DRIP, one Aboriginal leader, Tom Calma, stated, "The Declaration could be put to immediate use in Australia by providing guidance and articulating minimum standards to help the government in addressing some of the discriminatory elements remaining in the Northern Territory intervention."¹²³ While the DRIP creates no new rights for indigenous peoples in Australia, it does bring together their existing rights into one cohesive document, and "lays out the minimum standards for the 'survival, dignity and well being of Indigenous Peoples.'"¹²⁴

Despite Australia's recent adoption of the DRIP, Australia still needs to change its national policies on indigenous affairs in order to bring itself into alignment with this important document. Though the DRIP is non-binding,

many of [its] articles are actually legally binding as these are lifted from the Convention on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights. The Declaration does not set new international standards on human rights. It merely interprets International Human Rights Law as it applies to the specific situations of indigenous peoples as distinct peoples.¹²⁵

¹²¹ See Thalia Anthony, *United Nations Committee Finds Australia in Breach of Obligations*, <http://blogs.usyd.edu.au/thaliaanthony/2009/03/> (Mar. 19, 2009, 15:17 EST) ("The Committee referred especially to Article 2(2) [of the International Convention on the Elimination of All Forms of Racial Discrimination, which Australia ratified in 1975] that special measures 'shall in no case entail . . . unequal or separate rights for different racial groups.' This signals to the government that its efforts to convey the Intervention as a special measure are actually a breach of international law.").

¹²² *Australia to Support UN Indigenous Rights Declaration*, *supra* note 111.

¹²³ Press Release, Austl. Human Rights Comm'n, *United We Stand — Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia* (Apr. 3, 2009), http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html.

¹²⁴ Austl. Human Rights Comm'n, *Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples* (Apr. 2009), http://www.hreoc.gov.au/Social_Justice/declaration/declaration_QA_2009.html (quoting the Office of the High Commissioner for Human Rights and the DRIP).

¹²⁵ Victoria Tauli-Corpuz, Chair, UN Permanent Forum on Indigenous Issues, *Paper Presented at the Indigenous Peoples' Summit, The Challenges of Implementing the UN Declaration on the Rights of Indigenous Peoples* (July 1–4, 2008), *available at* http://www.tebt ebba.org/index.php?option=com_content&view=article&id=22:the-challenges-of-implementing-

Further, “[t]he [DRIP] [was] expected to eventually become a convention and then binding international law within a few years.”¹²⁶ The UN made progress towards the goal of making the DRIP international law on December 13, 2008, when the U.N. Human Rights Council passed a resolution establishing the Expert Mechanism on the Rights of Indigenous Peoples (the Mechanism).¹²⁷ The Mechanism is an enforcement body which will work to actually implement the policies outlined in the DRIP.¹²⁸ This recent resolution was deemed “[t]he first substantial step in the effort to make the declaration law.”¹²⁹

In a world where human rights violations are normally considered a problem limited to developing countries, Australia has yet to prove that it is up to speed with the times.¹³⁰ Perhaps most embarrassing for Australia is that it held out until public criticism reached its height before endorsing the DRIP, a

the-un-declaration-on-the-rights-of-indigenous-peoples-&catid=50:unpfi.

¹²⁶ Valerie Taliman, *United Nations Moves to Adopt Indigenous Declaration*, INDIAN COUNTRY TODAY, Sept. 14, 2007, available at <http://www.indiancountrytoday.com/archive/28144809.html>.

¹²⁷ Gale Courey Toensing, *First Step Taken*, INDIAN COUNTRY TODAY, Dec. 31, 2008, available at <http://www.indiancountrytoday.com/global/undeclaration/36748814.html>.

¹²⁸ See *id.* (“The expert mechanism will report directly to the council as a subsidiary body that will ‘assist the Human Rights Council in the implementation of its mandate’ to promote universal respect for the protection of all human rights and fundamental freedoms and to address human rights violations, including systemic or institutionalized human rights violations.”). The Mechanism has held two sessions since its formation; however, the results show that this body is still in its planning phase. These sessions mainly consisted of discussions for potential recommendations to states and proposals for studies on indigenous rights rather than strict enforcement measures. See The Chairperson-Rapporteur, Expert Mechanism on the Rights of Indigenous Peoples, Aug. 10–14, 2009, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Its Second Session, Summary, delivered to the General Assembly*, U.N. Doc. A/HRC/12/32 (Sept. 8, 2009) (recommending, among five other proposals, “a suggested thematic study on indigenous peoples’ right to participate in decision-making”); The Chairperson-Rapporteur, Expert Mechanism on the Rights of Indigenous Peoples, Oct. 1–3, 2008, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Its First Session*, ¶ 6, *delivered to the General Assembly*, U.N. Doc. A/HRC/10/56 (Jan. 8, 2009) (proposing “a request to States to implement recommendations made by the Committee on the Elimination of Racial Discrimination in relation to indigenous peoples’ rights”). The third session is scheduled to “take place from 12 to 16 July 2010, at the United Nations Office in Geneva.” Office of the UN High Commissioner for Human Rights, Expert Mechanism on the Rights of Indigenous Peoples, <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm> (last visited Apr. 2, 2010).

¹²⁹ Toensing, *supra* note 127.

¹³⁰ See Valmaine Toki & Natalie Baird, *An Indigenous Pacific Human Rights Mechanism: Some Building Blocks*, 40 VICTORIA U. WELLINGTON L. REV. 215, 225 (2009) (“[B]oth New Zealand and Australia voted against the [initial] adoption of DRIP. This illustrates how out of step New Zealand and Australia have become with the international community on indigenous issues.”).

document which only “sets minimal standards on how countries should treat indigenous peoples.”¹³¹ Unless Australia aligns its policies with those of the DRIP, the country will continue in its failure to extend even the most basic rights to its indigenous people.

V. STEPS TOWARD TOMORROW: WHERE AUSTRALIA SHOULD GO FROM HERE

A. Reinstate the RDA and Put a Halt to the Intervention

At the end of his recent visit to Australia, UN Special Rapporteur James Anaya emphasized the importance of the DRIP and instructed Australia to do more in light of its recent endorsement of the document:

The [DRIP] expresses the global consensus on the rights of indigenous peoples and corresponding state obligations on the basis of universal human rights. I recommend that the Government undertake a comprehensive review of all its legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders in light of the [DRIP].¹³²

An appropriate starting point for instating the minimal standards of human rights would be to reverse the Intervention legislation and reinstate the RDA. Instead of making more public apologies to its indigenous people, Australia needs to take action. Continuing down the current path of protecting indigenous people from themselves at the expense of freedom from discrimination can only lead to more problems within the Aboriginal population. Although the Australian government may argue that the discriminatory measures imposed by the Intervention are necessary as “special measures,” these measures actually violate international law, as noted above.¹³³ Significantly, there is no proof that the Intervention has resulted in any actual improvement in conditions among Aborigines.¹³⁴

¹³¹ Taliman, *supra* note 126.

¹³² Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, as He Concludes His Visit to Australia (Aug. 27, 2009) [hereinafter Statement of the Special Rapporteur], available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/313713727C084992C125761F00443D60?opendocument>.

¹³³ See *supra* notes 74–82 and accompanying text.

¹³⁴ See Bonnie Malkin, *More Aboriginal Children Put into Care Now Than During 'Stolen Generations'*, TELEGRAPH (U.K.), Jan. 3, 2009, <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/4092776/More-Aboriginal-children-put-into-care-now-than->

The Aboriginal community has made its voice heard in opposition to the Intervention, calling for the reinstatement of the RDA.¹³⁵ However, Prime Minister Rudd has voiced his opposition to such recommendations. In response to proposed compromises, such as allowing indigenous communities to “opt in or opt out” of the Intervention, Prime Minister Rudd stated: “This Government is not into rolling the clock back to some sort of ancient business-as-usual approach to dealing with the challenges of indigenous Australia. Most of them failed. We are on with the business of what works. And it will be a completely new approach.”¹³⁶

The discriminatory effects of the Intervention approach have been criticized by many. Northern Land Council chairman Wali Wunun Gmurra stated, “By suspending this important law [the RDA], the previous Australian government told the rest of the country and the world that it was okay to treat Aboriginal people in the Northern Territory as museum exhibits and that we are less than human and this is an insult.”¹³⁷ Again, this sentiment was confirmed by the UN Special Rapporteur, James Anaya, who at the end of his visit to Australia reported:

Any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional and necessary to achieve the legitimate objectives being pursued In my view, the Northern Territory emergency response is not. These measures overtly discriminate against Aboriginal peoples, infringe on their right of self-determination and stigmatise already stigmatised communities.¹³⁸

Instead of further marginalizing this group of people, the Australian government should work to find practical and non-discriminatory solutions to the very real problems of poverty, alcoholism, and sexual abuse within its indigenous population.

during-Stolen-Generations.html (stating that the “military-style intervention in the Northern Territory ordered by the former Prime Minister John Howard . . . [has] done little to improve life in Australia’s diverse Aboriginal communities”).

¹³⁵ See Thousands of Australians, *supra* note 61 (explaining that a group of 4,000 Aborigines and non-Aborigines signed a petition to Parliament on the matter).

¹³⁶ Patricia Karvelas, *Northern Territory Intervention at Crucial Junction*, AUSTRALIAN, Oct. 16, 2008, at 1, available at <http://www.theaustralian.com.au/news/territory-response-at-crucial-junction/story-e6 frg6po-111117763968>.

¹³⁷ *Id.*

¹³⁸ Robinson, *supra* note 52.

There is evidence, however, that unless and until Aborigines gain representation in government, they will remain at a disadvantage. Mal Brough, the politician behind the Intervention, criticized the recent UN assessment of the Intervention, stating:

I get very annoyed when I hear people pontificating about human rights when today there will be children sitting out there in abject squalor with diseases they don't have to have, inadequate education, poor nutrition and poor access to health and we have some nicety about human rights legislation¹³⁹

This attitude among white government officials, that human rights are not a priority related to practical concerns, is unacceptable.

Discriminatory effects aside, the Intervention simply is not working. As one commentator further noted, "Yes, the intervention is racially discriminatory—even [Mal] Brough concedes that. But it also happens to be failing miserably."¹⁴⁰ As early as 2008, reports showed that the "one size fits all" legislation behind the Intervention was already failing to produce results.¹⁴¹ There would seem, then, to be no reason to continue to implement this program, one that furthers discriminatory policies and has produced few, if any, positive results.¹⁴²

B. A New Representative Body

Any solutions should, as stated in the DRIP, be made in accordance with informed consent, and Aboriginal people should be involved in any legislation concerning them,¹⁴³ just as all Australians are guaranteed a voice through

¹³⁹ *Id.*

¹⁴⁰ Graham, *supra* note 85.

¹⁴¹ Sarah Everingham, *NT Intervention 'Blanket Approach' Not Working: Report*, ABC NEWS (Austl.), Aug. 15, 2008, <http://www.abc.net.au/news/stories/2008/08/15/2336727.htm>.

¹⁴² See Chris Graham, *Racist, Not Working: UN Bashes NT Intervention*, CRIKEY (Austl.), Aug. 28, 2009, <http://www.crikey.com.au/2009/08/28/racist-and-not-working-un-calls-us-on-our-intervention/> ("The alcohol bans have not stopped the grog The extraordinary coercive powers (and millions of dollars) handed to the Australian Crime Commission (ACC) to target child abusers have not resulted in the capture of a single paedophile [sic] The income management has also resulted in near starvation and demonstrable harm to Aboriginal people . . . [and t]he 'tens of millions' that John Howard outlined would be spent on the NT intervention has blown out to more than \$1 billion.").

¹⁴³ DRIP, *supra* note 8, art. 18 ("Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own

representation in the legislature.¹⁴⁴ Notably, because there have only been two Aboriginal senators in the Australian Parliament, enforcement of provisions in the DRIP that would allow for greater indigenous input into government, such as the right to informed consent, is badly needed.¹⁴⁵ As of 2009, indigenous Australians had “suffered from the absence of a national body for five years,”¹⁴⁶ since the dissolution of ATSIC in 2004.¹⁴⁷

In August of 2009, Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner, submitted a proposal for a new indigenous body to Indigenous Affairs Minister Jenny Macklin.¹⁴⁸ The Australian Government, in accepting the proposal,¹⁴⁹ assured that it would “not create another ATSIC,” backing this promise with the mandate that applicants for an initial strategy session “had to be an Aboriginal and/or Torres Strait Islander.”¹⁵⁰ By November 2009, the new council was approved as the National Congress of

indigenous decision-making institutions.”). Article 19 of the DRIP further mandates that “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.”

¹⁴⁴ See Commonwealth of Australia Constitution Act, 1900, § 7 (mandating that “[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State”).

¹⁴⁵ See Senator Dee Margetts, *Senate Condolences Speech: Bonner, Mr. Neville Thomas, AO*, in PARLIAMENTARY DEBATES (Austl.) 1844 (Feb. 15, 1999), available at http://parlinfo.aph.gov.au:80/parlInfo/genpdf/chamber/hansards/1999-02-15/0042/hansard_frag.pdf;fileType%3Dapplication%2Fpdf (recognizing the late Neville Bonner as “the first Aboriginal person in federal parliament” and noting that “from 1 July [1999] we will have Senator-elect Aden Ridgeway taking his place as the next Aboriginal senator”); see also Australian Electoral Commission, Electoral Milestone/Timetable for Indigenous Australians, http://www.aec.gov.au/Voting/indigenous_vote/indigenous.htm (last visited Mar. 6, 2009) (listing Aboriginal senators Neville Bonner and Aden Ridgeway, who served from 1971 to 1983 and 1999 to 2005, respectively).

¹⁴⁶ Nicola Berkovic & Stuart Rintoul, *Probity Check for ‘New ATSIC’ As Minister Fails to Commit to Seed Money*, AUSTRALIAN, Aug. 28, 2009, at 2, available at <http://www.theaustralian.news.com.au/story/0,,25991970-2702,00.html>.

¹⁴⁷ See Radio Broadcast: UN Official Slams NT Intervention (PM with Mark Colvin radio broadcast, Aug. 27, 2009) (transcript available at <http://www.abc.net.au/pm/content/2009/s2669042.htm>) (stating, “This afternoon, five years after the troubled ATSIC was abolished, the Aboriginal Social Justice Commissioner Tom Calma handed over a plans for a new body to the Indigenous Affairs minister, Jenny Macklin.”).

¹⁴⁸ Berkovic & Rintoul, *supra* note 146.

¹⁴⁹ Australian Gov’t Dep’t of Families, Housing, Community Services and Indigenous Affairs, National Indigenous Representative Body—Update November 2009, <http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/NIRB/Pages/default.aspx> [hereinafter Update November 2009] (last visited Apr. 2, 2010).

¹⁵⁰ *Id.*; see *supra* p. 380 and notes 30–31 (noting that indigenous people saw ATSIC as not “their own,” and that a majority of the indigenous population did not participate in ATSIC elections).

Australia's First Peoples (First Peoples).¹⁵¹ The government stated at that time that the "[p]rocesses necessary for the establishment of the representative body will begin immediately and continue throughout 2010 with a fully operational body expected to be in place by January 2011."¹⁵² The list of proposed functions for the First Peoples does not include legislative powers.¹⁵³ Similarly, Calma has stated that the new representative body would not be formally linked to government except through some initial funding.¹⁵⁴ The advantage of this independence seems to be that the indigenous body would not "be subject to threats of being abolished like ATSIC was in the Parliament."¹⁵⁵

However, "[t]he new body," it has been stated, "would not be responsible for any service delivery and would only have advisory powers."¹⁵⁶ Arguably, then, it is difficult to see how the new group will have any real impact on government decision-making, or how this will prevent further indigenous marginalization. The initial proposal was criticized by those who feel certain it will not be truly representative of remote indigenous communities. As one indigenous leader stated, "I think the Canberra [government seat] Aboriginal perspective is just as potentially out of touch with the real world of Aboriginal people as the Canberra whitefella perspective I fear an elected body which will lobby and advocate but not actually decide anything[,] will be just another high-powered talkfest."¹⁵⁷

Meanwhile, others have proposed that the solution should be simply to elect more indigenous people to the Australian Parliament.¹⁵⁸ However, this is a

¹⁵¹ Update November 2009, *supra* note 149.

¹⁵² *Id.*

¹⁵³ *See id.* (noting that the three function of the First Peoples will be "formulating policy and advice," "advocacy and lobbying," and helping "monitor and evaluate government performance").

¹⁵⁴ *Id.* ("The Government has announced funding of \$29.2 million for the new representative body to provide appropriate support during its very important establishment phase and the early years of its operation."); Emma Rodgers, *Calma Urges Support for ATSIC Replacement*, ABC NEWS (Austl.), Aug. 27, 2009, <http://www.abc.net.au/news/stories/2009/08/27/2668710.htm>.

¹⁵⁵ *See Independent Indigenous Body 'Won't Suffer ATSIC Fate'*, ABC NEWS (Austl.), Aug. 28, 2009, <http://www.abc.net.au/news/stories/2009/08/28/2669740.htm> (quoting Aboriginal leader Sam Jeffries).

¹⁵⁶ Rodgers, *supra* note 154.

¹⁵⁷ Berkovic & Rintoul, *supra* note 146; *see also Anderson Sceptical About Post-ATSIC Body*, ABC NEWS (Austl.), Aug. 28, 2009, <http://www.abc.net.au/news/stories/2009/08/28/2669505.htm> (stating that "the independent Member for MacDonnell, Alison Anderson, says she does not think anyone from remote areas will make it onto the board").

¹⁵⁸ *See Mayor Urges More Indigenous Parliamentarians*, ABC NEWS (Austl.), Aug. 28, 2009, <http://www.abc.net.au/news/stories/2009/08/28/2669987.htm?site=news> (quoting Mayor Alf Lacey, who stated, "Let's not cloud ourselves with an Indigenous representative body—we also need representation around Parliament where the laws are made").

possibility that has existed for years, and yet there have been only two Aborigine representatives elected¹⁵⁹—this suggests that another solution is needed. Prior to the formation of the First Peoples, one proposal was to “set aside seats in Parliament” for indigenous leaders,¹⁶⁰ though it is unclear how this suggestion would be implemented. Perhaps the answer is to set aside a percentage of seats, based on the percentage of indigenous people in the Australian population, and hold elections for those seats. While this practice is inconsistent with Western ideals of democracy, it is consistent with Australia’s ideal of “special measures” or affirmative action for disadvantaged minority groups. This may not be a perfect solution, but it would provide Aborigines with a guaranteed voice in government and a say in the laws that affect them. Further, this policy is consistent with the DRIP’s mandate of informed consent for laws affecting indigenous peoples.

Additionally, reform of existing government aid programs is needed. Notably, the biggest flaw in existing indigenous aid programs is that, while the government has provided funding, much of the funding gets “chew[ed] up,”¹⁶¹ either by consultations and reports,¹⁶² or by the various levels of administration between the grass-roots needs and the top-level authorities.¹⁶³ The Northern Territory government has consistently failed to spend its allocation of [grant] money from Canberra as intended In services to indigenous communities alone, the Territory government has on average underspent by 54[%].¹⁶⁴ The Australian government granted \$3 billion towards programs in 2009, a “significant portion” of which “was either underspent or the result of creative accounting.”¹⁶⁵

¹⁵⁹ See sources cited *supra* note 145.

¹⁶⁰ *Remove Government Shackles, Former ATSIC Leader Says*, ABC NEWS (Austl.), Aug. 29, 2009, <http://www.abc.net.au/news/stories/2009/08/29/2670531.htm> (quoting Ray Robinson, a former ATSIC leader).

¹⁶¹ Tony Barass, *NT in a 'Political Calamity'*, AUSTRALIAN, Aug. 12, 2009, at 6, available at <http://www.theaustralian.news.com.au/story/0,25197,25917836-5013404,00.html>.

¹⁶² See *Rudd 'Slowly Killing Off' Intervention*, ABC NEWS (Austl.), Sept. 3, 2009, <http://www.abc.net.au/news/stories/2009/09/03/2676139.htm> (quoting former Indigenous Policy minister Alison Anderson who argues that the federal and Northern Territory governments are “spending too much time supposedly consulting communities, rather than taking action, so the Intervention has ‘practically come to a halt’ ”).

¹⁶³ Barass, *supra* note 161.

¹⁶⁴ Lex Hall, *\$2bn Diverted from Aid for Aborigines and Welfare*, AUSTRALIAN, Nov. 28, 2009, at 1, available at <http://www.theaustralian.com.au/news/nation/bn-diverted-from-aid-for-aborigines-and-welfare/story-e6frg6nf-1225804773394>.

¹⁶⁵ Debra Jopson & Joel Gibson, *Black Dollars Go Everywhere but to Blacks*, SYDNEY MORNING HERALD, Aug. 21, 2007, <http://www.smh.com.au/news/national/black-dollars-go-everywhere-but-to-blacks/2007/08/20/1187462176698.html>.

One former director of social and economic policy in the Northern Territory stated, "There are way too many programs, and the high administration costs in delivering them makes them almost certain to fail The NT government sometimes chews up to 40[%] of the costs. Transaction costs on the ground are also unbelievably debilitating."¹⁶⁶ These programs can be streamlined, and many eliminated, to increase the effectiveness of government aid. James Anaya, UN Special Rapporteur on Indigenous Affairs, stated in his recent address to Australia, "In particular, it is essential to provide continued funding to programmes that have already demonstrated achievements."¹⁶⁷ Those programs that are stagnant or redundant, on the other hand, should be cut. None of this can be accomplished without a central indigenous body to oversee the administration of government funds and services.

What is needed, both to work towards solving the problems facing Australia's Aborigines and to bring Australia into compliance with the DRIP, is a body of indigenous advisors in Parliament, not outside of government, who will have an actual impact on the laws affecting Aborigines.

VI. CONCLUSION

Australia's belated adoption of the DRIP highlights how far Australia lags behind other UN member states in its position on human rights.¹⁶⁸ Some have hinted that the adoption of the DRIP, which came at a time of international criticism of Australia's handling of indigenous affairs, was only a symbolic act that will do little to actually improve indigenous conditions.¹⁶⁹ If for no other reason than the most shallow, Australia has benefited by adopting the DRIP in order to cure its lost favor in the public eye.¹⁷⁰ Now, however, the Australian government needs to take action to actually bring its policies into alignment with the DRIP, showing that its adoption of the DRIP was not just a symbolic gesture.

The Intervention legislation and the suspension of the RDA is an overreaching act of government that violates Australia's international

¹⁶⁶ Barass, *supra* note 161 (quoting Professor Rolf Gerritsen, a researcher in central Australia with Charles Darwin University).

¹⁶⁷ Statement of the Special Rapporteur, *supra* note 132.

¹⁶⁸ See Anthony, *supra* note 116 (stating "[i]n light of its Indigenous scorecard on the international arena, Australia has a lot of answering to and a long way to catch up to meeting its treaty obligations").

¹⁶⁹ See *id.* ("Support for this non-legally binding Declaration may be seen as simply another act of symbolism. It may be analogised with the national apology to the Stolen Generations, which did nothing further to address the suffering of those victims.").

¹⁷⁰ See *supra* note 107 and accompanying text.

obligations under the DRIP. Further, the Intervention, from the very beginning, has borne little practical connection to the purpose for which it was supposedly intended. As one RDA supporter put it, “Racial discrimination does not improve the lives of children, nor does violating international human rights standards.”¹⁷¹ Further, the Intervention has been a set-back for long-awaited Aborigine rights:

The announcement of the NT intervention was met with an almost audible collective sigh of despair across much (but not all) of Aboriginal Australia. In an instant, another weight was placed on Aboriginal communities, spelling a potential end to the progress made in generations of struggle for acknowledgement and recognition of Aboriginal people’s right to have some control over the future of their families and communities.¹⁷²

At the very least, Australia should reinstate the RDA and go about the Intervention in other, more viable ways, such as providing more funding for health care and education among its Aborigine population, and limiting welfare quarantines only to parents who actually neglect their children, instead of all Aborigine parents.

Finally, Australia needs a representative body made up of Aborigines that can serve to bridge the gap between people in remote indigenous communities and the Australian government. Although the formation of the First Peoples is a step forward, ideally, such a representative body would be part of Parliament, instead of a marginalized group that might have only nominal effects on policy.

Australia has the potential for an about-face from its current position on indigenous affairs. Already, through the recent adoption of the DRIP and hopefully through potential reinstatement of the RDA, Australia can give its Aboriginal population what they have long been waiting for—action to back up the promises of their government.

¹⁷¹ Thousands of Australians, *supra* note 61 (quoting Rodney Dillon, Indigenous Rights Coordinator for Amnesty International Australia).

¹⁷² Alex Brown & Ngiare J. Brown, *The Northern Territory Intervention: Voices from the Centre of the Fringe*, 187 MED. J. AUSTRAL. 621, 621 (2007), available at http://www.mja.com.au/public/issues/187_11_031207/bro11318_fm.html.

