

**STILL PAYING THE PRICE FOR BENIGN INTENTIONS?
CONTEXTUALISING CONTEMPORARY
INTERVENTIONS IN THE LIVES OF ABORIGINAL
PEOPLES**

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[The design and implementation of the Commonwealth government's intervention into Northern Territory Indigenous communities and the Queensland government's welfare reform trials in Cape York have been presented as radical departures from previous policies by federal and Queensland governments respectively. This article critically examines these claims by reference to past protectionist and assimilationist policies. It examines the ideology underpinning the federal intervention and considers the legislation implementing the intervention in terms of what it effects (and, with respect to the Racial Discrimination Act 1975 (Cth), what it undoes) as well as the unsatisfactory manner in which it was sped into law. It is argued that the intervention neither addresses new issues in Indigenous welfare, nor does it operate — conceptually — in a radically different manner to previous Indigenous welfare policies. The article then carefully examines certain aspects of the intervention — governance, medical examinations, prohibitions on pornography and alcohol, housing and land reforms, and social welfare payments — concluding that there are worrying commonalities on many levels between the intervention and past protectionist and assimilationist policies. The article concludes by suggesting that the Australian government appears to have learnt very little from past failed policies, and that any continuation of the intervention must be evidence-based and adapted to the true needs of Indigenous Australians.]

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Intervention — ‘It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. ... [I]n the case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success. Of all things, at once the most unjustifiable and the most impolitic is an unsuccessful Intervention.’¹

I INTRODUCTION

Living under the heavy hand of government is, once more, an aspect of life in many communities across the Northern Territory today. The protection of children from neglect as well as physical and sexual abuse, and the promotion of their general welfare (health and education) as well as that of their communities, was the basis for the Howard government’s wide-ranging intervention in the NT, announced in June 2007² in the aftermath of the Northern Territory Board of Inquiry’s report into child sexual abuse.³ The intervention signifies a re-intensification of government control, management and surveillance over Aboriginal families and communities, who are problematised once more.⁴

¹ W G G V V Harcourt, *Letters by Historicus on Some Questions of International Law: Reprinted from The Times with Considerable Additions* (1863) 41. The passage is taken from a paper on the practice of foreign powers intervening in the affairs of another sovereign state. Its relevance here operates on three levels: first, by speaking to the questionable legality of aspects of the Northern Territory intervention; secondly, by the parallel to the intervention’s supporters, who believe the approach will be vindicated by improved socioeconomic outcomes for Aboriginal children; and, thirdly, because the intervention may be said to signify a further attack upon the sovereignty of Aboriginal peoples. For recent discussions on Indigenous sovereignty, see Henry Reynolds, ‘Reviving Indigenous Sovereignty?’ (2006) 6 *Macquarie Law Journal* 5; Chris Cunneen et al, ‘Responses to Henry Reynolds’ (2006) 6 *Macquarie Law Journal* 13.

² Acting under the authority of s 122 of the *Australian Constitution* (the territories power) the Commonwealth undermined the authority of the NT government and intervened via three substantive and two appropriation Acts: *Northern Territory National Emergency Response Act 2007* (Cth) (*‘NTNER Act’*); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (*‘SSOLA Act’*); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (*‘FCSIA Act’*); *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007–08* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007–08* (Cth). The legislation received Royal Assent on 17 August 2007. Many aspects of the intervention, such as child health checks, additional legal services for Indigenous people and school nutrition programmes, had no statutory basis and were provided for administratively.

³ Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle — ‘Little Children Are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) (*‘Little Children Are Sacred Report’*). This report was preceded by many others documenting chronic problems in Aboriginal communities: see, eg, Department of Premier and Cabinet (WA), *Putting the Picture Together — Inquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002). In 2006, accounts of child sexual abuse in central Australia reached a global audience: see Phil Mercer, ‘Abuse Rife at Aboriginal Camps’, *BBC News* (online), 16 May 2006 <<http://news.bbc.co.uk/2/hi/asia-pacific/4984986.stm>>.

⁴ Conceptualising Aboriginal peoples as a ‘problem’ to be solved is a recurring theme, with parallels in the period of protectionism (the problem of managing a ‘dying race’) and assimila-

Governmental concerns about the wellbeing of Aboriginal peoples, particularly children, have a long pedigree; they provided a rationalisation for ‘protection’ and ‘assimilation’ laws and the associated bureaucracies of the 19th and 20th centuries, which facilitated racial segregation and the break-up of Aboriginal families.⁵ Critics of the government’s actions in the NT have asserted that the legal, administrative and institutional reforms symbolise the paternalism of these bygone eras.⁶ The intervention has created a feeling of ‘collective existential despair’⁷ in those people subject to it, who refer to feelings of shame, humiliation and loss of dignity⁸ characteristic of an epoch when the state controlled ‘every aspect of the life of any person of Aboriginal descent targeted for state “care”.’⁹ It is also suggested that the federal government’s actions mark the restoration of the ideology of assimilation¹⁰ and give rise to Aboriginal peoples’ fears of ‘another stolen generation’.¹¹

tion (the problem of the failure of segregation and increasing numbers of ‘mixed-race’ people): see Jeremy Beckett, ‘Aboriginality, Citizenship and Nation State’ (1988) 24 *Social Analysis* 3, 4, 9. The themes of surveillance, management and control are part of an enduring legal tradition forged by the poor law of England, which intervened in the lives of vagrants and beggars by criminalising their behaviour: see Sandra S Berns, ‘Regulating the “National Livestock” — An Experiment in Human Husbandry’ (2002) 4 *University of Notre Dame Australia Law Review* 1.

⁵ The degree of state intrusion into the lives of Aboriginal peoples varied over time and according to place, dependent on the juridical definition of Aboriginality in any given instrument and the application of highly discretionary administrative powers. See below Part III(C).

⁶ See, eg, Larissa Behrendt, ‘The Emergency We Had to Have’ in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 15, 18.

⁷ Northern Territory Emergency Response (‘NTER’) Review Board, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Northern Territory Emergency Response — Report of the NTER Review Board* (2008) 35 (‘Report of the NTER Review Board’), quoting Australian Indigenous Doctors’ Association, Submission No 187 to NTER Review, 22 August 2008, [17].

⁸ See *Report of the NTER Review Board*, above n 7, 7–8; Raelene Webb, ‘The Intervention — A Message from the Northern Territory’ (2008) 7(9) *Indigenous Law Bulletin* 18.

⁹ Ros Kidd, ‘Abuse of Trust: The Government as Banker in Queensland and the United States’ (2003) 5(26) *Indigenous Law Bulletin* 13, 13, referring to the period 1897–1972. The *Aborigines’ Protection Act 1869* (Vic) was the first ‘protection’ instrument. The essence of protection policies was the segregation of Indigenous peoples from the white population. Bright lines cannot be drawn between the different eras in Aboriginal affairs in the absence of a harmonised adoption and implementation of the policies of protectionism, assimilation and self-determination by the governments of the (former) colonies and the Commonwealth respectively. (There are more nuanced categorisations of Aboriginal policy-making than those presented in this article.)

¹⁰ Patrick Dodson, ‘Whatever Happened to Reconciliation?’ in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 21, 28. See also John Sanderson, ‘Indigenous Affairs’ (Lecture delivered at the Australian National University Public Lecture Series, Canberra, 23 August 2007) <http://www.anu.edu.au/discoveranu/content/podcasts/indigenous_affairs>. The origins of assimilation may be traced back to the 1937 Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities, and assimilation remained the underlying official ideology until 1967. Essentially, it meant that all persons of Aboriginal birth or mixed descent would live like white Australians, as members of a single homogenous Australian community, although initially it was understood as biological, rather than social, cultural and economic absorption: see Anthony Moran, ‘White Australia, Settler Nationalism and Aboriginal Assimilation’ (2005) 51 *Australian Journal of Politics and History* 168, 172, 176.

¹¹ Mick Dodson, ‘Bully in the Playground: A New Stolen Generation?’ in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 85, 85. The policy of removing ‘neglected’ children of Aboriginal descent into state care was officially ended in 1967: see generally Human Rights and Equal Opportunity Commission,

This article critically examines whether contemporary law and policy is a repetition or modification of familiar historical patterns, and what, if any, foundation exists for claims that the wide-ranging changes made to Indigenous communities in the NT constitute a radical change of direction.¹² The analysis juxtaposes the institutions, rules of law and administration associated with periods of protection and assimilation with recent and ongoing reforms.¹³ The nature and extent of a paradigm shift away from the era of Indigenous self-determination — a shift seemingly confirmed by the NT intervention — is also considered.¹⁴ This article explores the connections between socio-politico-economic factors and the implementation and functioning of historic and present-day legal rules and institutions. In short, the article aims to contextualise, in a historical manner, the significant developments made to the regulation of Indigenous communities in parts of Australia in modernity and asks whether Aboriginal peoples are still paying the price for the benign intentions of government.¹⁵

II STILL ‘NO TIME FOR “ROSE WATER AND SENTIMENT”’?¹⁶

Many supporters of the intervention argue that a return to assimilation policies is warranted because of the failings of its policy successor over the past 30 years:

Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) 39–40 (*‘Bringing Them Home Report’*).

¹² The claims are inferred from the rhetorical question:

Do we respond [to the problems in remote communities] with more of what we have done in the past? Or do we radically change direction with an intervention strategy matched to the magnitude of the problem?

Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 10 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

¹³ In the interests of brevity, this article primarily draws on the jurisdictions of the NT, Queensland and Western Australia to reveal the parallels between historic and contemporary law and policy; these jurisdictions are also the current sites of state intervention.

¹⁴ The self-determination ‘era’ brought with it major land rights reforms and recognition of native title. Aspects of the intervention threaten to undermine some of those achievements: see below n 213 and accompanying text. After 1996, the Howard government referred to the notion of ‘self-empowerment’, rather than ‘self-determination’ or ‘self-management’, the latter of which had characterised the preceding 30 years: John Herron, ‘Ninth Annual Joe and Dame Enid Lyons Memorial Lecture’ (Lecture delivered at University House, The Australian National University, Canberra, 15 November 1996) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F17630%22>>.

¹⁵ ‘Although partly the result of neglect and ill-treatment, [Indigenous peoples’] decline, therefore, was also the price of well-meant experiments in their civilization and uplift’: Edmund J B Foxcroft, *Australian Native Policy: Its History Especially in Victoria* (1941) 153. ‘More than a century of policy experimentation with Aboriginal people climaxed when the Howard Commonwealth government sent a special police taskforce, troops and emergency medical staff into the Northern Territory’: Marcia Langton, ‘Essay: Trapped in the Aboriginal Reality Show’ (2008) 19 *Griffith Review* 143, 145.

¹⁶ In justifying the removal of Aborigines to reserves for their protection, Archibald Meston, architect of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), informed the Home Secretary their situation was so dire that it was ‘no time for “rose water and sentiment”’, despite his awareness of the affiliation Aborigines had to the land: Thom Blake, ‘Deported ... at the Sweet Will of the Government: The Removal of Aborigines to Reserves in Queensland 1897–1939’ (1998) 22 *Aboriginal History* 51, 60.

‘Self-determination created a wicked problem for Aborigines. Their lives were confined to the insular world of Aboriginal politics and public-sector provision.’¹⁷ Integration into urban areas is prescribed as the course to enhance general welfare on the basis that measures of wellbeing indicate that Aborigines living in remote communities are worse off than Aborigines living in urban and semi-urban areas.¹⁸ As in the past, the dysfunction in remote communities is frequently attributed to individuals’ failure to adapt to modernity, not situational factors such as poverty or the ongoing effects of racism and paternalism.¹⁹ Such an attribution is reminiscent of the justification given for 80 years of state intervention in, and control over, the lives of Indigenous children during much of the 20th century in Queensland.²⁰ Indeed, exponents of neoliberalism positively marginalise the effects of colonisation as a causal factor in spiritual, mental, social and physical disease in Indigenous peoples²¹ (notwithstanding medical evidence establishing this link).²² Others counter the neoliberal position arguing that the causes of community dysfunction are not reducible to the period of self-determination and that the recent history of assimilation and consequential family break-up should not be marginalised. The solutions proffered reflect an alternative — Indigenous — evidence base.²³ For example, Larissa Behrendt opposes the neoliberal approach, pointing to the failings of ‘practical reconciliation’ under the Howard government for diminishing Indigenous peoples’ input into policy-making to cursory levels and removing community autonomy over resource allocation.²⁴ Indeed, her assessment of the Howard government’s philosophies prefigured the intervention:

[This is] not a new ideology but a throwback to the paternalistic days when Welfare Boards and Aboriginal Protection Boards dictated the lives of Indige-

¹⁷ Gary Johns, ‘The Northern Territory Intervention in Aboriginal Affairs: Wicked Problem or Wicked Policy?’ (2008) 15(2) *Agenda* 65, 73. See also Helen Hughes and Jenness Warin, ‘A New Deal for Aborigines and Torres Strait Islanders in Remote Communities’ (Issue Analysis No 54, The Centre for Independent Studies, 2005) <http://www.cis.org.au/issue_analysis/IA54/IA54.PDF>. Hughes and Warin observe that ‘[a]fter 30 years, it is clear that the experiment that was to give Aborigines and Torres Strait Islanders a socialist utopia, leading to the establishment of a separate nation, has been a miserable failure’: at 2.

¹⁸ See Johns, ‘The Northern Territory Intervention in Aboriginal Affairs’, above n 17, 66–7; Hughes and Warin, above n 17, 5–15.

¹⁹ ‘The path out of the ghetto lies in changing the behaviour of individuals, not the dominant society’: Gary Johns, ‘Preface to the 2005 Web Edition’ in Geoffrey Partington, *Hasluck versus Coombs: White Politics and Australia’s Aborigines* (2005) iii, iv <<http://www.bennelong.com.au/books/pdf/PartingtonWeb.pdf>>.

²⁰ See Gordon Reid, *That Unhappy Race: Queensland and the Aboriginal Problem 1838–1901* (2006) 224–5.

²¹ See, eg, Partington, above n 19, 109: ‘Harping on [about] victim status and blaming white racism and the colonial past will do no good at all.’ Cf Larissa Behrendt, ‘Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development’ (2001) 24 *University of New South Wales Law Journal* 850.

²² Peter W Tait, ‘Protecting Little Children’s Health — Or Not?’ (2007) 187 *Medical Journal of Australia* 619, 619.

²³ See, eg, Stephen Cornell, ‘A North American Perspective’ (Speech delivered at the Cornell Lecture Series, Canberra, 11 September 2008) <<http://www.reconciliation.org.au/home/get-involved/closing-the-gap/dr-stephen-cornell>>.

²⁴ Behrendt, ‘Indigenous Self-Determination’, above n 22, 855.

nous people and their children. It is an ideology that has been used in the past, did not work then and has not only been rejected by Indigenous people, but has left a lasting legacy of disadvantage, trauma and family breakdown that is still plaguing Indigenous communities and Indigenous families today.²⁵

In summary, the policy debate about how to restore Aboriginal wellbeing in the context of cultural fragmentation, social dysfunction and past government interventions is divided broadly between those who would seek to re-impose aspects of assimilation (now recast as ‘mainstreaming’) and those who view self-determination as central to improved socioeconomic outcomes for Aboriginal peoples in the long-term.²⁶ Another view ‘interprets the problems of Indigenous communities not only as symptoms of dispossession and racism, but also as the result of a social norms deficit’²⁷ — a deficit that originates, in some instances, from the self-determination era.²⁸ This is illustrated by the consequences of citizenship in the Cape York Peninsula. Communities maintained strong values in relation to personal conduct during the oppressive periods of protection and assimilation; however, recognition of citizenship brought equal wages, which contributed to Aboriginal stockmen losing their jobs and gave Aboriginal people access to the welfare support system and the right to drink alcohol in licensed premises. Peoples’ suffering was attributed to these factors.²⁹ The Cape York Institute for Policy and Leadership has suggested that social order in remote communities can be restored by rebuilding a ‘base of positive social norms’³⁰ that ‘mandate personal responsibility for work, education and the welfare of children’.³¹ For the Rudd government, endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*³² (and, implicitly, self-determination and the idea of self-government) is to be realised through a three-way partnership between local communities, public bodies and private bodies.³³

²⁵ Larissa Behrendt, ‘Power from the People: A Community-Based Approach to Indigenous Self-Determination’ (2003) 6 *Flinders Journal of Law Reform* 135, 136.

²⁶ Regarding the ‘mainstreaming’ approach, see, eg, Johns, ‘The Northern Territory Intervention in Aboriginal Affairs’, above n 17; Hughes and Warin, above n 17. Cf *Report of the NTER Review Board*, above n 7, 8, which presented a vision for future development as one that is community-nurtured and community-led, in partnership with governments.

²⁷ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Reform Project — Volume 2* (2007) 25 (*From Hand Out to Hand Up: Volume 2*).

²⁸ Cape York Institute for Policy and Leadership, *From Hand Out to Hand Up: Cape York Welfare Reform Project — Design Recommendations* (2007) 7, 20 (*From Hand Out to Hand Up: Design Recommendations*).

²⁹ *Ibid* 20.

³⁰ *From Hand Out to Hand Up: Volume 2*, above n 27, 25.

³¹ *Ibid* 197. See also *From Hand Out to Hand Up: Design Recommendations*, above n 28, 17.

³² GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (2007) (*UNDRIP*). See Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm>.

³³ Kevin Rudd announced that the Commonwealth government’s strategy involved partnerships ‘based on mutual respect and mutual responsibility’ at a Labor Cabinet meeting in Yirrkala: ‘PM to Consider Indigenous Rights Recognition in *Constitution*’, *World News Australia* (online), 23

The popular colonial myth at the turn of the 20th century was that, if left to their own devices, Aboriginal women and children would have a future of vagabondage and harlotry; consequently, intrusive measures for their protection and control were justified. The view prevailing within federal governments since 21 June 2007 is that children and women in remote communities cannot be left to the devices of their communities and that radical, invasive solutions are warranted.³⁴ This view is supported by some commentators: for example, Stephanie Jarrett has argued that separation from the identity of mainstream Australian society, heralded by self-determination, may reinforce patterns of violence against Aboriginal women.³⁵ However, Marcia Langton, who believed the intervention was necessary to tackle child abuse in the NT and is critical of those who perceive the child abuse claims as a fantasy,³⁶ acknowledged that the failure to consult with Aboriginal people undermined the government's claim that the intervention was a 'special measure'.³⁷

From 2006 to 2007, Aboriginal men were often represented in the media as 'feckless'³⁸ in a manner similar to early colonial representations of Indigenous people. One hundred years ago, men of mixed race living on reserves in New South Wales were described as a menace and a bad example to children, gambling away their earnings and living off the rations of others.³⁹ Today, opinions divide sharply over whether or not remote communities are crucibles of despair for women and children, rife with child sexual abuse. Whether the alleged scale of Aboriginal child exploitation is a modern myth, sustaining a new era in Aboriginal law and policy, remains unclear.⁴⁰ Paul Toohey suggests that the

July 2008 <<http://www.sbs.com.au/news/article/552526/PM-to-consider-Indigenous-rights-recognition-in-Constitution>>.

³⁴ See generally Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 1–25 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

³⁵ Stephanie Jarrett, "'This Is as Much as We Can Do': Aboriginal Domestic Violence" in Gary Johns (ed), *Waking Up to Dreamtime: The Illusion of Aboriginal Self-Determination* (2001) 102, 116. Cf Carmen Lawrence, 'A National Disgrace: Violence against Women and Children in Indigenous Communities' (2006) 30(5) *Aboriginal and Islander Health Worker Journal* 29, 33, where the author stresses the importance of self-determination and Indigenous involvement in finding solutions to violent communities.

³⁶ See Patricia Karvelas, 'PM Puts Price on Children: Langton', *The Australian* (Sydney), 5 March 2009, 1.

³⁷ Marcia Langton, 'Optional Intervention Gives Choice', *The Australian* (Sydney), 16 October 2008, 12. 'Special measures' are excluded from the operation of the *Racial Discrimination Act 1975* (Cth) ('RDA'): see below nn 141–8 and accompanying text. Evidently, child neglect in some Indigenous communities across Australia is a pressing issue: see, eg, Janet Stanley, Adam M Morison and Julian Pocock, 'Child Abuse and Neglect in Indigenous Australian Communities' (Child Abuse Prevention Issues No 19, Australian Institute of Family Studies, 2003) <<http://www.aifs.gov.au/nch/pubs/issues/issues19/issues19.pdf>>. What is contested is the scale of the problem and the propriety of a top-down response.

³⁸ See, eg, W E H Stanner, *The Dreaming and Other Essays* (2009) 260.

³⁹ Anna Doukakis, *The Aboriginal People, Parliament and 'Protection' in New South Wales 1856–1916* (2006) 97, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 December 1909, 4550 (Robert Donaldson).

⁴⁰ The number of people arrested or summonsed for sexual abuse offences against children in Aboriginal communities subject to the intervention decreased from 39 in 2006–07 to 26 in 2007–08: *Report of the NTER Review Board*, above n 7, 116. The NT police reported that, as at 23 June 2008, three convictions for child abuse offences had been secured with four matters

intervention was ‘marketed’⁴¹ as a child sex intervention and that the *Little Children Are Sacred Report* was the peg on which the government could hang its politics — an opportunistic approach to Indigenous policy-making with resultant dilution of Aboriginal land rights and control over service delivery.⁴²

III SAFEGUARDING THE WELLBEING OF CHILDREN

The legislation that comprised the emergency response was passed in response to the findings in the *Little Children Are Sacred Report*, which highlighted the need for urgent action to protect Aboriginal children in some communities from sexual abuse.⁴³ Importantly, it was noted in the report that there was ‘nothing new or extraordinary’⁴⁴ in the allegations of sexual abuse of Aboriginal children that were made throughout the course of the inquiry. Indeed, the findings of the report, it was said, serve as a reminder that child sexual abuse is an under-acknowledged problem in the communities and amongst all races in Australia, particularly amongst those who experience multiple forms of disadvantage such as poverty, housing shortages, drug and alcohol misuse, and other health difficulties.⁴⁵ The report also stated that the sexual abuse of Aboriginal children is not necessarily endemic; rather, the number of perpetrators is small, and there are some communities with no problems at all.⁴⁶ It was repeatedly stressed in the report that the sexual abuse of children is being perpetrated by a range of offenders, of both Aboriginal and non-Aboriginal descent.⁴⁷

A Parliamentary Scrutiny of the Commonwealth’s Intervention

Shortly after the publication of the *Little Children Are Sacred Report*, the federal government announced emergency measures on 21 June 2007,⁴⁸ claiming that they were ‘confronted with a failed society where basic standards of law and order and behaviour [had] broken down and where women and children [were] unsafe’.⁴⁹ Animated by a desire to protect Aboriginal children from neglect and

pending before the courts: Northern Territory Police, Fire and Emergency Services, ‘Taskforce Themis — One Year On’ (Press Release, 23 June 2008) <<http://www.nt.gov.au/pfes/index.cfm?fuseaction=viewMediaRelease&pID=8500&y=2008&mo=6>>.

⁴¹ Paul Toohey, ‘Last Drinks: The Impact of the Northern Territory Intervention’ (2008) 30 *Quarterly Essay* 1, 40.

⁴² *Ibid* 39, 45–7.

⁴³ *Little Children Are Sacred Report*, above n 3, 7. The timing of the intervention, just a few months before the federal election, casts a shadow upon the benign reasons given for the government’s response and begs the question whether the emergency was manufactured to boost poll ratings — was it John Howard’s *Tampa* for 2007?

⁴⁴ *Ibid* 5.

⁴⁵ *Ibid* 5–6.

⁴⁶ *Ibid* 6.

⁴⁷ See, eg, *ibid* 5, 57, 61, 64–5, 68.

⁴⁸ Mal Brough, ‘National Emergency Response to Protect Aboriginal Children in the NT’ (Press Release, 21 June 2007) <http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm>.

⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 10 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

widespread sexual abuse, in recognition of Australia's international law obligations,⁵⁰ and owing to a perception that reasonable expenditure on Indigenous affairs since the 1970s had not improved the situation,⁵¹ a suite of Bills was presented to Parliament.⁵² The legislation received Royal Assent on 17 August 2007, barely two months after the public release of the *Little Children Are Sacred Report*.⁵³ The Senate Standing Committee on Legal and Constitutional Affairs had been afforded just six days to scrutinise the proposals and finalise their deliberations.⁵⁴ Given the complexity of the legislative package, the limited time for parliamentary scrutiny signalled contempt for the parliamentary process and was inimical to a transparent and thorough debate. The failure to consult with primary stakeholders amounted to a rejection of the first recommendation in the *Little Children Are Sacred Report*.⁵⁵

B *The Legislative Framework*

The NT intervention was framed as advancing the human rights of Indigenous peoples and implementing Australia's obligations under human rights treaties.⁵⁶ Dr Sue Gordon, the Chairperson of the Northern Territory Emergency Response ('NTER') Taskforce, explained to the Senate Standing Committee on Legal and Constitutional Affairs⁵⁷ how various aspects of the legislation relate to the

⁵⁰ Importance was attributed to the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC') and the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'): see, eg, Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth) 1; Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 2.

⁵¹ See, eg, *From Hand Out to Hand Up: Design Recommendations*, above n 28, 20–1; *Report of the NTER Review Board*, above n 7, 55, commenting on the advent of self-determination.

⁵² Initial expenditure on the emergency response was \$587 million (announced on 21 June 2007) with an additional allocation of \$313.5 million in February 2008 and \$323.8 million to continue the intervention over the 2008–09 financial year: NTER Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Final Report to Government* (2008) 14 ('*NTER Taskforce Report*') <<http://www.fahcsia.gov.au/about/news/2008/pages/nterfinalreport.aspx>>; *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007–08* (Cth) s 6; *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007–08* (Cth) s 6.

⁵³ The report was completed by April 2007 but was publicly released by the Northern Territory government on 15 June 2007: *Little Children Are Sacred Report*, above n 3, 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (2008) 209 ('*Social Justice Report*').

⁵⁴ *Social Justice Report*, above n 53, 211. See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills Concerning the Northern Territory National Emergency Response* (2007) <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/report/index.htm>.

⁵⁵ *Little Children Are Sacred Report*, above n 3, 22 (recommendation 1).

⁵⁶ Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth) 1–2.

⁵⁷ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 August 2007, 77–9 (Sue Gordon, Chairperson, NTER Taskforce).

requirements of the *Convention on the Rights of the Child*.⁵⁸ She drew particular attention to art 3(2) (ensuring child protection and care as is necessary for their wellbeing) and art 6 (right to life and development). Moreover, she relied on art 19(1), which provides that governments ‘shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’.⁵⁹ Other related socioeconomic rights include the right to ‘the highest attainable standard of health ... [and equal access to] health care services’,⁶⁰ the right to ‘benefit from social security’,⁶¹ the right to an adequate standard of living⁶² and the right to education.⁶³ In furtherance of these objectives, Australia’s international treaty obligations in relation to eliminating racial discrimination were suspended.⁶⁴

The *Northern Territory National Emergency Response Act 2007* (Cth) (*‘NTNER Act’*) enabled fundamental changes to be made in respect of certain Aboriginal communities in order to improve their wellbeing.⁶⁵ Provision was made for widespread alcohol restrictions⁶⁶ to reduce the vulnerability of women and children to physical attacks fuelled by grog.⁶⁷ The use of publicly funded computers was regulated to preclude their usage for viewing adult material.⁶⁸ Premised upon a link between adequate housing and child safety, native title to land in certain areas was suspended,⁶⁹ allowing the government to compulsorily acquire five-year leases over Aboriginal land, community living areas and other places.⁷⁰ This enabled the government to have unconditional access to land to make building and infrastructure repairs, and also to facilitate home ownership by giving directions to community services entities.⁷¹ Moreover, the government also assumed powers to terminate or resume leases in relation to town camps and the option of acquiring a freehold interest over these areas.⁷² A further aspect of the government’s ‘integrated’ approach to addressing (so-called) dysfunctional communities was the appointment of Government Business Managers (*‘GBMs’*)

⁵⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁵⁹ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 August 2007, 77–9 (Sue Gordon, Chairperson, NTER Taskforce).

⁶⁰ *CRC* art 24(1).

⁶¹ *CRC* art 26(1).

⁶² *CRC* art 27(1).

⁶³ *CRC* art 28.

⁶⁴ See below nn 141–8 and accompanying text.

⁶⁵ *NTNER Act* s 5.

⁶⁶ *NTNER Act* pt 2.

⁶⁷ Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007 (Cth) 12.

⁶⁸ *NTNER Act* pt 3.

⁶⁹ *NTNER Act* s 51; see generally pt 4 div 3.

⁷⁰ *NTNER Act* pt 4 div 1.

⁷¹ Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007 (Cth) 26, 76–7.

⁷² *NTNER Act* pt 4 div 2.

to assist local people in the administration of government services and the implementation of emergency measures in ‘business management areas’.⁷³

Accompanying the principal legislation, the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) (‘SSOLA Act’) provided for a regime applicable to welfare recipients in prescribed communities in the NT⁷⁴ and, beyond the site of the emergency, laid the foundation for a pilot scheme in four Cape York communities.⁷⁵ It also established three national schemes for conditioning welfare support.⁷⁶ The unifying rationale was to ‘promote socially responsible behaviour aimed at protecting and nurturing the children’.⁷⁷

The third cognate statute, the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (‘FCSIA Act’), facilitated the emergency response by placing prohibitions on the possession and distribution of pornographic material in prescribed NT communities,⁷⁸ in order to reduce the exposure of children to such material. Additional powers were given to the police to implement the ban. The *FCSIA Act* invested new powers in the Australian Crime Commission (‘ACC’) to improve child welfare.⁷⁹ These initiatives, along with increased policing in the NT, represented the law and order dimension of ‘normalising’ communities. Two other aspects of the statute effecting changes to Aboriginal-owned and -controlled land are more indirectly linked to the idea of child protection. Fiscal concerns were an impetus behind the amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth),⁸⁰ which invested the federal and NT governments with an extensive statutory interest in Aboriginal land on which public money had been expended on construction and renovation of both buildings and infrastructure, including services such as water, gas and sewerage.⁸¹

Moreover, the permit system, enabling the traditional owners of Aboriginal land to control access to all land held under the *Aboriginal Land Rights (North-*

⁷³ *NTNER Act* pt 5 div 4; *Report of the NTER Review Board*, above n 7, 114. Regarding GBMs, see *Report of the NTER Review Board*, above n 7, appendix 15.

⁷⁴ *SSOLA Act* s 123TD.

⁷⁵ See below nn 244–53 and accompanying text.

⁷⁶ *Social Security (Administration) Act 1999* (Cth) s 123TA, inserted by *SSOLA Act* sch 1 item 17. *SSOLA Act* sch 1 item 17 provides for two ‘local’ schemes of income management — in the NT (‘prescribed communities’) and Cape York. Additionally, a person could be subject to income management if they fall within three other categories outlined in sch 1 item 17. Unlike the two ‘local’ schemes, the legislation does not place geographic limitations on their potential application. See also below n 232.

⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 2 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

⁷⁸ *FCSIA Act* sch 1.

⁷⁹ *FCSIA Act* sch 2 pt 1.

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 19–20 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

⁸¹ *FCSIA Act* sch 3.

ern Territory) Act 1976 (Cth), was changed.⁸² Significantly, members of the public no longer required permits to enter ‘common areas’ of 52 communities and the major access routes to those areas.⁸³ The government claimed that the permit system required revision because it had placed the problem of child abuse and antisocial behaviour beyond public scrutiny.⁸⁴ However, stimulating economic activity on Aboriginal land appears a more likely candidate as the chief policy driver in this regard.⁸⁵

C *The Emergency Response and Constitutionalism*

Not only was the legislation rushed through Parliament, but additionally many aspects of the interventions in the NT and Queensland weaken constitutionalism — the touchstone of the institutional legitimacy of the state. The separation of powers and rule of law are undermined by the emergency legislation, which contains: inappropriately delegated legislative powers; legislative powers that are put beyond the reach of parliamentary accountability; King Henry VIII clauses; restrictions on merits review; and retrospective provisions (relevant examples are discussed below). Safeguarding constitutional principles received diminished importance because of the ‘emergency’ nature of the measures.⁸⁶

A notable accountability deficit vis-à-vis the administration of the law is evident in the terms of the land reforms, which invest considerable power in the hands of the executive. The *NTNER Act* declared that wide-ranging ministerial determinations and notices issued in relation to the federal government’s acquisition of five-year leases over Aboriginal land, community living areas and some other specified areas are outside the scope of the *Legislative Instruments Act 2003* (Cth).⁸⁷ This means that important decisions affecting people’s property rights are not scrutinised by Parliament.⁸⁸ So too in relation to town camps where

⁸² *FCSIA Act* sch 4.

⁸³ *FCSIA Act* ss 70B, 70F.

⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 20–1 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

⁸⁵ See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 20 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs). The NTER Review Board concluded that there was no persuasive evidence to support the repealing of the permit system and recommended its reinstatement: *Report of the NTER Review Board*, above n 7, 41.

⁸⁶ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 9 of 2007, 13 August 2007, 11 <<http://www.aph.gov.au/senate/committee/scrutiny/alerts/2007/d09.doc>>.

⁸⁷ *NTNER Act* ss 34(9), 35(11), 37(5); *Legislative Instruments Act 2003* (Cth) s 7(1)(b). But see *NTNER Act* s 36(5), which renders any additional terms of leases imposed by the Minister (beyond those contained in s 31) subject to extremely weak legislative scrutiny, by making them legislative instruments but removing them from the operation of disallowance provisions.

⁸⁸ The Minister can, for example, vary the terms of an acquired lease, if done in writing to the owner: *NTNER Act* ss 35(6), (8). The Minister may also terminate in writing any pre-existing right, title or interest in land in relation to which a five-year lease has been acquired: ss 37(1), (3). These notices do not constitute legislative instruments: ss 35(11), 37(5). Consequently, they are not subject to parliamentary scrutiny: *Legislative Instruments Act 2003* (Cth) ss 7(1)(b), 38, 42.

the leases are taken over by — and land rights, interests and titles vested in — the government.⁸⁹ These decisions are put beyond political accountability mechanisms and are simultaneously excluded from merits review by the Administrative Appeals Tribunal ('AAT') on the basis that this would compromise the timely administration of the emergency response.⁹⁰ Consequently, only the more restricted avenue of judicial review is available as a means of checking these important powers.

Another feature of the land reforms is the frequent use of Henry VIII clauses,⁹¹ enabling the use of regulations to modify primary legislation.⁹² This delegation of legislative power to the executive is concerning, especially in the absence of a reasonable justification. The marginalisation of Parliament as primary legislator is further evidenced by instances of legislation by press release.⁹³ Parts of the welfare reforms operated from 21 June 2007,⁹⁴ the date the emergency response was announced, and others from 9 July 2007,⁹⁵ flowing on from ministerial announcements about the rollout of the emergency response. '[T]hat persons arrange their affairs in accordance with such announcements rather than in accordance with the law tends to undermine the principle that the law is made by Parliament, not by the executive.'⁹⁶

Ministerial determinations of NT areas as relevant for the purposes of the income management regime, by legislative instrument, are not disallowable by Parliament.⁹⁷ The lack of accountability was explained away on the basis that the welfare management regime was 'a matter of significant government policy',⁹⁸ hardly a convincing reason to dispense with the established mechanisms of parliamentary scrutiny in respect of powers curtailing individual rights and autonomy. The absence of review rights before either the Social Security Appeals Tribunal or the AAT in relation to the administration of the welfare reforms in the NT is also striking. Decisions made in relation to those subject to the income management regime are classed as non-reviewable by the Social Security

⁸⁹ For example, where the Minister notifies the NT government that, in relation to a town camp area, land has either been resumed or a lease forfeited, such notification is not a legislative instrument: *NTNER Act* ss 47(1)–(2), (7).

⁹⁰ See, eg, Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007 (Cth) 63, 66–8. The AAT can review decisions only if an Act specifically provides that a decision is subject to review by the Tribunal.

⁹¹ See Senate Standing Committee for the Scrutiny of Bills, above n 86, 21–2.

⁹² For example, *NTNER Act* s 64 permits the use of regulations to modify sch 1 pt 4 'by omitting land referred to in that Part'.

⁹³ See, eg, Senate Standing Committee for the Scrutiny of Bills, above n 86, 32–4, commenting on *SSOLA Act* ss 6(1)(a), 7(1)(a).

⁹⁴ *Social Security (Administration) Act 1999* (Cth) ss 123UB(1)(b)(i), (2)(d)(i), inserted by *SSOLA Act* sch 1 item 17.

⁹⁵ *SSOLA Act* ss 6(1)(a), 7(1)(a).

⁹⁶ Senate Standing Committee for the Scrutiny of Bills, above n 86, 32.

⁹⁷ *SSOLA Act* sch 1 item 17, inserting pt 3B (specifically ss 123TE(13)–(14)) into the *Social Security (Administration) Act 1999* (Cth).

⁹⁸ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 12.

Appeals Tribunal under the *Social Security (Administration) Act 1999* (Cth).⁹⁹ Denying access to justice was justified on the basis that it would compromise the efficient administration of the scheme.¹⁰⁰ Judicial review before the Federal Court is a distant option for most Aboriginal people in remote communities.

Comparisons can be drawn between the intervention's concentration of power in the executive branch without checks and balances and the 'protective' governance framework of a century ago. Primary legislation and broad regulation-making powers invested enormous discretion in the executive over the lives of Indigenous peoples with correspondingly few and relatively weak accountability mechanisms. The character of discretionary powers contained in primary legislation can be illustrated by *Aboriginals Ordinance 1911* (NT) s 3(1), which provided that 'the Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste if in his opinion it is necessary or desirable ... for him to do so.'¹⁰¹ Such provisions were commonplace throughout the protectionist era with limited political oversight. Accountability might consist of annual reporting requirements incumbent upon officialdom and, more commonly, public expenditure on Aboriginal welfare was subject to audit.¹⁰² Mechanisms to challenge the application of the law were almost non-existent.

The *Aborigines Act 1934–39* (SA) appears unique among protectionist instruments in providing for an appeal in relation to the administration of the exemption provisions in the Act. An Aboriginal person could challenge either a refusal to declare them exempt from the Act, or the revocation of such a declaration, before a special magistrate.¹⁰³ It is a striking, if not surprising, feature of the *Aboriginals Ordinance 1918* (NT) that commercial interests were given a degree of protection. The administration of the prohibition on mining on Aboriginal reserves entailed a form of internal merits review, enabling those holding a 'miners' right' to appeal to the NT Administrator against the decision of a Protector to refuse a mining permit.¹⁰⁴

⁹⁹ *Social Security (Administration) Act 1999* (Cth) s 144(ka). Consequently, there is no right of appeal to the AAT: see *Social Security (Administration) Act 1999* (Cth) s 179(1). However, such decisions will soon be reviewable: see Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2009 (Cth) sch 2 item 1, seeking to repeal *Social Security (Administration) Act 1999* (Cth) s 144(ka).

¹⁰⁰ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 12.

¹⁰¹ The reach of this provision was extended by *Aboriginals Ordinance 1918* (NT) s 6(1), enabling the Chief Protector to enter premises for the purpose of securing the care, custody and control of an Aboriginal person. See also *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 5, amending *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 4(d): a half-caste person who, in the opinion of the Minister, was insufficiently intelligent to manage their own affairs was deemed Aboriginal and therefore subject to the jurisdiction of the protective legislation.

¹⁰² See, eg, *Aborigines Protection Act 1886* (WA) ss 12, 14; *Aboriginals Preservation and Protection Act 1939* (Qld) s 6(2). The NT Chief Protector appears to have been free of any reporting requirements.

¹⁰³ *Aborigines Act 1934–39* (SA) s 11a(4).

¹⁰⁴ *Aboriginals Ordinance 1918* (NT) s 21(2).

Broadly defined administrative powers removing people's autonomy were features of regulations in the protectionist era. Regulation-making powers were granted where 'convenient for the administration' of the legislation, where 'necessary or expedient to carry out the objects and purposes of such Acts'¹⁰⁵ or to supply an omission or insufficiency of the legislation in order to give effect to the Acts.¹⁰⁶ The powers to make regulations specifically covered, inter alia: entry onto or removal from reserves; care, custody and education of Aboriginal children; mode of supply of welfare (rations, blankets or other relief) and medical support; control and inspection of Aborigines on a reserve; and imposition of summary punishment upon Aborigines found guilty of ill-discipline on reserves.¹⁰⁷ While the regulatory framework of the NT intervention is characterised by an absence of parliamentary oversight over delegated instruments, this was not true of all the protectionist legislation. Queensland aside,¹⁰⁸ several of the states provided for regulations to be laid before the legislature and subject to disallowance.¹⁰⁹ Queensland was also atypical in its employment of a King Henry VIII clause.¹¹⁰

Post-protectionism, the excessive delegation of broad controls over Aboriginal welfare to the executive and the corresponding conferral of regulatory powers — with limited political oversight — continued. Accordingly, the powers of control exerted by the Director of Welfare under the *Welfare Ordinance 1953–60* (NT) in relation to 'wards' were comparable with the discretionary powers invested in the Chief Protector during the protectionist period.¹¹¹ In furtherance of 'their economic and social assimilation by the community of the State',¹¹² the Minister and Department of Native Welfare of Western Australia were invested with wide

¹⁰⁵ See, eg, *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 26. See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 12; *Aboriginals Ordinance 1918* (NT) s 67.

¹⁰⁶ See, eg, *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 26.

¹⁰⁷ *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 31, which was reflected in the terms of *Aborigines Act 1905* (WA) s 60. See also *Aboriginals Ordinance 1918* (NT) s 67.

¹⁰⁸ *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 32; *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) ss 27, 38(2) (ouster clauses); *Aboriginals Preservation and Protection Act 1939* (Qld) s 13, which reiterated the earlier ouster clause providing that the publication of the Proclamation, Order in Council or regulation shall be conclusive of the power and authority to make them.

¹⁰⁹ See, eg, *Aborigines Protection Act 1909* (NSW) s 20(2)(iii): regulations were laid before Parliament and subject to disallowance by resolution of either House of Parliament. *Aborigines Act 1911* (SA) s 39 also provided that the regulations were to be laid before Parliament and subject to disallowance within 14 days. Subsequently, no provision for parliamentary scrutiny of regulations was made: see *Aborigines Act 1934–39* (SA) s 42. In WA, the legislation required simply that regulations were to be 'laid before both Houses of Parliament within fourteen days' of publication in the *Government Gazette: Native Administration Act 1905–36* (WA) s 69. In the NT, the Commonwealth Minister could disallow regulations made for the purposes of the Act by the NT Administrator: *Aboriginals Ordinance 1918* (NT) s 67(3).

¹¹⁰ *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 34 permitted the alteration and amendment of the schedule to the Act by Order in Council.

¹¹¹ See *Welfare Ordinance 1953–60* (NT) pt III; see especially ss 17, 25–9, pt IV. Cf *Social Welfare Ordinance 1964* (NT) s 10.

¹¹² *Native Welfare Act 1963* (WA) s 7(f).

regulatory powers over ‘natives’.¹¹³ Neither the Director of Welfare nor the Commissioner of Welfare in the NT or WA respectively was under a duty to provide an annual report on the administration of the law. However, in the application of Queensland’s assimilation statute,¹¹⁴ the Director of Aboriginal and Island Affairs was required to report annually through the Minister to the Legislative Assembly and the management of assisted persons’ property was audited.¹¹⁵

Legal controls, so conspicuously absent from protectionist legislation, were present during the assimilation era. The NT Wards Appeal Tribunal, constituted by a judge, had jurisdiction to conduct merits review and to hear claims by wards for the revocation of declarations made under the *Welfare Ordinance 1953–60* (NT) on specified grounds.¹¹⁶ In Queensland, a Stipendiary Magistrate could hear a reference made by an ‘assisted’ person about the unlawful application of the *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld) (*ATSIA Act*).¹¹⁷ Stipendiary Magistrates also oversaw the exercise of officials’ discretion regarding the ongoing management of assisted peoples’ property and decisions about the transfer of assisted persons to and from reserves.¹¹⁸

The scope of delegated assimilation powers during the assimilation era also chimed with the protectionist period, with the Queensland Governor-in-Council given powers ‘necessary, desirable or convenient’ for carrying the *ATSIA Act* into effect or for ‘better achieving the objects and purposes of [the] Act’,¹¹⁹ as well as a host of specific powers¹²⁰ relating to, inter alia: the ‘preservation, development, assimilation, integration, education, training and employment of assisted Aborigines’;¹²¹ ‘health and medical treatment’;¹²² ‘inspection of reserves’;¹²³ the granting of, and conditions upon, aid (money or in kind) given;¹²⁴ and the establishment of trust funds for the management and control of property and the estates of deceased or missing persons.¹²⁵ The Governor-in-Council could also micro-manage assisted persons so as to exclude the application of a regulation in cases specified in ‘special rules’.¹²⁶ Such rules, regulations and Orders in Council were, in a break with the past, subject to a degree of legislative scrutiny

¹¹³ *Native Welfare Act 1963* (WA) ss 5, 7, 11, 18–20, 23.

¹¹⁴ *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld) ss 27–31, 34 (*ATSIA Act*) provided that ‘assisted Aborigine[s]’ could have their property and estates managed and could be transferred to and from reserves.

¹¹⁵ *ATSIA Act* ss 10(6), 28(4). See also *Aborigines Act 1971* (Qld) s 14. *Native Welfare Act 1963* (WA) ss 35–6 made the Department of Native Welfare subject to audit and oversight.

¹¹⁶ *Welfare Ordinance 1953–60* (NT) pt 3 div 4, later amended by *Welfare Ordinance 1961* (NT) s 14.

¹¹⁷ *ATSIA Act* s 25.

¹¹⁸ *ATSIA Act* ss 29, 35.

¹¹⁹ *ATSIA Act* s 60.

¹²⁰ *ATSIA Act* s 60. Section 60 enumerated 38 specific regulation-making powers.

¹²¹ *ATSIA Act* s 60(4).

¹²² *ATSIA Act* s 60(5).

¹²³ *ATSIA Act* s 60(8).

¹²⁴ *ATSIA Act* s 60(12).

¹²⁵ *ATSIA Act* s 60(16).

¹²⁶ *ATSIA Act* ss 61, 62(2).

through provision for tabling and disallowance.¹²⁷ In contrast, the regulations made pursuant to the *Welfare Ordinance 1953–60* (NT) and the *Native Welfare Act 1963* (WA) were not even subject to the process of simply being laid before the legislature.

Thus, the eras of protectionism and assimilation were a mixed bag in terms of political and legal accountability mechanisms, although affording individuals access to justice is a discernible development in the latter period. Fifty years on, in an era with more sophisticated and established systems of administrative review within Australia, it is all the more remarkable that people subject to income management in the NT should be denied access to merits review.¹²⁸ Equally, transparency and accountability are not hallmarks of executive determinations in relation to the compulsory acquisition of Aboriginal land via five-year leases, which are beyond the reach of the *Legislative Instruments Act 2003* (Cth) and merits review.¹²⁹

IV RACIAL DISCRIMINATION

Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well-being of these communities ...¹³⁰

Historically, the ‘comparative backwardness’ of the Aboriginal population was the construct used to justify different treatment under the law.¹³¹ Assimilation, while not predicated upon the racial inferiority of Aboriginal peoples, was intended to secure their ‘advancement’ so they could live like white Australians.¹³² The first measure of separate legal control over Queensland’s Aboriginal people was the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), and it provided the model for state paternalism throughout most of Australia for much of the 20th century.¹³³ In contrast, the legislation implement-

¹²⁷ *ATSIA Act* s 63.

¹²⁸ Note, though, that this restriction will soon be removed: see above n 99.

¹²⁹ See above nn 87–90 and accompanying text.

¹³⁰ *Social Justice Report*, above n 53, 248.

¹³¹ Diana Henriss-Anderssen, ‘The “Stolen Generation” in Queensland: A Critical Perspective’ (2002) 11 *Griffith Law Review* 286, 296. See also Christina Twomey, ‘Vagrancy, Indolence and Ignorance: Race, Class and the Idea of Civilization in the Era of Aboriginal “Protection”, Port Philip 1835–49’ in Tracey Banivanua Mar and Julie Evans (eds), *Writing Colonial Histories: Comparative Perspectives* (2002) 93. This general perception of Indigenous people is vividly illustrated by the *Aborigines Act 1934–39* (SA) s 11a(1), which enabled the Protection Board to exempt Aborigines from the Act where, in their estimation, their character and standard of intelligence warranted it. Further, in order to obtain citizenship rights an Aboriginal person had to establish that they were a fit and proper person and satisfy a Magistrate that they had the manner and habits of civilized life: see, eg, *Natives (Citizenship Rights) Act 1944* (WA) ss 4–5.

¹³² During the assimilation era, exemption from the legislative controls required people to demonstrate that they had given up traditions and communal associations and prove that they could manage in ‘white’ Australia: see, eg, *Welfare Ordinance 1953–60* (NT) s 32; *Aboriginal Affairs Act 1962* (SA) s 17(2).

¹³³ The *Industrial and Reformatory Schools Act 1865* (Qld) established a separate system of welfare for Aboriginal children in which ‘neglect’ was synonymous with Aboriginality: s 6(7). The Act was amended in 1906 and the reference to Aboriginal children was removed: see Ian O’Connor,

ing the object of assimilation in the NT was not intended to be race-based.¹³⁴ However, indirect discrimination transpired because of the minutiae of these laws and the manner of their application. The use of the term ‘ward’ in the *Welfare Ordinance 1953–60* (NT) implied a neutral concern for the welfare of all those in need of assistance, but the exemption of those entitled to vote from the jurisdiction of the wardship system meant it was almost confined to Aboriginal people in its application.¹³⁵ Moreover, people who came into the NT from other neighbouring states were automatically rendered wards if they were persons controlled by specified state Acts.¹³⁶ At the time, those Acts were race-based, thereby colouring the purported race-neutrality of the *Welfare Ordinance 1953–60* (NT).

Similarly, the welfare of Aboriginal children across Australia was regulated by legislation that was, on its face, of general applicability. The *Child Welfare Ordinance 1958* (NT) handed responsibility to the Director of Child Welfare for the care, management and control of every state child, and provided that welfare officers, police officers or other authorised personnel could ‘take into custody a child appearing or suspected by him to be ... destitute, neglected, incorrigible or uncontrollable.’¹³⁷ The *Children’s Services Act 1965* (Qld) also invested enormous discretion in the authorities to deem individuals in need of state care and protection, where, in the absence of a proper caregiver, they were ‘neglected’ or ‘exposed to physical or moral danger’ (among many other reasons).¹³⁸ The malleable terms of these instruments, relative impoverishment of Aboriginal children and white sociocultural assumptions about child-rearing meant that legislation intended to further the best interests of *any* child operated in a discriminatory fashion, resulting in public authorities assuming legal responsibility for Aboriginal children at much greater rates than non-Indigenous children.¹³⁹

‘Aboriginal Child Welfare Law, Policies and Practices in Queensland: 1865–1989’ (1993) 46(3) *Australian Social Work* 11, 12.

¹³⁴ The states did not omit racial references from their legislation during the assimilation era. Paul Hasluck, Commonwealth Minister for Territories from 1951 to 1963, was initially attracted to the idea of biological absorption as a solution to the ‘Aboriginal problem’. Subsequently he viewed it as supplementing cultural assimilation: Cora Thomas, ‘From “Australian Aborigines” to “White Australians”’ (2001) 1 *Australian Aboriginal Studies* 21, 31.

¹³⁵ *Welfare Ordinance 1953–60* (NT) s 14(2), considered in *Namatjira v Raabe* (1959) 100 CLR 664, 667–9 (Dixon CJ for Dixon CJ, McTiernan, Fullagar, Kitto and Windeyer JJ). Section 14(2)(c) was later amended by *Welfare Ordinance 1961* (NT) s 5.

¹³⁶ *Welfare Ordinance 1953–60* (NT) s 15. For a discussion of this see John Chesterman and Heather Douglas, ‘Law on Australia’s Northern Frontier: The Fall and Rise of Race’ (2009) 24(1) *Canadian Journal of Law and Society* 69, 74. See generally Russell McGregor, ‘Avoiding “Aborigines”’: Paul Hasluck and the Northern Territory *Welfare Ordinance, 1953*’ (2005) 51 *Australian Journal of Politics and History* 513, 520. *Welfare Ordinance 1953–60* (NT) s 15 was later amended by *Welfare Ordinance 1961* (NT) s 6.

¹³⁷ *Child Welfare Ordinance 1958* (NT) s 31; see also s 7; see generally pt V. In similar terms, see *Child Welfare Act 1947* (WA) ss 29–34.

¹³⁸ *Children’s Services Act 1965* (Qld) s 46; see also s 60, enabling the State to assume responsibility for the ‘care and control’ of a child on broad grounds. The police could arrest persons who, having responsibility for a child, were suspected of neglecting them by reason of the inadequate provision of food, clothing, lodging, etc: ss 69–70. See also *Child Welfare Act 1947* (WA) ss 29–34 (committal of destitute, neglected, incorrigible or uncontrollable children).

¹³⁹ See Henriss-Anderssen, above n 131, 301, 305.

In 2007, it was the alleged lack of normalcy (once more suggesting a lack of civility) in remote communities and town camps that denoted Aboriginal peoples' 'otherness', which in turn warranted separate legal norms and administration.¹⁴⁰ Key aspects of the emergency legislation and acts done pursuant to those statutes were deemed to be 'special measures'.¹⁴¹ That is, measures necessary for advancing Aboriginal peoples and ensuring their substantive equality. The special measures provision, s 8(1) in the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), gives effect to art 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*')¹⁴² and constitutes an exception to the non-discrimination norm.

As insurance, the 'emergency' provisions and their application were also excluded from the operation of *RDA* part II.¹⁴³ 'In essence, this is a statement that if the intervention measures do not qualify as special measures and are in fact racially discriminatory, then the protections of the *RDA* do not apply.'¹⁴⁴ The government's lack of conviction about the characterisation of the intervention as 'special measures' contributed to its decision to remove the protection of the *RDA* entirely. The government considered it was *obliged* to exclude the operation of the *RDA* in relation to provisions that authorised the management of property owned by Aboriginal persons. This was on the understanding that such provisions contravene *RDA* s 10(1) and cannot constitute 'special measures' for the purposes of that Act.¹⁴⁵ Furthermore, the government claimed it was necessary to suspend non-discrimination principles so that measures could be implemented without delay and uncertainty.¹⁴⁶ Certainly, the question of how the abstract 'special measures' principle is to be applied is not settled, either as a matter of domestic or international law. The importance attached by Brennan J in *Gerhardy v Brown* to the wishes of the beneficiaries of 'special measures' when

¹⁴⁰ Milnes has observed that WA's protection-based interventions in the early 20th century were designed to curtail perceived animalistic tendencies in Aboriginal people and to facilitate their education: Peter D Milnes, *From Myths to Policy: Aboriginal Legislation in Western Australia* (2nd ed, 2005) 42–6. This resonates with recent representations of the predatory behaviour of Aboriginal males: see, eg, observations made by Toohey, 'Last Drinks', above n 41, 3.

¹⁴¹ The federal government never substantiated this claim with precision. It is beyond the scope of this article to engage with the vexed question of whether aspects of the intervention do constitute special measures, but there would seem to be strong grounds for contesting such a characterisation: see, eg, *Social Justice Report*, above n 53, 262; see also at 259–65.

¹⁴² Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). *CERD* as a whole was 'approved' in *RDA* s 7. For an overview of other applicable and interconnected human rights treaty standards, see *ibid* 235–43.

¹⁴³ *NTNER Act* ss 132–3; *FCSIA Act* ss 4–5; *SSOLA Act* ss 4–6. NT and Queensland anti-discrimination laws were also suspended: *SSOLA Act* ss 5(2), (3).

¹⁴⁴ *Social Justice Report*, above n 53, 218.

¹⁴⁵ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 August 2007, 10–11 (Robyn McKay). Under *RDA* s 10(3), a law that authorises the management of property of an Aboriginal or a Torres Strait Islander without the owner's consent, or that restricts the termination of an agreement to manage the property of an Aboriginal or a Torres Strait Islander (and is not a law applicable to persons generally), is deemed to contravene s 10(1) and cannot be a special measure pursuant to s 8.

¹⁴⁶ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 August 2007, 10 (Anthony Field).

construing the legality of such measures,¹⁴⁷ was not treated with the same importance by Nicholson J in *Bropho v Western Australia*.¹⁴⁸

With no domestic avenue open to people to seek redress of their grievances due to the suspension of the *RDA*, the Prescribed Area People's Alliance — a group of Aboriginal people from the NT — brought a *Request for Urgent Action* to the United Nations Committee on the Elimination of Racial Discrimination.¹⁴⁹ The request sought to test the Commonwealth's understanding of the 'special measures' principle and to argue that several intervention measures were discriminatory. In reply, the Committee noted its concern about the suspension of the *RDA* and called upon the Australian government to report by 31 July 2009 on the progress it has made to reinstate the *RDA*.¹⁵⁰

V CONSULTATION AND COMMUNITY OWNERSHIP OF POLICY PLANNING AND IMPLEMENTATION

In Victoria in the late 1850s, William Thomas (Guardian of the Aborigines) placed great store in consulting with Aborigines in respect of the location of proposed reserves and other matters, a view based on observations about the failings of past schemes devised by white men.¹⁵¹ However, the protection and assimilation periods were characterised by the exclusion of Aboriginal voices. A feature of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) was that, although Aboriginal people were recognised as British subjects, the Aboriginal problem was 'solved over their heads'.¹⁵² Garth Nettheim was critical of Queensland's assimilation-driven legislation because of the lack of consultation with the state's Indigenous inhabitants about how best to promote wellbeing.¹⁵³ The first recommendation in the *Little Children Are Sacred Report* stressed the critical importance of consultation with Aboriginal

¹⁴⁷ (1985) 159 CLR 70, 135 (in dicta).

¹⁴⁸ [2007] FCA 519 (Unreported, Nicholson J, 13 April 2007) [569]–[570]. His Honour placed no weight on this aspect of Brennan J's judgment, observing that it was unsupported by other Justices and inconsistent with the general principles expressed in the case. Subsequently, the Full Federal Court did not readdress this question in *Bropho v Western Australia* (2008) 169 FCR 59. For a discussion of the principle of 'special measures', non-discrimination and women's rights, see Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7(10) *Indigenous Law Bulletin* 11.

¹⁴⁹ Jumbunna Research Unit, University of Technology Sydney (prepared by Ron Merkel, George Newhouse and Ben Schokman), *Request for Urgent Action under the International Convention on the Elimination of All Forms Racial Discrimination* [sic] (2009) <http://www.jumbunna.uts.edu.au/research/pdf/RequestforUrgentAction_28Jan09.pdf>. For an overview, see Peta MacGillvray, 'Aboriginal People, the United Nations and Racial Discrimination: The *Request for Urgent Action* in the Northern Territory' (2009) 7(10) *Indigenous Law Bulletin* 6.

¹⁵⁰ Letter from Fatimata-Binta Victoire Dah (Chairperson of the Committee on the Elimination of Racial Discrimination) to Caroline Millar (Australian Ambassador to the UN in Geneva), 13 March 2009 <<http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>>.

¹⁵¹ Foxcroft, above n 15, 117.

¹⁵² Reid, above n 20, 232. Similarly, in New South Wales, 'the voices of the Aborigines went unheeded' during the passage of the Aborigines Protection (Amending) Bill 1915 (NSW), which enabled the removal of children from camps: Doukakis, above n 39, 101.

¹⁵³ Garth Nettheim, *Victims of the Law: Black Queenslanders Today* (1981) 151.

people.¹⁵⁴ This and other recommendations of the report, including Aboriginal ownership over initiatives to address child sexual abuse,¹⁵⁵ reflected the ideology of the self-determination era. The report also noted that there is ‘sufficient evidence to show that well-resourced programs that are owned and run by the community are more successful than generic, short term, and sometimes inflexible programs imposed on communities’.¹⁵⁶

That the era of self-determination was founded upon the importance of deliberative democracy, a principle still formally endorsed during the Howard administration,¹⁵⁷ made the absence of consultation prior to the intervention that much more conspicuous. For many Aboriginal people, the top-down approach was repugnant, echoing failed and debilitating methods to arrest their ‘decline’ in the past. For others, the break from the deliberative approach was entirely defensible because community leaders did not address the problem of familial violence and child neglect over many years and had, therefore, forfeited their right to be part of the solution.¹⁵⁸ The Aboriginal and Torres Strait Islander Social Justice Commissioner has observed that the greatest irony in the government’s approach was ‘that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services!’¹⁵⁹ The manner of the intervention was the very antithesis of a partnership in policy formulation and administration, and appears to be contrary to *CERD*, which requires that decisions directly affecting the rights and interests of Indigenous peoples are made on the basis of informed consent.¹⁶⁰ In contrast, the creation and administration of a new statutory body in Queensland, the Family Responsibilities Commission,¹⁶¹ is

¹⁵⁴ *Little Children Are Sacred Report*, above n 3, 21–2 (recommendation 1). The importance of consultation and cooperation with Indigenous peoples in order to obtain free and informed consent to measures that may affect them is reflected in *UNDRIP* art 19. Without such consultation, the exercise of coercive political authority is illegitimate: see generally Steven Wheatley, ‘Indigenous Peoples and the Right of Political Autonomy in an Age of Global Legal Pluralism’ in Michael Freeman and David Napier (eds), *Law and Anthropology* (2009, forthcoming).

¹⁵⁵ *Little Children Are Sacred Report*, above n 3, 31 (recommendation 75).

¹⁵⁶ *Ibid* 53. This principle of ‘[c]ommunity-based and community-owned initiatives’ is number five of nine guiding principles for engagement with communities. The guiding principles are set out at 50–6.

¹⁵⁷ The manner of the intervention was at odds with an objective of *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 3(a): ‘to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them’.

¹⁵⁸ See Jenness Warin and James Franklin, ‘Remote Aboriginal Communities: Why the Trade in Girls and Other Human Rights Abuses Remain Hidden’ (Occasional Paper, The Bennelong Society, October 2007) 1.

¹⁵⁹ Tom Calma, ‘Continuity and Change through the New Arrangements — Lessons for Addressing the Crisis of Child Sexual Abuse in the Northern Territory’ (Speech delivered at the Launch of the Social Justice Report and Native Title Report 2006, Sydney, 3 July 2007) <http://www.humanrights.gov.au/about/media/speeches/social_justice/2007/continuity_change2007.html>.

¹⁶⁰ Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, Annex V para 4(d), UN Doc A/52/18 (1997) (‘*General Recommendation XXIII on the Rights of Indigenous Peoples*’), reflecting upon its examination of reports of states parties under *CERD* art 9.

¹⁶¹ See below nn 246–53 and accompanying text.

prima facie more in harmony with the underlying recommendation of the authors of the *Little Children Are Sacred Report*. The Queensland Premier sought to distinguish the intervention in Cape York from the federal intervention in the NT, with reference to community ownership of, and willing participation in, the income management trial.¹⁶²

VI GOVERNANCE

On 25 June 2007, the NTER Taskforce was established and charged with supervisory and advisory roles in relation to the management of the whole-of-government intervention, promoting transparency and public understanding of the issues, and accounting to the government about the implementation and progress of the measures.¹⁶³ The original taskforce had experience in areas such as health, government, law, education and business. On the ground, GBMs were installed as the face of the Australian government at the local community level; their multifaceted role embraced engagement with the community, coordination of the whole-of-government response, and reporting back to the Taskforce's operations centre.¹⁶⁴ Additionally, 'observers' were appointed to oversee community service entities in 'business management areas'.¹⁶⁵ This represents another attempt at placing Aboriginal communities under 'official' surveillance, and the supervision of Aboriginal people finds strong precedents in the past.¹⁶⁶

The presence of GBMs in NT communities today points back towards the visiting justices and travelling inspectors of yesteryear. In Queensland, the Governor-in-Council could appoint a Justice of the Peace ('JP') to be a visiting justice to a reserve for the inspection of the condition of Aboriginal people.¹⁶⁷ The JP was to inspect schools, hospitals, houses, etc and furnish a report to the Director of Native Affairs within seven days after the inspection of the condition of buildings, sanitation and accommodation, discipline, and general welfare of Aborigines on the reserve.¹⁶⁸ In the 1960s, little had changed: the Queensland

¹⁶² Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 332–3 (Anna Bligh, Premier).

¹⁶³ Mal Brough, 'NT Emergency Response Taskforce' (Press Release, 25 June 2007) <http://www.fahcsia.gov.au/internet/minister3.nsf/content/taskforce_25jun07.htm>.

¹⁶⁴ While the Taskforce has commented favourably on the role played by GBMs, they advocated the recruitment of local Indigenous community agents to facilitate engagement between government and communities: *NTER Taskforce Report*, above n 52, 16.

¹⁶⁵ *NTNER Act* pt 5 div 3.

¹⁶⁶ See, eg, *Aboriginals Ordinance 1918* (NT) s 5(1)(f) (which provided that the Chief Protector would 'exercise a general supervision and care over all matters affecting the welfare of the aboriginals'); *Native Administration Act 1905–36* (WA) s 6(6) (which gave the Department of Native Affairs general supervisory responsibilities over welfare). This continued via the instruments of assimilation: see, eg, *ATSIA Act* ss 10, 15; *Native Welfare Act 1963* (WA) s 7(f).

¹⁶⁷ *Aboriginals Preservation and Protection Act 1939* (Qld) s 10(1).

¹⁶⁸ *Aboriginals Preservation and Protection Act 1939* (Qld) s 10(2). Aboriginals in employment were subjected to inspection and inquiry by the protector or their delegate: s 14(7). Also, travelling inspectors examined the condition of people and management of Aboriginal institutions, reporting to the WA Commissioner of Native Affairs: *Native Administration Act 1905–36* (WA) s 7.

Director of Aboriginal and Torres Strait Islander Affairs was invested with broad investigatory powers and subjected to related reporting requirements, and officers and visiting justices could be appointed to oversee reserves.¹⁶⁹ The role of GBMs is central to the control over community governance arrangements sought by the Howard government as part of its departure from the principle of self-determination. The *NTNER Act* enables the government, inter alia, to vary and terminate funding for the provision of public services and management of community assets, and to ‘micromanage’ the provision of public service delivery and assets through ministerial directions to community councils where they are not being provided to the Minister’s satisfaction.¹⁷⁰ The GBMs are one of the conduits through which the Minister can ascertain whether a change to funding, micro-management or even the external administration of community service entities is warranted.¹⁷¹

The role of government inspector is also played by ‘men in black’ — the ACC — a body designed to tackle sophisticated organised crime across state and national borders and equipped with special coercive powers. Aboriginal communities were already under investigation by a special ACC taskforce to uncover perpetrators of violence and child abuse prior to the emergency response.¹⁷² The intervention was the harbinger of heightened surveillance over all Aboriginal communities by redefining a federally relevant crime to include ‘Indigenous violence or child abuse’ for the purposes of the ACC’s jurisdiction under the *Australian Crime Commission Act 2002* (Cth).¹⁷³ The extension of the ACC’s jurisdiction was predicated on claims made in mid-2006 that paedophile rings were operating in remote Aboriginal communities.¹⁷⁴ The ACC reported to Parliament that no evidence of paedophile rings had been found nearly one year into the intervention.¹⁷⁵

¹⁶⁹ *Aborigines Act 1971* (Qld) ss 11, 13; *ATSIA Act* pt II.

¹⁷⁰ *NTNER Act* pt 5.

¹⁷¹ While the problems that have beset local governance arrangements in the past are indisputable, such disempowerment of local councils seems unlikely to yield long-term solutions.

¹⁷² The National Indigenous Violence and Child Abuse Intelligence Task Force (‘NIITF’) was established in July 2006 for two years to gather intelligence. By September 2008, 124 communities and 35 towns across Australia had been visited yielding 1050 reports on, inter alia, child abuse, drug use and violence: Australian Crime Commission, *National Indigenous Violence and Child Abuse Intelligence Task Force (NIITF) — Special Intelligence Operation* <http://www.crimecommission.gov.au/our_work/determinations/niitf.htm>; Department of Families, Housing, Community Services and Indigenous Affairs (Cth), Submission No 203 to NTER Review, August 2008, appendix 1 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_review_submission/app1.htm>.

¹⁷³ The crime was defined in *Australian Crime Commission Act 2002* (Cth) s 4(1) as ‘serious violence or child abuse committed by or against, or involving, an Indigenous person.’ The ACC has coercive powers and may compel attendance at examinations, production of documents and the answering of questions: see pt II div 2. It has a range of investigative powers including the use of surveillance devices: *Surveillance Devices Act 2004* (Cth) ss 3, 6 (definition of ‘law enforcement officer’ para (b)), 14, 18; see also ss 37(1)(b), 38(1)(b).

¹⁷⁴ Mal Brough, Minister for Indigenous Affairs, made the allegation on television: ABC Television, ‘Paedophile Rings Operating in Remote Communities: Brough’, *Lateline*, 16 May 2006 <<http://www.abc.net.au/lateline/content/2006/s1640148.htm>>.

¹⁷⁵ Rachel Siewert, The Australian Greens, ‘No Evidence of Organised Paedophile Rings: ACC’ (Press Release, 27 May 2008) <<http://rachel-siewert.greensmps.org.au/content/media-release/no-evidence-organised-paedophile-rings-acc>>. It is suggested that some NT health clinics are not

The North West Mobile Force ('NORFORCE') was employed during the first six months of the intervention, providing logistical support for survey teams and child health check teams and helping with community liaison activities.¹⁷⁶ Their supporting role notwithstanding, the presence of the army (which embodies physical force) conveyed the *appearance* of communities living under martial law. Critics of the militarisation of Aboriginal communities have doubted whether any other groups in Australia need fear such a move against them and pointed to the political vulnerability of Aboriginal people to the whims of white Australia.¹⁷⁷ The presence of the army in Aboriginal communities instilled anxiety and fear into many of those being 'protected'. A failure to communicate adequately with Aboriginal communities prior to, and during, the early stages of the Commonwealth's intervention again gave rise to legitimate fears about family break-up.¹⁷⁸

VII PROMOTING WELLBEING

A Medical Examinations

One of the emergency measures implemented without the need for legislation was general health checks for Aboriginal children under 16 years of age. Originally the health checks were to be compulsory¹⁷⁹ and although the government changed its position two weeks later, the damage was done; women and children left communities before the arrival of the intervention.¹⁸⁰ Aboriginal peoples' fears about the nature and consequences of health checks for children are explicable in the light of past practices. Coerced medical examinations were a feature of the lives of Aboriginal people in the early 20th century. In the NT, health control — safeguarding white health from diseases associated with the Indigenous population — entailed the Chief Protector endeavouring to submit to medical examination every Indigenous person at every point of contact with officialdom, for example, when picked up by the police.¹⁸¹ Aboriginal people feared medical interventions because the Chief Protector's broad powers of

assisting the ACC's investigation into child sexual abuse by withholding medical records: Paul Toohey, 'Intervention's Pursuit of Sex Abuse Cases Stymied by Secrecy', *The Australian* (Sydney), 24 October 2008, 29.

¹⁷⁶ Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *The Role of the Army* (2009) <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/coordination/Pages/role_of_army.aspx>.

¹⁷⁷ Michael Mansell, 'The Political Vulnerability of the Unrepresented' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 73, 73. The Howard government also mobilised the military against a vulnerable minority in 2001 to interdict asylum seekers aboard the *Tampa*.

¹⁷⁸ Bill Glasson (a Member of the NTER Taskforce specialising in health) was quoted as saying: 'There was this fear that we'd come along and take these children away': 'Govt to Consider Intervention Report', *The Sydney Morning Herald* (online), 30 September 2008 <<http://news.smh.com.au/national/govt-to-consider-intervention-report-20080930-4qj7.html>>.

¹⁷⁹ Brough, 'National Emergency Response to Protect Aboriginal Children in the NT', above n 48.

¹⁸⁰ *Report of the NTER Review Board*, above n 7, 37.

¹⁸¹ Tony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911–1939* (1997) 275–7.

control could result in the removal of adults and children to reserves and institutions.¹⁸² Furthermore, the so-called ‘dog-tag’ system of the 1930s required each Aborigine in the Darwin district to wear a numbered bronze disc to facilitate their medical supervision and restrict their movements.¹⁸³ *Native Administration Act 1905–36* (WA) s 16 is indicative of provisions requiring Aborigines to submit to examinations. Authorised officers could employ ‘such means as may be necessary to compel any native to undergo examination’ and require people ‘to submit to such treatment as may be necessary’.¹⁸⁴ Refusal to do so constituted an offence under the Act.¹⁸⁵ During the assimilation era, children were removed from their families on grounds of, inter alia, ‘neglect’, ‘destitution’ or exposure to ‘moral danger’, and this could lead to a court ordering medical examinations notwithstanding a lack of consent by parent or guardian.¹⁸⁶

B Prohibition: Alcohol and Pornography

Part 2 of the *NTNER Act* expanded prohibitions and offences under NT liquor legislation,¹⁸⁷ making it an offence to possess, control or consume liquor in a ‘prescribed area’.¹⁸⁸ The supervision of alcohol consumption away from licensed premises is effected via the Act’s identification and reporting requirements, which are placed upon licensees and their employees selling large quantities of alcohol to individuals. Failure to keep records of the details of purchasers of alcohol exceeding 1350 mL in quantity is an offence.¹⁸⁹

The first acts of paternalism containing alcohol restrictions were in New South Wales and Victoria,¹⁹⁰ followed later by Queensland,¹⁹¹ in the latter of which the ‘incidence of disease, malnutrition, alcoholism and prostitution among Aborigines was so commonly reported that it had become a serious social problem’.¹⁹² Consequently, penalties for selling or giving liquor to Aboriginal people without authority were introduced — the Queensland Act’s preamble declared that it was

¹⁸² *Aboriginals Ordinance 1911* (NT) ss 3–5; *Aboriginals Ordinance 1918* (NT) ss 6, 16.

¹⁸³ Austin, above n 181, 278.

¹⁸⁴ *Native Administration Act 1905–36* (WA) s 16(b).

¹⁸⁵ *Native Administration Act 1905–36* (WA) s 16(c). See also *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) ss 12–14; *Aboriginals Preservation and Protection Act 1939* (Qld) s 20.

¹⁸⁶ See, eg, *Child Welfare Ordinance 1958* (NT) ss 66, 94 (no court authorisation required), 95; *Children’s Services Act 1965* (Qld) ss 49(3), 61(3), 62(a), 145.

¹⁸⁷ *Liquor Act 1978* (NT).

¹⁸⁸ *NTNER Act* s 12(2). A prescribed area is defined in *NTNER Act* s 4. It includes, inter alia, Aboriginal land as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), town camps and areas prescribed by the Commonwealth Minister via legislative instrument.

¹⁸⁹ *NTNER Act* ss 20–1.

¹⁹⁰ The *Supply of Liquors to Aborigines Prevention Act 1867* (NSW) and *Aborigines’ Protection Act 1869* (Vic) s 6 prohibited the supply of liquor to Aborigines. *Aborigines Protection Act 1909* (NSW) s 9 (as amended by *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(d)) extended the prohibition to half-castes. Prohibition for Aborigines was introduced as early as 1838: Maggie Brady, ‘Indigenous and Government Attempts to Control Alcohol Use among Australian Aborigines’ (1990) 17 *Contemporary Drug Problems* 195, 198.

¹⁹¹ *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 19. The supply of opium was also punishable by a fine or imprisonment: s 20.

¹⁹² Reid, above n 20, 231.

for the ‘better protection and care of the aboriginal and half-caste inhabitants of the Colony’.¹⁹³ Subsequently, almost identical provisions were introduced in WA and the NT.¹⁹⁴ With protection and preservation the avowed rationale, penalties for supplying liquor to Aboriginal people remained a feature of Queensland’s legislative amendments at the onset of World War II.¹⁹⁵ Restrictions on supply of alcohol were complemented by penalties for ‘knowingly receiv[ing]’ or ‘possess[ing]’ alcohol or opium.¹⁹⁶ Postwar, people made ‘wards’ under the first instrument of assimilation, the *Welfare Ordinance 1953* (NT), were not permitted to drink alcohol either.¹⁹⁷

The alcohol restriction measures were a response to the *Little Children Are Sacred Report*’s findings that alcohol abuse resulted in unsafe and unhealthy environments for children in the NT.¹⁹⁸ Unlike community-focused approaches to alcohol management, indicative of the period of self-determination, Aboriginal people were not co-authors of the latest strategy or willing partners in its implementation.¹⁹⁹ Schemes such as dry areas and alcohol management plans were already in place in many communities before the declared emergency, and the legislation overlaid the *Liquor Act 1978* (NT), resulting in ‘confusion and frustration at poorly targeted and ineffective restrictions’.²⁰⁰ Although the alcohol regulations of the self-determination era were largely unsuccessful, arguably an aspiration towards self-determination is preferable, in the longer-term, to the present coercive, ‘neo-assimilation[ist]’ approach.²⁰¹

Levels of exposure to adult materials (films, computer games and publications) by children were considered abnormal in some remote communities. Referring to the *Little Children Are Sacred Report*, the government identified stabilising communities through the prevention of child exposure to pornography as a key issue.²⁰² Therefore, for the duration of the intervention, the possession and

¹⁹³ *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld).

¹⁹⁴ *Aboriginals Ordinance 1918* (NT) s 49(1); *Aborigines Act 1905* (WA) s 45; *Native Administration Act 1905–36* (WA) s 48(1). ‘Loitering’ around licensed premises was also prohibited: *Aboriginals Ordinance 1918* (NT) s 18; *Native Administration Act 1905–36* (WA) s 49.

¹⁹⁵ *Aboriginals Preservation and Protection Act 1939* (Qld) s 28.

¹⁹⁶ See, eg, *Aboriginals Preservation and Protection Act 1939* (Qld) s 24. See also *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 19; *Aborigines Act 1905* (WA) s 45(2), as amended by *Aborigines Act Amendment Act 1911* (WA) s 10; *Native Administration Act 1905–36* (WA) s 48(2).

¹⁹⁷ *Licensing Ordinance 1939–60* (NT) ss 141–2. The top-down approach to alcohol regulation gave way to a lifting of prohibitive laws and collaborative approaches to alcohol management from the mid-1960s: see Heather Douglas, ‘The Curse of “White Man’s Water”: Aboriginal People and the Control of Alcohol’ (2007) 4 *University of New England Law Journal* 3, 12–25; Brady, above n 190, 201.

¹⁹⁸ *Little Children Are Sacred Report*, above n 3, 161.

¹⁹⁹ For some Aboriginal people, being able to drink is bound up with a remembered past of discriminatory restrictions on alcohol consumption and is linked to the acquisition of citizenship and formal equality: Brady, above n 190, 205.

²⁰⁰ *Report of the NTER Review Board*, above n 7, 24, citing Northern Territory Government, Submission No 214 to NTER Review, 25 September 2008, 10.

²⁰¹ Douglas, above n 197, 31.

²⁰² Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth) 5.

control of pornographic material in prescribed communities is prohibited, as is the supply of such material into those communities.²⁰³ Police were assigned powers to seize and destroy material suspected of being prohibited found in prescribed areas, without first obtaining court orders or convictions.²⁰⁴

While there is no historical analogue to the prohibition on pornography, penalties imposed on people for failing to shield children from inappropriate influences correspond to provisions of the protectionist era. Any Aboriginal person who was the parent or custodian of an Aboriginal female apparently under 16 years of age and found 'within two miles of any creek or inlet used by the boats of pearlers or other sea boats' was guilty of an offence.²⁰⁵ Here, as with the prohibition on pornography, adults were censured for failing in their responsibilities to children, albeit that the threat of sexual exploitation was presented as external at this time. More seriously, the depraved lives led by Aboriginal parents and the horrors of camp life were cited as justification for extending the discretionary powers of the New South Wales Aborigines Protection Board in 1915,²⁰⁶ enabling it to 'assume full control and custody of the child of any aborigine, if after due inquiry it is satisfied that such a course is in the interest of the moral or physical welfare of such child.'²⁰⁷ The state as protector of children's best interests is also reflected in the guardianship powers invested in the Queensland Director of Native Affairs 'where in his opinion the parents ... [were] not exercising their own powers in the interests of the child.'²⁰⁸ The *Child Welfare Act 1947* (WA), which made provision for the institutionalisation of neglected and destitute children, defined a 'neglected child' as meaning a child who, inter alia: 'associates or dwells with any person who ... is known to the police as of bad repute, or who has been or is reputed to be a thief or habitual drunkard'; 'is under the guardianship or in the custody of any person whom the court considers unfit'; or 'is living under such conditions as to indicate that the child is lapsing

²⁰³ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101–3, as amended by *FCSIA Act* sch 1. *FCSIA Act* sch 1 inserted these sections as part of the new *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 10 ('Material prohibited in prescribed areas').

²⁰⁴ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 106, 110, as amended by *FCSIA Act* sch 1.

²⁰⁵ *Aborigines Act 1905* (WA) s 41; *Native Administration Act 1905–36* (WA) s 44.

²⁰⁶ See Doukakis, above n 39, 100, citing New South Wales, *Parliamentary Debates*, Legislative Council, 4 November 1914, 1353–5 (Frederick Flowers).

²⁰⁷ *Aborigines Protection Act 1909* (NSW) s 13A (inserted by *Aborigines Protection Amending Act 1915* (NSW) s 4), as amended by *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(h). The assumption of broad responsibility for the 'custody, maintenance, and education of children' was provided for by *Aborigines Protection Act 1909* (NSW) s 7(c), as amended by *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(b). See also *Aboriginals Ordinance 1918* (NT) s (1)(d); *Aborigines Act 1911* (SA) s 7(5); *Aborigines Act 1934–39* (SA) s 7(e); *Aborigines Protection Act 1886* (WA) s 6(3); *Aborigines Act 1897* (WA) s 7(3); *Aborigines Act 1905* (WA) s (3); *Native Administration Act 1905–36* (WA) s 6(3).

²⁰⁸ *Aboriginals Preservation and Protection Act 1939* (Qld) s 18(1). Such situations resulted in transference of legal custody to some suitable person: s 18(3). See also *Aboriginals Ordinance 1918* (NT) s 7(1); *Aborigines Act 1911* (SA) s 10(1); *Aborigines Act 1934–39* (SA) s 10(1); *Aborigines Act 1905* (WA) s 8, later amended by *Aborigines Act Amendment Act 1911* (WA) s 3; *Native Administration Act 1905–36* (WA) s 8.

or likely to lapse into a career of vice or crime'.²⁰⁹ Subsequent child welfare legislation enabled the authorities to assume responsibility for children's care where parents or guardians were failing to prevent exposure to physical or moral danger, bad associates, a possible life of vice or crime, or addiction to drugs, or where the child was in the custody of an unfit person by reason of their conduct and habits.²¹⁰ Hence, the incapacity of Aboriginal parents and guardians to raise children normally is a recurring theme, expressed in the terms of race-specific legislation and in the application of child welfare legislation that resulted in the removal of Indigenous children in far greater numbers than non-Indigenous children. Mal Brough's representation of remote communities as sites of organised and endemic child abuse²¹¹ (representations that became the orthodoxy in mainstream Australia) accorded with and reinforced historic constructions of Aboriginal communities and families as deviant and inept care-givers.

C Housing and Land Tenure Reforms

The federal government assumed control over Aboriginal land in order to 'normalise' communities. Intent on improving living conditions and physical wellbeing in communities, 'intensive Commonwealth oversight'²¹² was warranted. This was achieved with the suspension of native title and the temporary acquisition of five-year leases over certain areas on which Aboriginal people live,²¹³ thereby enabling the government to have unfettered access to buildings and infrastructure in need of repair. The terms of the leases provided the government with exclusive possession and quiet enjoyment of the leasehold area,²¹⁴ but people were not to be removed from their land while the repairs were made. The majority of the High Court has held that this statutory acquisition of land was constrained by the 'just terms' requirement in *Australian Constitution* s 51(xxxi) and that the guarantee of 'reasonable ... compensation' in *NTNER Act* s 60(2) satisfied this requirement.²¹⁵ Additionally, the Commonwealth acquired

²⁰⁹ *Child Welfare Act 1947* (WA) ss 4 (definition of 'neglected child' paras (4)–(5), (7)). See also *Child Welfare Ordinance 1958* (NT) ss 5 (definition of 'neglected child' paras (d)–(e), (j)).

²¹⁰ *Children's Services Act 1965* (Qld) ss 46 (care and protection), 60 (care and control).

²¹¹ See ABC Television, above n 174.

²¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 14 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs). Economic arguments regarding the development of remote communities also inspired the reforms to communal land tenure: see Helen Hughes, 'The Economics of Indigenous Deprivation and Proposals for Reform' (Issue Analysis No 63, The Centre for Independent Studies, 2005) <http://www.cis.org.au/issue_analysis/IA63/IA63.PDF>. The link between communal land tenure and child sexual abuse is more tenuous than between adequate public housing and child welfare.

²¹³ *NTNER Act* s 31(1)(a). Schedule 1 items 1–3 describe the land over which a lease is granted to the Commonwealth. Freehold title remains unaffected: s 34.

²¹⁴ *NTNER Act* s 35(1).

²¹⁵ *Wurridjal v Commonwealth* (2009) 252 ALR 232, 263 (French CJ), 284–5 (Gummow and Hayne JJ), 316–17 (Heydon J), 350–2 (Kiefel J). Kirby J dissented: at 313.

powers to forfeit and resume certain leases known as ‘town camps’,²¹⁶ which were characterised as ‘ghettos’²¹⁷ on the fringes of urban centres, in order to ‘normalise’ them.²¹⁸ Despite categorical denials of a hidden agenda by the government, some commentators have asked what the acquisition of a controlling interest in land has to do with child abuse. There are suspicions that land rights are being rolled back and removed because of commercial (mining) interests.²¹⁹ Just as pastoralists dispossessed Aboriginal people of their land in the 19th century, the NT intervention has the potential to initiate a second ‘land grab’.²²⁰

The *NTNER Act* also enabled the government to acquire long-term rights, titles and interests (including freehold title) in town camps.²²¹ In order to protect public investment on Aboriginal land,²²² the *FCSIA Act* enabled either the Commonwealth or NT governments to retain a legal interest over property constructed or improved as part of the emergency response.²²³ This is in the form of specified statutory rights, where the upgrade of infrastructure is undertaken with the consent of the Land Council concerned.²²⁴ Protecting public investment in property resembles the manner in which states retained control over real and personal property distributed to Aboriginal people to ameliorate their condition. *Aborigines Protection Act 1909* (NSW) s 8(3) stipulated that ‘[a]ny building erected on a reserve shall be vested in and become the property of the [protection] board, also all cattle, horses, pigs, sheep, machinery, and property thereon

²¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 14–15 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

²¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 14 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 95 (David Tollner).

²¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 17 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

²¹⁹ Naomi Farmer, ‘This Is about Getting Rid of Land Rights’ (2008) 132 *Socialist Alternative* 16, 16–17 <http://www.sa.org.au/index.php?option=com_content&task=view&id=1771&Itemid=1>. This flows on from the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth), which was concerned with promoting economic development via a new tenure system with a consequential loosening of traditional landowners’ control. It contained provisions permitting 99-year leases over townships on Aboriginal land to government entities and ‘improvements’ to the provisions relating to mining and exploration on Aboriginal land: sch 1 item 46, inserting s 19A into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See generally *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) sch 1 pt 1.

²²⁰ John Pilger, ‘Cover of Racist Myth: A New Land Grab in Australia’ (2008) 32(6) *Aboriginal and Islander Health Worker Journal* 20, 20.

²²¹ *NTNER Act* pt 4 div 2.

²²² ‘The Howard government is no longer prepared to invest public money in buildings and infrastructure on private land unless it can have a continuing interest over them’: Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 20 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

²²³ *FCSIA Act* sch 3 item 1, inserting *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20W, 20ZH.

²²⁴ *FCSIA Act* sch 3 item 1, inserting *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 20U(1)(b), 20ZF(1)(b).

purchased or acquired for the benefit of aborigines.’ Moreover, blankets, bedding, clothing and other articles were loaned to Aboriginal people and remained the property of the Crown.²²⁵ Articles given to ‘wards’ to promote their welfare in the NT remained the property of the Commonwealth after the ideological shift to assimilation.²²⁶ The *NTER Act* and *FCSIA Act*, by removing Aboriginal control over land and housing management, wind the clock back to an era before land rights were won, and into the distant past.

D Access to Aboriginal Land

An economic imperative also appears to have underpinned changes to the permit system governing access to Aboriginal land.²²⁷ Opening up common areas in the main townships and transport links connected with them was prompted by the perceived failure of the permit system to protect children from abuse and because improved access for the wider community would help promote economic activity.²²⁸ Here then, a market-based rationalisation is explicitly advanced in conjunction with the human rights case for action. Just as the state of the economy has influenced Indigenous policy in the past, the desire to maintain a robust economy on the back of global demands for minerals may have driven the land reform features of the intervention.²²⁹ Removing the rights of Aboriginal people to determine who can access their land corresponds with the lack of control they experienced in the past, notably when access to reserves was regulated by the state.²³⁰

E Social Welfare

The *SSOLA Act* represented an extension of the principle of mutual obligation beyond participation in the workforce and aimed to promote socially responsible behaviour, particularly parental behaviour in relation to the care and education of children.²³¹ This was to be achieved largely through income management,²³² by

²²⁵ *Aboriginals Ordinance 1918* (NT) s 5(2); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 18; *Aboriginals Preservation and Protection Act 1939* (Qld) s 27; *Aboriginals Protection Act 1886* (WA) s 40; *Aborigines Act 1905* (WA) s 46; *Native Administration Act 1905–36* (WA) s 50.

²²⁶ *Welfare Ordinance 1953–60* (NT) s 9.

²²⁷ See *FCSIA Act* sch 4.

²²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 20 (Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

²²⁹ The potential for expansion of mineral enterprises in remote Australia is noted in Hughes, above n 212, 9.

²³⁰ *Aboriginals Ordinance 1911* (NT) s 7; *Aboriginals Ordinance 1918* (NT) ss 11, 15–16, 19–20; *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss 9–11; *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) s 7; *Aboriginals Preservation and Protection Act 1939* (Qld) ss 9–10; *Native Administration Act 1905–36* (WA) ss 12–14; *Native Welfare Act 1963* (WA) s 20. See also *Aborigines Act 1971* (Qld) pt III, which ceded some control over access to reserves to Aboriginal councils: ss 17(2), 19, 20–7.

²³¹ *SSOLA Act* sch 1 item 17, inserting pt 3B into the *Social Security (Administration) Act 1999* (Cth). An object of pt 3B is promotion of socially responsible behaviour regarding children:

setting aside some or all of persons' welfare payments to ensure that money is directed to meeting the priority needs of the recipient of the welfare payment and their partner, children and/or other dependents. A person may become subject to the income management regime because:²³³ the person lives in a declared relevant NT area;²³⁴ a child protection officer of a state or territory requires the person to be subject to the income management regime;²³⁵ the person (or their partner) has a child who does not meet school enrolment requirements; the person (or their partner) has a child who has unsatisfactory school attendance;²³⁶ or the Queensland Commission requires the person to be subject to the income management regime.²³⁷

Therefore, for some communities, income management applies indiscriminately, regardless of individuals' personal circumstances and whether or not they are meeting their family responsibilities. In declared areas in the NT, all persons in those communities had 50 per cent of income support and family tax benefits quarantined and up to 100 per cent of other benefits.²³⁸ People subject to the income management regime have an income management account. Amounts are deducted from the person's welfare payments and credited to the person's income management account; these amounts are directed towards meeting the 'priority needs' of the person, their partner, children and/or other dependents.²³⁹ Initially, store cards were issued that allowed people to spend the managed funds

s 123TB(a). See also Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 7.

²³² Income management was perhaps the most contentious aspect of the emergency response and is the focus of this section. There were several welfare-related measures, notably the licensing of community stores (*NTNER Act* pt 7) and the abolition of Community Development Employment Projects with transition to 'real' jobs, training and employment programmes (with the safety net of income support) (*SSOLA Act* sch 3). For a discussion of the latter, see Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 49–50.

²³³ Five non-voluntary categories are outlined in *Social Security (Administration) Act 1999* (Cth) s 123TA.

²³⁴ *Social Security (Administration) Act 1999* (Cth) s 123TE, inserted by *SSOLA Act* sch 1 item 17, defines relevant areas.

²³⁵ The Act enabled the trialling of compulsory income management as a child protection mechanism in selected WA communities from 2008: see Jenny Macklin, 'Closing the Gap — Building an Indigenous Future' (Speech delivered at the National Press Club, Canberra, 27 February 2008) <http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27_feb08.htm>.

²³⁶ The provisions allowing for the quarantining of welfare payments for families whose children are not enrolled or do not attend school regularly were not implemented. Instead, *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth) sch 1 introduced a different scheme for linking schooling benchmarks to income management.

²³⁷ The *Family Responsibilities Commission Act 2008* (Qld) ('*FRC Act*') was enacted on 13 March 2008 and commenced operation on 1 July 2008. The *Social Security (Administration) — Queensland Commission (Family Responsibilities Commission) Specification 2008* (Cth) provided that the Family Responsibilities Commission ('FRC') satisfied para (b) of the definition of 'Queensland Commission' in s 123TC of the *Social Security (Administration) Act 1999* (Cth) for the purposes of that provision.

²³⁸ *Social Security (Administration) Act 1999* (Cth) pt 3B div 5, inserted by *SSOLA Act* sch 1 item 17.

²³⁹ See *Social Security (Administration) Act 1999* (Cth) s 123TA, inserted by *SSOLA Act* sch 1 item 17.

in selected stores and that excluded expenditure on goods such as alcohol and tobacco. This led to humiliation and overt racism in some towns because of the difficulties of acquiring and using the cards.²⁴⁰ The blanket application of income management in declared areas was explained by the government on the basis that it enabled child abuse and neglect in Indigenous communities to be addressed without delay.²⁴¹ This indiscriminate scheme has given rise to widespread resentment.²⁴² Conversely, many other members of the communities appeared generally receptive to the use of compulsory income management for people who demonstrate they are not meeting family or community responsibilities and also consider that people should be free to volunteer for it.²⁴³

The *SSOLA Act* provided the platform for the Queensland welfare reforms. The *Family Responsibilities Commission Act 2008* (Qld) (*'FRC Act'*) is a response to a report by the Cape York Institute for Policy and Leadership, which posited a holistic approach to tackling welfare dependency in the Cape York Peninsula.²⁴⁴ The main objects of the Act are:

- (a) to support the restoration of socially responsible standards of behaviour and local authority in welfare reform community areas; and
- (b) to help people in welfare reform community areas to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.²⁴⁵

Welfare recipients living in welfare reform community areas are subject to the jurisdiction of a new statutory body, the Family Responsibilities Commission (*'FRC'*),²⁴⁶ and the Act is administered 'under the principle that the wellbeing and best interests of a child are paramount.'²⁴⁷ Unlike declared areas in the NT, income management is not imposed indiscriminately and automatically in welfare reform community areas (Aurukun, Coen, Hope Vale and Mossman Gorge); a person is subject to the FRC's jurisdiction if one of five triggers is engaged.²⁴⁸ The FRC has authority over the operation of income management of

²⁴⁰ *Report of the NTER Review Board*, above n 7, 20.

²⁴¹ Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) 15.

²⁴² *Report of the NTER Review Board*, above n 7, 20. This occurred in a significant segment of the community.

²⁴³ *Ibid* 21. The report notes that the testimony of a substantial number of people, especially women, supports the view that income management has brought about benefits.

²⁴⁴ See *From Hand Out to Hand Up: Design Recommendations*, above n 28, 27; *From Hand Out to Hand Up: Volume 2*, above n 27, 233 (recommendation 5).

²⁴⁵ *FRC Act* s 4(1).

²⁴⁶ *FRC Act* s 4(2).

²⁴⁷ *FRC Act* s 5(1).

²⁴⁸ *FRC Act* pt 4. If a child has three or more unexplained absences in a school term, the school is mandated to report that fact to the FRC: s 40. If a child of school age is not enrolled in school, the second trigger applies and the education chief executive must notify the FRC: s 41. The third trigger arises on the making of a child safety notification to the Department of Child Safety; in that event, the Department will give a notice to the FRC: s 42. The fourth trigger is when a Magistrates Court convicts a person of an offence, in which case the clerk of the court must notify the FRC: s 43. The fifth is when a public housing tenant uses the premises for an illegal purpose, fails to remedy a breach concerning activities in the house (such as causing a nuisance to

welfare payments in order to encourage compliance.²⁴⁹ Further, income management is a measure of last resort for the FRC, to be imposed after referrals to support services have been tried and deemed unsuccessful.²⁵⁰ The Cape York trial was declared ‘groundbreaking’, ‘unique’ and a ‘significant departure’ from policies of the past.²⁵¹ The engagement of a trial of community members prior to the introduction of the new statutory body²⁵² and a community presence in the composition of the FRC²⁵³ distinguishes this initiative from the NT top-down intervention.

The present-day concerns about the economics of Aboriginal welfare, Aboriginal pauperisation (or ‘passive welfare’ in modern parlance) and the use of welfare as a tool to modify individuals’ behaviour have direct parallels with the protectionist period. In WA in 1898, ‘natives’ were decried as welfare-dependent, their ‘indolence’ attributed to too much money being spent upon them.²⁵⁴ In Queensland, the high costs associated with maintaining the unemployed in remote Aboriginal communities were used by Archibald Meston as a justification for removing Aboriginal people and placing them in reserves at the start of the 20th century.²⁵⁵ Meston also perceived that providing sustenance for them encouraged welfare dependency and led to substance abuse.²⁵⁶ While he advocated removal to reserves on humanitarian grounds, the *threat* of removal to reserves served an ancillary purpose, as a device used to control Aboriginal workers and modify their behaviour.²⁵⁷

The denial of agency that income management signifies represents a return to policies that disempowered several generations of Indigenous peoples. Most obviously, Aboriginal agency was removed by legislation that prescribed where

neighbours) or fails to pay rent; in that case, the Department of Housing or other housing body gives a notice to the FRC: s 44.

²⁴⁹ *FRC Act* ss 10–11.

²⁵⁰ Interim services were available from July 2008, including counsellors with drug and alcohol, mental health, gambling and family support expertise. Wellbeing centres that provide drug and alcohol, family violence, gambling and general counselling support were to be fully operative by the end of the year in each community: see Queensland Government, *Quarterly Report on Key Indicators in Queensland’s Discrete Indigenous Communities — April – June 2008* (2008) 18 (‘*Cape York Welfare Reforms*’) <<http://www.atsip.qld.gov.au/government/programs-initiatives/partnerships/quarterly-reports/documents/quarterly-report-april-june-2008.pdf>>.

²⁵¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2008, 332 (Anna Bligh, Premier).

²⁵² The ‘Community Engagement Process’ is set out in *From Hand Out to Hand Up: Volume 2*, above n 27, 25–43. Cf J C Altman and M Johns, ‘Indigenous Welfare Reform in the Northern Territory and Cape York: A Comparative Analysis’ (Working Paper No 44/2008, Centre for Aboriginal Economic Policy Research, The Australian National University, 2008) 11–12.

²⁵³ *FRC Act* s 14. Twenty-four Local Commissioners were appointed and undertook training: see *Cape York Welfare Reforms*, above n 250, 18.

²⁵⁴ Suzanne Welborn, ‘Politicians and Aborigines in Queensland and Western Australia 1897–1907’ (1978) 2 *Studies in Western Australian History* 18, 23, citing Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 October 1898, 2458 (Sir John Forrest).

²⁵⁵ See Blake, above n 16, 52. Meston (1851–1924) was Southern Protector of Aborigines in Queensland from 1898 to 1903 and architect of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld): at 51.

²⁵⁶ See Reid, above n 20, 219.

²⁵⁷ Blake, above n 16, 52–5.

and how they should live.²⁵⁸ Moderating Aboriginal persons' relationship with their money finds strong precedents in the protectionist instruments that established control over the earnings of Aboriginal people. Officials could receive, or direct another to receive, wages in lieu of an Aboriginal person, to be expended on behalf of that person where it was deemed in their best interests.²⁵⁹ Moreover, wages due, or property belonging, to an Aboriginal person who absconded from service or was deceased would be payable into a trust fund.²⁶⁰ 'Protectors' were afforded the power to manage all property of Aboriginal people, including the appointment of any person to act as an agent for the Aboriginal person.²⁶¹ Furthermore, proceedings for the recovery of wages owing to Aboriginal people could be instituted and carried on by, and in the name of, a public official, police officer or other authorised person.²⁶² The paternalism evidenced by controls over property remained an entrenched feature of the legislation during the era of assimilation. In the NT, the Director of Welfare was the nominated trustee of wards' property.²⁶³ In the states, the management of property of Aboriginal people was, purportedly, consensual,²⁶⁴ but the termination of such an arrangement was not necessarily automatic upon request and could be refused where it was not deemed to be in the best interests of the Aboriginal applicant or their family.²⁶⁵

²⁵⁸ *Aboriginals Ordinance 1918* (NT) s 16(1); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 9; *Aboriginals Preservation and Protection Act 1939* (Qld) s 22; *Aborigines Act 1911* (SA) s 17(1); *Aborigines Act 1934–39* (SA) s 17(1); *Aborigines Act 1905* (WA) s 12; *Native Administration Act 1905–36* (WA) s 12. Certain Aborigines were exempted from the restrictions, including those who were lawfully employed, those holding a permit to be absent, females lawfully married to non-Aboriginal husbands and those whom the relevant Minister considered to be satisfactorily provided for: *Aboriginals Ordinance 1918* (NT) s 16(3); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 10; *Aborigines Act 1911* (SA) s 19; *Aborigines Act 1934–39* (SA) s 19; *Aborigines Act 1905* (WA) s 13; *Native Administration Act 1905–36* (WA) s 13. See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 22(2).

²⁵⁹ *Aborigines Protection Act 1909* (NSW) s 13C, inserted by *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(i); *Aboriginals Preservation and Protection Act 1939* (Qld) s 14(6).

²⁶⁰ *Native Administration Act 1905–36* (WA) s 64. See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 12(10).

²⁶¹ *Aboriginals Ordinance 1918* (NT) s 43(1); *Aboriginals Preservation and Protection Act 1939* (Qld) s 16(1); *Aborigines Act 1911* (SA) s 35(1); *Aborigines Act 1934–39* (SA) s 35(1); *Aborigines Act 1905* (WA) s 33; *Native Administration Act 1905–36* (WA) s 34. However, under the *Native Administration Act 1905–36* (WA), the power was subject to the condition that it was not 'exercised, except in the case of minors, without the consent of the native except so far as may be necessary to provide for the due preservation of such property': s 34. For similar restrictions, see *Aboriginals Ordinance 1918* (NT) s 43(1); *Aborigines Act 1911* (SA) s 35(1); *Aborigines Act 1934–39* (SA) s 35(1); *Aborigines Act 1905* (WA) s 33.

²⁶² *Aborigines Protection Act 1909* (NSW) s 13D, inserted by *Aborigines Protection (Amendment) Act 1936* (NSW) s 2(1)(i); *Aboriginals Ordinance 1918* (NT) s 57; *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 27; *Aborigines Act 1905* (WA) s 54; *Native Administration Act 1905–36* (WA) s 53. See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 14(6), which allowed Protectors to direct employers to pay the wages of Aborigines to himself or some other person on his behalf.

²⁶³ *Welfare Ordinance 1953–60* (NT) s 25. The entire part containing this provision was amended by *Welfare Ordinance 1961* (NT) s 13, which required (in the new s 26(1)) the Director to apply to a court for a vesting order in relation to a ward's property.

²⁶⁴ See, eg, *Community Welfare Act 1972* (WA) ss 14–15; *Native Welfare Act 1963* (WA) s 23.

²⁶⁵ *Aborigines Act 1971* (Qld) ss 45–6.

Throughout the protectionist period, the education of Aboriginal children was presented as central to the ‘betterment’ of Aboriginal people, both as individuals and collectively.²⁶⁶ The protection Acts gave the authorities the power to make regulations with respect to the education of Aboriginal children,²⁶⁷ including the power to detain them at educational institutions where necessary.²⁶⁸ The protection boards and relevant government departments were charged with the duty of providing for the education of children. Contemporary provisions that make parents’ social security payments conditional on ensuring their children attend school regularly have one precedent from the protectionist period. The *Aborigines Act 1934–39* (SA) stated:

The parent of every child to whom this section applies [that is, Aboriginal children aged between 14 and 16 years who reside at any Aboriginal institution] who fails to cause the child to attend at a school on every occasion when the school is open for instruction shall be guilty of an offence against this Act ...²⁶⁹

Like other aspects of the intervention, penalising parents for failing to ensure their children attend school is a punitive approach that has historical antecedents.

VIII CONCLUSIONS

This article has demonstrated that the NT emergency intervention repeats or resembles the manner of historic interventions in the lives of Aboriginal peoples. This historical perspective, in conjunction with human rights concerns, helps explain why many voices have been raised in opposition to the federal government’s methods. It is the processes adopted by the federal government in June 2007 as well as aspects of the substantive approach taken that are questioned here,²⁷⁰ not the underlying need for interventions to protect vulnerable and disadvantaged children (wherever they may live). For some, the justification for the intervention — with its racially discriminatory laws and questionable constitutionality — rests on its success in enhancing child protection and tackling social dysfunction. In short, it is claimed that the intervention is ‘cruel to

²⁶⁶ *Bringing Them Home Report*, above n 11, 28, 106.

²⁶⁷ *Aborigines Protection Act 1909* (NSW) s 20(1)(e); *Aboriginals Ordinance 1918* (NT) s 5(1)(d); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 31(6); *Aboriginals Preservation and Protection Act 1939* (Qld) s 12(7); *Aborigines Act 1934–39* (SA) s 7(e); *Aborigines Act 1905* (WA) s 60(c).

²⁶⁸ See, eg, *Aborigines Act 1905* (WA) s 60(d).

²⁶⁹ *Aborigines Act 1934–39* (SA) s 40a(2). The children to whom this section applied were defined in s 40a(1). Parents were excused from the fine where they could show that the child was engaged in employment, the child was sick, the child’s failure to attend was justified by any other reason, or they had obtained the consent of the superintendent: ss 40a(2)(a)–(d).

²⁷⁰ Indeed, Noel Pearson (Director of the Cape York Institute for Policy and Leadership), whose ideas were mistakenly associated with the emergency response because of the timing of the Institute’s publication (*From Hand Out to Hand Up: Design Recommendations*, above n 28), sought to distance himself from the authoritarian manner of the emergency response and the blanket imposition of income management: ABC Television, ‘Noel Pearson Discusses the Issues Faced by Indigenous Communities’, *Lateline*, 26 June 2007 <<http://www.abc.net.au/lateline/content/2007/s1962844.htm>>. This is unsurprising given that Pearson’s reform agenda was premised upon active community engagement: see *From Hand Out to Hand Up: Volume 2*, above n 27, ch 2.

be kind' and that its aims justify the means, just as A O Neville presupposed vis-à-vis the coercive approach to Indigenous welfare facilitated by the protectionist legislation.²⁷¹ Racial cleavages and authoritarian management are bonds that link the protectionist and contemporary periods of Indigenous law and administration.²⁷² Doukakis's examination of New South Wales law and policy from 1856 to 1916 concluded:

Through the lens of white socio-cultural obsessions, [the parliamentarians] saw the drunken half-caste layabouts, the neglectful mothers, a dependent people, a problem which needed to be solved by recourse to bureaucratisation.²⁷³

This evaluation can be applied to the contemporary NT intervention by adding 'neoliberal' alongside 'white socio-cultural'. The blunt application of neoliberal principles relating to mutual obligation and land management as much as concern for children's wellbeing are the hallmarks of the emergency response; they point strongly towards assimilationist principles and an emphasis on individual decision-making and responsibility as the pathway to better parenting and community wellbeing. The 'progression' of Aboriginal communities is measured in terms of how they measure up against 'normal' citizens or the 'mainstream', which has connotations extending beyond closing the gap in socioeconomic terms and touches upon Aboriginal culture and connections to land.

The intervention was a mixture of benign intentions, self-interest and ideology. The bureaucracies charged with its implementation have underperformed.²⁷⁴ *Plus ça change* — 70 years ago Stanner wrote:

Australian native policy and administration is a curious mixture of high intentions and laudable objectives, ... almost unbelievably mean finances, an extremely bad *local* administration and an obstinate concentration on lines of policy which 150 years of experience have made suspect.²⁷⁵

The changes to law and administration in the NT are not as radical in their approach as they were presented. Admittedly, the *scale* of the whole-of-government intervention is without precedent. If the Rudd government is committed to evidence-based policy-making, as it claims, and not driven by ideology, then coercive approaches to the complex problems of child neglect and community wellbeing will have a diminished role in prospective law and administration within the NT and the rest of the Commonwealth.²⁷⁶ The NTER

²⁷¹ A O Neville, *Australia's Coloured Minority: Its Place in the Community* (1947) 80–1. Neville was Chief Protector of Aborigines in WA from 1915–40.

²⁷² Reflecting on the period of protectionism, Foxcroft wrote, 'we cannot learn much from the history of [Victoria's] native policy except what to avoid in future': Foxcroft, above n 15, 107–8.

²⁷³ Doukakis, above n 39, 148.

²⁷⁴ According to Dr Bill Glasson, quoted in 'Not a One-Way Street', *The Australian* (Sydney), 30 September 2008, 15. See also 'When Responsibility Is a Two-Way Street', *The Australian* (Sydney), 15 August 2009, 16.

²⁷⁵ W E H Stanner, 'The Aborigines' in J C G Kevin (ed), *Some Australians Take Stock* (1939) 3, 11 (emphasis in original).

²⁷⁶ The government undermined its commitment to evidence-based policy-making by rejecting the recommendations of the NTER Review Board and maintaining a blanket imposition of compul-

Review Board observed that the processes characterising the design and implementation of the intervention ‘were not based on a consideration of current evidence about what works in Indigenous communities.’²⁷⁷ The evidence gathered by the Review Board prompted the following observation:

Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government’s actions should be regarded as a matter for serious concern.²⁷⁸

If, as Harcourt suggests, the justification for an intervention is its success,²⁷⁹ then on the available evidence the emergency response has not (yet) been validated. The anticipated increase in prosecutions for child sex offences has not eventuated, and communities have perceived little or no change in the safety and wellbeing of Aboriginal children.²⁸⁰ Indeed, the negative impacts of the intervention may have, in some cases, further damaged the health and wellbeing of communities.²⁸¹

An attitudinal change is warranted, one that does not simply problematise Aboriginal peoples: an agenda that is predicated on non-discrimination and recognition of its interdependence with human rights and that is governed by the principles of informed consent, participation and partnership.²⁸² This is a comprehensive rights-based framework, rooted in international law, the importance of which has been ignored and the implementation of which greatly weakened in recent times. The political rhetoric surrounding the emergency response focused on Aboriginal dysfunctionality and how parents and families were failing in their obligations to their children, and not on Commonwealth and NT government failings and under-investment over several decades, which have contributed to systems failure in education and child protection.²⁸³ The exclusion of the *RDA* engendered feelings of humiliation and shame by marking out Aboriginal communities as less worthy of the legislative protections enjoyed by

sory income management and the suspension of the *RDA* for a further year: see Jenny Macklin, ‘Compulsory Income Management to Continue as Key NTER Measure’ (Press Release, 23 October 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm>. Cf *Report of the NTER Review Board*, above n 7, 23.

²⁷⁷ *Report of the NTER Review Board*, above n 7, 47.

²⁷⁸ *Ibid* 8. The lack of empirical baseline data available to the NTER Review Board, which would permit an assessment of the impact and progress of the NTER upon communities, was cited as a major problem by the report: at 43.

²⁷⁹ Harcourt, above n 1, 41.

²⁸⁰ *Report of the NTER Review Board*, above n 7, 34.

²⁸¹ *Ibid* 28, 37.

²⁸² See above n 154 and accompanying text. To be clear, the protection of children from abuse may provide a justification for proportionate legislative and administrative measures that override the objections of Aboriginal people, but only after a process of careful deliberation with communities that reflects values enshrined in relevant international treaties.

²⁸³ On the problems with funding and service delivery, see *Report of the NTER Review Board*, above n 7, 50 (‘Funding and fiscal reform’). Whether sufficient financial resources have been allocated to Aboriginal communities or reached their intended beneficiaries in the NT is hotly contested: see Langton, above n 15, 146.

all other Australians. Through the failure to communicate and engage with Aboriginal communities about the intervention, its potential effectiveness was undermined. This approach tarnished aspects of the response that enjoyed broad support in communities, such as increased community policing. Collective action will strengthen efforts to serve the best interests of children and communities. 'In looking to the future, we have to understand the lessons of the past and to avoid repeating them to the disadvantage of those we seek to help.'²⁸⁴

²⁸⁴ *Report of the NTER Review Board*, above n 7, 46.