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Commission

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# The Declaration Dialogue Series:

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## Paper No.5 - Equality and non- discrimination

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**Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.**

## Table of Contents

	<b>July 2013.....</b>	<b>1</b>
<b>1</b>	<b>Introduction.....</b>	<b>4</b>
1.1	<b>This Paper .....</b>	<b>5</b>
<b>2</b>	<b>What is meant by equality and non-discrimination?.....</b>	<b>6</b>
<b>3</b>	<b>Aboriginal and Torres Strait Islander people’s experience of racial discrimination in Australia .....</b>	<b>10</b>
<b>4</b>	<b>Governments’ obligations to prevent discrimination and promote equality .....</b>	<b>10</b>
<b>5</b>	<b>Achieving non-discrimination and equality for Aboriginal and Torres Strait Islander peoples .....</b>	<b>12</b>
<b>6</b>	<b>Conclusion .....</b>	<b>13</b>

# 1 Introduction

The adoption of the Declaration by the General Assembly of the United Nations in September 2007 was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world. The adoption of the Declaration strengthened and reinforced the international human rights framework.

The Declaration does not contain any new human rights or international standards. Rather it reflects existing legal obligations sourced in international human rights treaties. It simply provides the lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.

It enshrines our right to be different as peoples and affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide. The Declaration therefore provides Australia with an opportunity to move beyond the stalemate that is currently frustrating positive development for Aboriginal and Torres Strait Islander peoples and communities.

While the Declaration covers all areas of human rights as they relate to Indigenous peoples, we believe it also incorporates fundamental foundational human rights principles which could be categorised into four key areas:

- self-determination
- participation in decision-making, free, prior and informed consent, and good faith
- respect for and protection of culture
- equality and non-discrimination.

Although the Declaration was endorsed by the General Assembly in 2007, little action has taken place to incorporate it into policy frameworks in Australia.

The Aboriginal and Torres Strait Islander Social Justice Commissioner considers that the Declaration is the most comprehensive tool available to advance the rights of Indigenous peoples and to address the contemporary effects of oppression and colonisation. As such, he has committed to promote its full implementation during the term of his appointment.<sup>1</sup> The National Congress of Australia's First Peoples has also committed to building a policy platform underpinned by the Declaration.<sup>2</sup>

However, if we are serious about support for the Declaration, an overarching policy framework based on human rights standards is essential to ensure a holistic approach that addresses the needs and priorities identified by Aboriginal and Torres Strait Islander peoples and communities.

A national conversation progressed through a series of dialogues is necessary to ensure the principles and rights outlined in the Declaration are fully integrated into the Australian Indigenous policy landscape. These dialogues are considered integral to a process aimed at developing an agreed understanding of the key principles that underpin the Declaration; and the development of a coordinated response based on these principles to realise the rights outlined in the Declaration in an Australian context. The anticipated results of this conversation would culminate in a National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples.

By encouraging dialogue between Aboriginal and Torres Strait Islander peoples, governments and other stakeholders, we can move beyond the rhetoric of ‘support’ for the Declaration and work towards achieving its purpose: to improve the lives of Aboriginal and Torres Strait Islander peoples, Australia’s Indigenous peoples.

This Dialogue Series will be informed by a set of focused discussion papers, and it will be supported by other consultative mechanisms including:

- an Aboriginal and Torres Strait Islander Declaration Survey
- high level dialogue meetings with governments and key industry stakeholders
- Aboriginal and Torres Strait Islander community dialogues
- a national summit.

## **1.1 This Paper**

Principles of self-determination; participation in decision-making, free, prior and informed consent and good faith; respect for and protection of culture and; equality and non-discrimination must underpin relevant legislation, policy, programs and service delivery to ensure that these mechanisms empower rather than disempower communities to address the challenges they face.

While these key principles are inextricably linked and indivisible, this paper focuses specifically on the principles of equality and non-discrimination on the basis of race.

The Australian Government has a legal obligation to promote equality and prohibit discrimination on the basis of race. This obligation arises from its ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)<sup>3</sup> in September 1975. ICERD is brought into Australian law through the *Racial Discrimination Act 1975* (RDA).<sup>4</sup>

In its preamble, the Declaration affirms that as Indigenous peoples:

1. We are equal to all others. We have a right to be different, to consider ourselves as different, and be respected as such.<sup>5</sup>
2. In the exercise of our rights, we should be free from discrimination.<sup>6</sup>
3. We are organising our political, economic, social and cultural enhancement in order to end all forms of discrimination and oppression.<sup>7</sup>

The Declaration can be used to guide the Australian Government in implementing its responsibilities under ICERD and the RDA as they apply to Aboriginal and Torres Strait Islander peoples.

This paper will consider the views of Aboriginal and Torres Strait Islander peoples, Australian governments and human rights advocates in order to progress a constructive dialogue about the implementation of Australia’s obligations arising from the ICERD. It will also consider how the Declaration provides guidance to governments and indigenous peoples, in applying the standards contained within the ICERD to the rights of Aboriginal and Torres Strait Islander peoples.

## 2 What is meant by equality and non-discrimination?

'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relevant to the protection of human rights.'<sup>8</sup> These norms are recognised in every major international human rights treaty, convention and declaration.<sup>9</sup> However, in order to understand the meaning of the key principles of non-discrimination and equality, we must also understand what discrimination and inequality looks like in the context of human rights.

### *Racial discrimination*

Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) provides a starting point for understanding the general concepts of discrimination and equality. It reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>10</sup>

ICERD (Article 1(1)) defines racial discrimination as:

...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>11</sup>

The definition of racial discrimination under international law is generally considered to have two elements:

- First, 'a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin' is required.
- Second, the distinction based on race must nullify or impair 'the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' This second element is generally taken to mean that any racially specific measure must be deemed detrimental to the racial group in question to be considered discriminatory.

In a practical context, racial discrimination is a form of oppression that relies on and reinforces negative stereotypes of a group of people based on their race.

Racial discrimination is when a person is treated less favourably than another person in a similar situation because of their race.

For example, if a real estate agent refuses to rent a house to a person because they are Aboriginal or Torres Strait Islander. This is called 'direct discrimination'.<sup>12</sup>

It is also racial discrimination when there is a rule or policy that is the same for everyone but has an unfair effect on people of a particular race. This is called 'indirect discrimination'. For example, income management while it applies to everyone in certain communities has the potential to have an unfair effect on Aboriginal people, particularly in the Northern Territory where the number of Aboriginal people on income benefits is higher per population. This is substantiated by the Government's own data which says that more than 90% of people on income management in the Northern Territory are Indigenous.<sup>13</sup>

Racial discrimination also includes racial hatred. Racial hatred (sometimes referred to as vilification) is doing something in public based on the race, colour, national or ethnic origin of a person or group of people which is likely to offend, insult, humiliate or intimidate.

Examples of racial hatred may include:

- racially offensive material on the internet, including e-forums, blogs, social networking sites and video sharing sites
- racially offensive comments or images in a newspaper, magazine or other publication such as a leaflet or flyer
- racially offensive speeches at a public rally
- racially abusive comments in a public place, such as a shop, workplace, park, on public transport or at school
- racially abusive comments at sporting events by players, spectators, coaches or officials.

Discrimination is extremely confronting and demoralising for Aboriginal and Torres Strait Islander peoples and goes to the heart of our identity, and our sense of belonging as Australians. Race discrimination attacks and denies our cultural heritage and it denies our histories of oppression and colonisation.

Some forms of racial discrimination are less easy to identify. For example, institutional or systemic discrimination can be largely invisible. It is the application of beliefs, values, presumptions, structures and processes by the institutions of society (be they economic, political, social or cultural) that disadvantage a certain racial group or treat their values as inferior. It can involve a failure to rectify historical discrimination against a particular group which results in that group occupying an inferior or unequal position in the present society.

In Australia, systemic discrimination has been perpetuated by legislative and policy frameworks that seek to define what constitutes being Aboriginal or Torres Strait Islander.<sup>14</sup> These legislative frameworks have supported the colonisation process and continue to affect our own constructs of identity, family, community and systems of organisation.

A United Nations seminar convened to discuss the effects of racial discrimination on indigenous-state relations reported that:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as "primitive" and "inferior". The

discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual condition [needed] for the maintenance of their [way of life], on the other hand, attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.<sup>15</sup>

In this context, discrimination arises where the powerful assert their authority against the powerless. While Aboriginal and Torres Strait Islander peoples can face discrimination based on a range of personal characteristics (including sex, age, disability and race), racial discrimination exacerbates the effects of all others, and in many cases exacerbates the other factors that contribute to inequality.

### *Equality*

Inequality is generated by the existence and promotion of unequal power dynamics.

Equality therefore requires an acknowledgement of cultural difference and recognition that historical discrimination continues to have negative impacts on particular groups such as Indigenous peoples. Accommodating and accounting for this difference can create true equality.

Equality as a human rights principle affirms that:

- all human beings are born free and equal
- all individuals have the same rights and deserve the same level of respect
- all people have the right to be treated equally.

The characteristics outlined above are based on the two legal models of equality – namely, formal and substantive equality:

Formal equality relies on the notion that all people should be treated identically regardless of difference. However, this approach denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination.<sup>16</sup> Brennan J observed in *Gerhardy v Brown*:

formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities “in the political, economic, social, cultural or any other field of public life”.<sup>17</sup>

Substantive equality takes into account ‘individual, concrete circumstances’. Unlike formal equality, substantive equality takes into consideration the effects of past discrimination. It is premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality. It acknowledges that racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination must be taken into account in order to redress inequality.

The international legal approach to equality is one of substantive rather than formal equality.<sup>18</sup> The Human Rights Committee, which oversees the implementation of the ICCPR, has adopted a substantive equality approach to the meaning of non-discrimination. The Human Rights Committee has indicated that equality ‘does not mean identical treatment in every instance’.<sup>19</sup> Unfortunately this is a common



misinterpretation in applying the principles of non-discrimination and equality to the rights of Indigenous peoples, particularly in Australia.

### *Special Measures*

It is from the concept of substantive equality that 'special measures' emerge. The concept of special measures is generally understood to mean positive measures taken to redress historical disadvantage and confer benefits on a particular racial group. Special measures are designed to ensure equality of outcomes for disadvantaged groups, so they may enjoy their rights equally with other groups.<sup>20</sup>

As outlined by Jonathon Hunyor,<sup>21</sup> international human rights treaties concerned with racial discrimination,<sup>22</sup> discrimination against women<sup>23</sup> and most recently the rights of persons with disabilities<sup>24</sup> make provision for 'special' or 'specific' measures designed to promote the equal enjoyment of rights. Article 1(4) of the ICERD provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.<sup>25</sup>

Special measures are also a feature of the principle of non-discrimination at customary international law:

It is now generally accepted that the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared. Such measures must be strictly compensatory and not permanent or else they will become discriminatory. It is important that these measures should be optional and not against the will of the particular groups affected, and they must be frequently reconsidered to ensure that they do not degenerate into discrimination.<sup>26</sup>

The need for special measures is recognised in Australian discrimination laws, all of which contain an exemption in one form or another.<sup>27</sup> Section 8(1) of the RDA sets out in general terms that the provisions of the RDA prohibiting discrimination do not apply 'to or in relation to the application of special measures' to which Article 1(4) of ICERD applies.

It is generally understood that the special measures exemption is designed to protect things done to benefit a disadvantaged group from being challenged as discriminatory.<sup>28</sup> Accordingly, in Australia *Abstudy* has been upheld as a special measure when challenged by a non-Aboriginal person,<sup>29</sup> and the setting of quotas for women's representation on a union branch executive has been upheld under challenge from a man.<sup>30</sup>

### **3 Aboriginal and Torres Strait Islander people's experience of racial discrimination in Australia**

Research conducted with 12 000 people between 2001 and 2008 found that approximately 90% of respondents consider that racial prejudice is still a problem in Australia.<sup>31</sup> Research for the *Australian Reconciliation Barometer* conducted in 2009 revealed that most Australians felt there was a 'high' level of prejudice between Indigenous and non-Indigenous Australians.<sup>32</sup> Other national research conducted in 2002 shows that about 20% of Aboriginal and Torres Strait Islander adults report regular experiences of racism.<sup>33</sup>

More recently, Aboriginal and Torres Strait Islander peoples around Australia have told the Australian Human Rights Commission that they experience racism and racial discrimination on a day to day basis – in education, employment, housing and when accessing services. The Victorian Aboriginal Child Care Agency told the Commission that 'racism is a constant 'background noise' in the lives of Aboriginal and Torres Strait Islander people'.<sup>34</sup>

Unfortunately Aboriginal and Torres Strait Islander peoples have been subjected to racial discrimination resulting in disadvantage and inequality since colonisation.

In many instances the discriminatory treatment of Aboriginal and Torres Strait Islander peoples has been enabled by legislation. This stems back to the Aboriginal Protection Acts<sup>35</sup> commencing in the late 1890's and surviving through to the 1970's in Queensland. Each Australian state and territory enacted legislation that legalised the government's control and management of the lives and destinies of Aboriginal peoples, and later Torres Strait Islanders. These legislative arrangements defined Aboriginal and Torres Strait Islander identity and were based on abhorrent notions of blood quantum. This process of classification was based solely on the perspectives of the colonisers, rather than our own feelings of belonging and connection. Legislation of this kind led to what is today referred to as the Stolen Generations.

This experience was further entrenched by Australia's Constitution which was enacted in 1901. Section 25 contemplates the exclusion of voters based on race, while section 51(xxiv) allows Parliament to enact racially discriminatory laws.

More recently, legislation and policies concerning Aboriginal and Torres Strait Islander peoples continue to exclude protections against discrimination and inhibit equality. The Australian Government's Northern Territory Emergency Response (NTER) is a key example.

### **4 Governments' obligations to prevent discrimination and promote equality**

The obligations outlined in Article 2(1) of ICERD state that governments 'shall condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.' This obligation not only gives rise to government implementing non-discrimination measures, but to ensuring that

preventative measures (laws) and education systems are in place to protect its citizens from racial discrimination.

As a signatory, Australia has legal obligations in relation to ICERD. The Committee on the Elimination of Racial Discrimination (CERD) the body overseeing the implementation of ICERD, has provided States with considerable guidance on establishing measures to protect citizens from racial discrimination. In particular, the CERD has provided clear guidance on applying the ICERD to the rights of Indigenous peoples, including:

- *General Recommendation 23*, which acknowledges that the preservation of Indigenous culture and identity has been jeopardised as a result of colonisation, ongoing discrimination and the denial of human rights and fundamental freedoms. In paragraph four of the document, CERD specifically calls on governments to:
  - (a) recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation
  - (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity
  - (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics
  - (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent
  - (e) ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.<sup>36</sup>

The Declaration also reaffirms that 'indigenous peoples must be free from any kind of discrimination in the exercise of their rights. This is articulated at Articles 8, 15 and 21.

In response to Australia's ratification of ICERD, the Australian Parliament enacted the *Racial Discrimination Act 1975* (Cth), federal legislation designed to ensure equality of treatment of all people regardless of their race. The RDA prohibits racial discrimination under sections 9 and 10 of the Act but allows for 'special measures' to be taken to advance the human rights of certain racial or ethnic groups or individuals under section 8 of the Act.

However, relying on the benevolence of Parliament to protect the rights and interests of all Australians does not provide adequate protection against discrimination.<sup>37</sup>

Aboriginal and Torres Strait Islander peoples are particularly vulnerable to this lack of protection. The Commonwealth Parliament has compromised the RDA on three occasions, each time it involved Aboriginal and Torres Strait Islander issues: the 1998 amendments to the *Native Title Act* (Cth) 1993; the legislation concerning the

Hindmarsh Island Bridge;<sup>38</sup> and the legislation supporting the Northern Territory Emergency Response (NTER) in 2007.

Australia holds the dubious distinction of being perhaps the only country in the world whose Constitution still contains a 'race power' [section 51(xxvi)] that allows the Parliament to enact racially discriminatory laws.<sup>39</sup>

These examples demonstrate how easy it is to create and pass laws which discriminate against Aboriginal and Torres Strait Islander peoples despite the existence of the RDA.

## **5 Achieving non-discrimination and equality for Aboriginal and Torres Strait Islander peoples**

Achieving true equality does not mean that Aboriginal and Torres Strait Islander peoples should be assimilated or integrated into the nation's governance and society. The Declaration recognises that while Indigenous peoples are equal to all other peoples, we also have the right to be different, and to be respected in our difference.<sup>40</sup> Judge Tanaka, of the International Court of Justice, supported this position in his decision in the South West African Case. He stated:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.<sup>41</sup>

In order to achieve circumstances of equality the structures of society must be reoriented to account for Aboriginal and Torres Strait Islander peoples' difference. For example, when governments develop systems, be they education, health or any other area, they have a duty to design such systems so that they accommodate difference, whether the people affected are Aboriginal or Torres Strait Islander, refugees, have a disability or are gender different. It should not be up to people who are different to navigate their way through systems that do not take into account their particular needs and circumstances.

Rather than requiring Aboriginal and Torres Strait Islander peoples to fit in with mainstream services and institutions, the onus is placed on governments and other third parties to accommodate the priorities of Aboriginal and Torres Strait Islander peoples. This includes recognising the cultural distinctiveness and diversity of Indigenous peoples, as well as ensuring Indigenous participation in decision making.

These critical elements have been confirmed as essential to ensuring non-discriminatory treatment and equality before the law.

For example, the CERD has recommended that the Australian Government 'enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources'.<sup>42</sup>

In applying the principles of non-discrimination and equality, governments must be committed to removing existing structural and systemic impediments to healthy relationships within our communities and reinforcing protections against race discrimination. Governments can do this by actively involving Aboriginal and Torres Strait Islander peoples at all stages of the design, development, implementation, monitoring and evaluation of policies, programs and legislation. This approach, supporting the right of indigenous peoples to participate in decisions that affect them, is affirmed in articles 19 and 23 of the Declaration.

One way the Government has committed to addressing racism and racial discrimination and promoting equality is through the National Anti-Racism Strategy. The three year Strategy, launched in August 2012, has been developed in partnership with the Australian Human Rights Commission, led by the Race Discrimination Commissioner. Its objectives are to:

- create awareness of racism and how it affects individuals and the broader community
- identify, promote and build on good practice initiatives to prevent and reduce racism, and
- empower communities and individuals to take action to prevent and reduce racism and to seek redress when it occurs.<sup>43</sup>

There is also cross party support to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. Community consultations conducted to date have resulted in recommendations to remove the provisions within the Constitution that enable discrimination on the basis of race.

These developments will not only improve relationships between Aboriginal and Torres Strait Islander peoples and governments, they will also facilitate positive relationships between Aboriginal and Torres Strait Islander peoples and the broader Australian community.

## **6 Conclusion**

Australia has taken a number of steps to ensure that policies and legislation designed to address Indigenous disadvantage promote equality and non-discrimination. This includes ratifying the relevant international treaties and giving them effect through domestic law. They are also supporting structural developments that aim to reduce the effects of racial discrimination on our communities.

However, the full participation of Aboriginal and Torres Strait Islander peoples in processes designed to deliver on this goal is critical if we are to be successful. Policies and processes that are underpinned by the principles of self-determination, participation in decision-making, and respect for and protection of culture provide a solid foundation to achieving non-discrimination and equality. Just making a conscious effort to ensure the principle of non-discrimination and equality is applied as a minimum standard across the Australian societal and political environment, will increase the quality of life experienced by Aboriginal and Torres Strait Islander peoples, and Australians more generally.

## Questions:

1. What changes do Aboriginal and Torres Strait Islander peoples feel are required to achieve non-discrimination and racial equality:
  - a. In the policy and legislative context?
  - b. In areas of public life (e.g. employment, education, service provision)?
  - c. At the community and local level?
2. How can governments begin to address systemic racism against Aboriginal and Torres Strait Islander peoples in Australia?
3. Under international law, special measures are generally thought to be positive measures rather than punitive measures – is this consistent with the Government's application of special measures?
4. How can governments help protect Indigenous peoples from discriminatory legislation? Is constitutional recognition the answer?
5. How can Aboriginal and Torres Strait Islander peoples' 'right to be different' be operationalized at the legislative and policy level?

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<sup>1</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* Australian Human Rights Commission (2011), p 12. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport10/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html) (viewed 20 October 2012); and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 2. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport10/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html) (viewed 20 October 2012).

<sup>2</sup> National Congress of Australia's First Peoples, *National Congress Report 2011*, (2011), p 5. At <http://nationalcongress.com.au/wp-content/uploads/2011/08/ReportPart1.pdf> (viewed 20 October 2012).

<sup>3</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.

<sup>4</sup> *Racial Discrimination Act 1975* (Cth)

<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex) UN Doc A/RES/61/295 (2007), preambular para 2. At [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (viewed 19 October 2012).

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 5, preambular para 5.

<sup>7</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 5, preambular para 9.

<sup>8</sup> Human Rights Committee, General Comment No. 18 –Non-Discrimination, (1989) para. 1. At <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e> (viewed 6 December 2012).

<sup>9</sup> Australia is a party to the following standards containing the principles of non-discrimination and equality: International Covenant on Civil and Political Rights (ICCPR), Article 2 & 26; International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), Article 2; Convention on the Rights of the Child, Article 2; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2.

<sup>10</sup> *International Covenant on Civil and Political Rights*, 1966, Article 26.

<sup>11</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, Article 1(1).

<sup>12</sup> Section 9(1) RDA, prohibits what is generally known as 'direct' race discrimination.

<sup>13</sup> Parliament of Australia, *What's the future for income management in the Northern Territory?* Flagpost, Information and research from Australia's Commonwealth Parliamentary Library (2011), p 1. At:

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[http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/896709/upload\\_binary/896709.pdf;fileType=application%2Fpdf#search=%22library/prspub/896709%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/896709/upload_binary/896709.pdf;fileType=application%2Fpdf#search=%22library/prspub/896709%22) (viewed 5 September 2012).

<sup>14</sup> For example see the Australian Institute of Aboriginal and Torres Strait Islander Studies, *To Remove and Protect, laws that changed Aboriginal Lives*. At

[www1.aiatsis.gov.au/exhibitions/removeprotect/index.html](http://www1.aiatsis.gov.au/exhibitions/removeprotect/index.html) (viewed 7 December 2012).

<sup>15</sup> S James Anaya, *Indigenous Peoples in International Law*, (2<sup>nd</sup> ed, 2004), p 130.

<sup>16</sup> Race Discrimination Commissioner, *Alcohol Report: Race Discrimination, Human Rights and the Distribution of Alcohol*, Human Rights and Equal Opportunity Commission (1995), p 25. Quoting M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (1990), p16. As cited by the Australian Human Rights Commission, *International Review of Indigenous issues in 2000: Australia* (2000). At [http://www.humanrights.gov.au/social\\_justice/native\\_title/nt\\_issues/fight.html#5](http://www.humanrights.gov.au/social_justice/native_title/nt_issues/fight.html#5) (viewed 7 December 2012).

<sup>17</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 129.

<sup>18</sup> W McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 178, pp 185-186; G Triggs, "Australia's Indigenous Peoples and International Law" (1999) 23 *Melbourne University Law Review* 372, pp 379-381; also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31(1986) paras 150 and 158. As cited by the Australian Human Rights Commission, *International Review of Indigenous issues in 2000: Australia* (2000).

<sup>19</sup> Human Rights Committee, note 8, paras 8 and 9.

<sup>20</sup> For more information on special measures see, Australian Human Rights Commission, *Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth), Implementing 'special measures' under the Racial Discrimination Act 1975 (Cth)* (2011). At: [http://www.humanrights.gov.au/racial\\_discrimination/publications/special\\_measures2011.html](http://www.humanrights.gov.au/racial_discrimination/publications/special_measures2011.html) (viewed 7 December 2012).

<sup>21</sup> J Hunyor, *Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention*, (Paper presented to the National Association of Community Legal Centres Conference, 18 August 2008).

<sup>22</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, note 3.

<sup>23</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 1979, Article 4(1).

<sup>24</sup> *Convention on the Rights of Persons with Disabilities*, 2007, Article 5(4).

<sup>25</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, note 3, Article 1(4).

<sup>26</sup> W McKean, *Equality and Discrimination under International Law* (1983) p 288, cited by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 130.

<sup>27</sup> At the Commonwealth level, see *Racial Discrimination Act 1975 (Cth)* s 8(1); *Sex Discrimination Act 1984 (Cth)* s 7D; *Disability Discrimination Act 1992 (Cth)* s 45; *Age Discrimination Act 2004 (Cth)* s 33.

<sup>28</sup> See, T Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *Am J. Int'l Law* 283, p 305; C Ronalds and R Pepper, *Discrimination Law and Practice* (2004), pp 156-7.

<sup>29</sup> *Bruch v Commonwealth* [2002] FMCA 29

<sup>30</sup> *Jacomb v Australian Municipal Clerical and Services Union* [2004] FCA 1250.

<sup>31</sup> K Dunn, A Kamp, W Shaw, J Forrest and Y Paradies 'Indigenous Australians' attitudes towards multiculturalism, cultural diversity, 'race' and racism', *Journal of Australian Indigenous Issues*, forthcoming. See also Australian Human Rights Commission, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* (2010), paras 76-78. At [http://www.humanrights.gov.au/legal/submissions/united\\_nations/ICERD2010.html](http://www.humanrights.gov.au/legal/submissions/united_nations/ICERD2010.html) (viewed 10 December 2010).

<sup>32</sup> Reconciliation Australia, *Australian Reconciliation Barometer: Comparing the attitudes of indigenous people and Australians overall* (2009), pp 38-39. At

[http://www.reconciliation.org.au/extras/file.php?id=81&file=FINAL\\_Australian\\_Reconciliation\\_Barometer\\_Comparative\\_Report.pdf](http://www.reconciliation.org.au/extras/file.php?id=81&file=FINAL_Australian_Reconciliation_Barometer_Comparative_Report.pdf) (viewed 10 December 2010).

<sup>33</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002* (2004). At

<http://abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/2575DCC732E7EE9CCA25765E001589D4?opendocument> (viewed 10 December 2010).

<sup>34</sup> Australian Human Rights Commission, *National Anti-Racism Strategy Consultation Report* (2012). At: <http://www.humanrights.gov.au/antiracism/consultation.html> (viewed 5 September 2012).

<sup>35</sup> The Protection Acts can be found at Australian Institute for Aboriginal and Torres Strait Islander Studies, note 14.

<sup>36</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of indigenous peoples*, UN Doc A/52/18 (Annex V) (1997), para 4. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument) (viewed 11 October 2011).

<sup>37</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *40 years on: What does the 'Yes' vote mean for Indigenous Australians?* (Speech delivered at the Anglicare Tasmania Annual Social Justice Lecture, Hobart, 22 August, 2007). At [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2007/40\\_years\\_on20070822.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2007/40_years_on20070822.html) (viewed 10 November 2010).

<sup>38</sup> The *Hindmarsh Island Bridge Act 1997* is also arguably inconsistent with s 10 of the RDA because it denies the Ngarrindjeri women the right to enjoy their own culture (Art. 5(e) (vi) ICERD).

<sup>39</sup> G Williams, 'The Races Power and the 1967 Reference', unpublished article developed from 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

<sup>40</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 5, preambular para 2.

<sup>41</sup> *South West Africa Case (Second Phase)* {1966} ICJ Rep 6, pp303-304, p305. As cited by the Australian Human Rights Commission, note 16.

<sup>42</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

<sup>43</sup> More information about the National Anti-Racism Strategy is available at <http://itstopswithme.humanrights.gov.au/strategy.html> (viewed 5 September 2012).