2011

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

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

1 Introduction

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

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

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

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

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

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

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

    - as an exception to the definition of discrimination.

2.1 The positive obligation to take special measures

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

2.2 Special measures: an exception to the definition of discrimination

7. Article 1(4) of ICERD provides that special measures will be considered not to constitute racial discrimination. Specifically, article 1(4) states:

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

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

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

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

3 Special Measures in the RDA

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

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

3.1 Criteria for 'special measures'

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

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

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

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

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

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

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

3.2 Explaining the criteria

3.2.1 Benefit

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

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

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

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

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[13]

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

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

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

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

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

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

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

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

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

3.2.2 Class of people

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

3.2.3 Sole purpose

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

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

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

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

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

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

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

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

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

3.2.4 Necessity

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

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

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

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

3.2.5 Must stop once objectives are achieved

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

4. Case example illustrating a special measure

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

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

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

- that class was based on race;

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

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

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

5. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

[9](1985) 159 CLR 70

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

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