

THE RETURN TO THE LEGAL AND CITIZENSHIP VOID: INDIGENOUS WELFARE QUARANTINING IN THE NORTHERN TERRITORY AND CAPE YORK

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Introduction

This article will suggest that the universal quarantining of Indigenous people's social security in Northern Territory communities is a departure from Indigenous people's citizenship rights. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ('*Social Security Amendment Act*'), which is part of the Commonwealth's Northern Territory 'emergency' measures, represents a return to a historical legal void where Indigenous people had neither rights to their culture nor citizenship rights.

The Northern Territory policy, referred to broadly as the 'Northern Territory Intervention' will be compared to the Commonwealth and State welfare reforms in Cape York, Queensland. Welfare quarantining in Cape York applies to an individual who fails a 'responsibility' test. It is distinct from the blanket approach to Indigenous welfare recipients in Northern Territory communities.

Nonetheless, both systems apply distinctly to Indigenous people and require the suspension of the *Racial Discrimination Act 1975* (Cth). Both curtail citizenship rights and deny capacities for Indigenous communities to develop their own strategies or economies. In essence, they represent the reemergence of a legal void between Anglo-Australian and Indigenous laws that is filled by paternal state policies.

The recurring historical legal void

For many years colonial and 'post'(neo)-colonial laws placed Indigenous people in a legal void. Indigenous people were neither allowed to maintain their own Indigenous laws nor to acquire a citizenship status in line with other Australians. They were required to relinquish their land, forgo their culture and conform to the 'post'-colonial state, with none of the attendant citizenship rights. The laws of exclusion from Indigenous identity and citizenship rights went hand in hand.

The denial of Indigenous culture and citizenship enabled the state to

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seize control of Indigenous lives with little accountability. Control was exercised through force, protection regimes and, eventually, arbitrary criminal laws. Paul Havemann describes this historical exclusion in the following terms:

In the colonies Indigenous people ... have been the paradigm non-people, non-citizens, *homines sacri*. If not, at worst, exterminated with legal impunity, they have been excluded and condemned to placelessness in 'zones of exception' such as reserves, mission schools or camps and other forms of segregation under the regime of the sovereign's draconian 'protection'.¹

Aboriginal protection legislation, known as the *Aboriginal Acts*, precluded Indigenous people from receiving money for their work or welfare. From the early colonial period Indigenous workers were paid in rations of food and clothing. This included workers on cattle stations across northern Queensland, the Kimberley and the Northern Territory until at least the late 1960s.² Other Indigenous people had their wages and welfare payments paid into government accounts, which they never saw and are still trying to reclaim. This class of claims has become known as 'stolen wages'.

Also, well into the twentieth century, Indigenous people were excluded from social security schemes, or had their funds placed in government accounts, as with 'stolen wages'. There was a multitude of exclusions and the following are by way of example. Under the *Maternity Allowance Act 1912* (Cth), Aboriginal mothers were not eligible to make a claim. When Aboriginal mothers became eligible in 1942, the allowance could be paid to a State or Territory authority if considered desirable for the benefit of the Aboriginal person. Under the *Child Endowment Act 1947* (Cth), the Government could place child endowments into a special trust fund for the Aboriginal child's benefit. Indigenous people were not eligible for benefits under the *Commonwealth Widows' Pensions Act 1942* (Cth). Indigenous people were only entitled to receive benefits under the *Unemployment and Sickness Benefits Act 1944* (Cth) if the Director-General of Social Services was satisfied that, having regard to the applicant's character, standard of intelligence and development, it was reasonable that he or she should. The *Social Services Consolidation Act 1947* (Cth) removed the earlier disqualification directed against particular races, but left the position of 'Aboriginal natives' unchanged.

The official rationale for the denial of money was that Indigenous people could not be trusted with money, or would have no use for money. The Northern Territory's Chief Protector of Aborigines in 1912, Baldwin Spencer, claimed that Aboriginal people in remote areas were not sufficiently 'civilized'

¹ Paul Havemann 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia', (2005) 5 *Macquarie Law Journal* 57, 59 (footnotes excluded).

² Raymond Evans, "'Kings" in Brass Crescents: defining Aboriginal labour patterns in colonial Queensland', in (ed) Kay Saunders, *Indentured Labour in the British Empire, 1834-1920* (1984) 203; Sydney Correspondent, "'Conditions of Slavery": Alleged Treatment of N.T. Aborigines', *The Advertiser* (Adelaide), 30 May 1933, 11; Thalia Anthony, 'Labour relations on northern cattle stations: feudal exploitation and accommodation' (2004) 4(3) *Drawing Board: An Australian Review of Public Affairs* 117.

to understand the use and value of money.³ The Government claimed to know what was best for Indigenous people and their money. Effectively, the denial of money allowed the Government to control Indigenous people's property and movements.

In the 1950s, Indigenous people were classified as 'wards of the state'. In the Northern Territory, the *Welfare Ordinance 1953* gave the Administrator the power to declare a person to be a 'ward' because that person 'stands in need of special care and assistance', owing to that person's 'manner of living'; 'inability, without assistance, adequately to manage his own affairs' or 'standard of social habit and behaviour'. With few exceptions, all Indigenous people were declared wards.

The *Welfare Ordinance* retained extensive restrictions on Indigenous people's lives, under the guise that it was race-neutral. In effect it meant that Indigenous people could not vote, decide freely where they could move, whom they could associate with, or marry, or how they could spend their money. The Director of Native Affairs could take the ward into custody and detain the ward on a reserve or in an institution, if it was deemed to be in his or her best interests. The Director could also make orders authorising police to enter, search and remove a child.⁴

During the 1950s, assimilation rationales developed. They provided that Indigenous people could be granted rights where they could prove themselves worthy. The Minister responsible for the Territories, Paul Hasluck, considered that Indigenous people's citizenship rights should be earned, through growing 'into the society in which, by force of history they are bound to live'.⁵ Special laws should apply to Indigenous people. However, 'as Indigenous people acquired the capacities to live in the manner of other Australians, they should be exempted from the special laws'.⁶ These capacities must be in conformity with non-Indigenous ways of life. This transition was driven by a paternal state and would deem Indigenous people 'outcasts in their own land'.⁷

Towards an enhanced notion of citizenship for Indigenous people

The classic concept of citizenship has conservative origins pertaining to obedience to the imperial state. However, since the mid-twentieth century, the citizenship literature has developed to accommodate Indigenous rights. This section outlines the development of citizenship discourse into a rights-based approach for all members of society broadly and Indigenous peoples specifically.

³ Baldwin Spencer, 'Perfectly happy without pay' (1912) 2 *Bulletin of the Northern Territory*, 9.

⁴ See Human Rights and Equal Opportunity Commission ('HREOC'), *Bringing them Home* (1997), Appendix 7.

⁵ Paul Hasluck, *Native Welfare in Australia: Speeches and Addresses* (1953) 17.

⁶ Citing Paul Hasluck's position, Tim Rowse, 'Indigenous Citizenship' in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship* (2000) 88.

⁷ Havemann, above n 1, 59.

Early views of citizenship originated with thinkers such as Aristotle, Rousseau, and Machiavelli. They promoted political engagement in civil society. The citizen is required to ‘evaluate the performance of those in public office’, and ‘engage in public discourse’.⁸ In return for this active role in the state, citizens receive certain rights. In the *Social Contract*, Rousseau enunciated that ‘every act of Sovereignty ... binds or favours all citizens equally’⁹ and accordingly all citizens are ‘equal by convention and by right’.¹⁰

The classic notion of citizenship has attracted criticism that Indigenous people should not adhere to a ‘citizen’ status that is foreign to their Indigenous society.¹¹ Their allegiance should be to Indigenous culture and laws. In Australia, Indigenous people did not freely choose to acquiesce to the colonial sovereign or enter into a social contract. Conforming to the classic notion of citizenship involved relinquishing one’s Indigenous heritage and, as Kymlicka and Norman put it, ‘play[ing] by the majority’s rules’.¹²

However, in the mid-twentieth century T. H. Marshall developed a notion of citizenship that transcended its political and civil roots and branched out into social theory.¹³ It formed the basis for a universal rights claim under the welfare state. Marshall set the basis for a human-rights and ‘humanist’ approach that affords rights to all peoples. Cohen and Hanagan state that “‘right” and “citizen” became the typical form of claim-making in modern democratic societies’.¹⁴ A human-rights conception of citizenship is encapsulated in Article 22 of the Universal Declaration of Human Rights:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

John Chesterman catalogued the rights associated with citizenship that were denied historically to Indigenous people. These rights include the right to vote, speak freely, to choose one’s religion, to move freely, to be equally protected by the law, to enjoy free basic health care and to receive a minimum wage, a minimum level of social security, a fair trial and a basic level of

⁸ Cited in Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (2001) 296.

⁹ Jean-Jacques Rousseau, *The Social Contract and other later political writings* (edited and translated by Victor Gourevitch) (1997) 63.

¹⁰ *Ibid* 56.

¹¹ See Paul Muldoon, ‘Indigenous Citizenship’ (Paper presented at the Australian Institute of Aboriginal and Torres Strait Islander Studies Conference, Australian National University 5-8 November 2007).

¹² Will Kymlicka and Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts* (2000) 1.

¹³ T. H. Marshall, *Citizenship and Social Class and other essays* (1950).

¹⁴ Miriam Cohen and Michael Hanagan, ‘Politics, Industrialization and Citizenship: Unemployment Policy in England, France and the United States, 1890-1950’ in Charles Tilly (ed), *Citizenship, Identity and Social History* (1996) 92.

education.¹⁵

A human-rights approach does not necessitate conformity to the dominant ideal. Citizenship signifies inclusion and diversity, rather than exclusion. It can recognise, promote and accommodate Indigenous rights. Kymlicka and Norman assert that politically engaged citizens must express a ‘willingness to listen seriously to a range of views’,¹⁶ including those of minority groups. Although Kymlicka conflates unsatisfactorily Indigenous peoples with all other minority groups,¹⁷ his analysis with Norman is useful for understanding the importance of citizenship in multi-ethnic societies, especially qualities of ‘public reasonableness, mutual respect, critical attitudes towards government, tolerance, willingness to participate in politics, forums for shared political deliberation, and solidarity’.¹⁸

Jan Pakulski extends Marshall’s social formulation to include cultural rights generally and Indigenous rights specifically. These include ‘rights to unhindered and dignified representation’ and the ‘maintenance and propagation of distinct cultural identities’.¹⁹ Pakulski notes that Indigenous citizenship entails a complex interplay of rights and recognition: ‘a set of rights both claimed by and bestowed upon all members of a political community’; ‘*claimed* rights for protection, recognition, provision, etc.’, and ‘rights that are *recognised* as legitimate by the state and effectively *sanctioned*’.²⁰ Mick Dodson argues that Indigenous rights should be factored into an Australian notion of citizenship.²¹ This would transform an abstract and poorly defined term into a meaningful and dynamic notion of Australian citizenship.

Why a human rights approach: the struggle for social citizenship

This paper draws on the human-rights concept of citizenship because, first, it projects the unique place of Indigenous people in Australian society. It allows for the recognition of Indigenous rights in a way that enhances citizenship broadly. Inversely, Chesterman and Galligan state, ‘Treating Aborigines as citizens without rights fundamentally compromised Australian citizenship in the past because, to allow discrimination, citizenship had to be an empty concept, even a deeply hypocritical one’.²²

¹⁵ John Chesterman and Brian Galligan, ‘Indigenous Rights and Australian Citizenship’, in Kim Rubenstein (ed) *Individual Community Nation: Fifty Years of Australian Citizenship* (2000) 65.

¹⁶ Citing Galston in Kymlicka and Norman, above n 12, 8.

¹⁷ Such conflation overlooks Indigenous people’s original land ownership and unlawful colonial dispossession. See Thalia Anthony, ‘Aboriginal Self-determination after ATSIC: reappropriation of the ‘original position’’ (2005) 14(1) *Polemic* 4.

¹⁸ Kymlicka and Norman, above n 12, 11.

¹⁹ Jan Pakulski, ‘Cultural Citizenship’ (1997) 1 *Citizenship Studies* 73.

²⁰ *Ibid.*

²¹ Michael Dodson, ‘First Fleets and Citizenships: The Citizenship Status of Indigenous Peoples in Post-Colonial Australia’, in S. Rufus Davies (ed), *Citizenship in Australia: Democracy, Law and Society* (1996) 218.

²² John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian*

Second, a human-rights notion reflects the citizenship demands of Indigenous peoples and organisations in the twentieth century. The Federal Council for the Advancement of Aborigines and Torres Strait Islanders, which was the leading organisation at the cusp of the Indigenous citizenship developments in the mid-twentieth century, espoused a human-rights approach.²³ Social security entitlements were a key demand of the Indigenous citizenship movement.²⁴ An Indigenous activist at the time, Evelyn Scott, recalls that the Council was concerned with ‘equal opportunity in basic economic and social areas’, which ‘are rights defined by the Anglo-Celtic model of citizenship’ as well as Indigenous rights to self-determination.²⁵

A key demand was equal entitlement to social security.²⁶ It was not until 1960 that the *Social Services Consolidation Act 1959* (Cth) was enforced to enable all Aboriginal people, other than those who were nomadic and primitive, to be eligible for most social security benefits. All discriminatory restrictions were lifted in the amending legislation of 1966.²⁷

This change took place in the context of granting a raft of citizenship rights: the vote to Northern Territory Indigenous people under the *Commonwealth Electoral Act 1962*, Award wages to Indigenous workers under the Northern Territory Pastoral Award 1968,²⁸ and ‘rights’ to be counted in the Australian census and capacity for the Commonwealth to legislate in relation to Indigenous people following the 1967 Referendum.²⁹

At the time of the 1967 Referendum, the Government and Australian people held the view that the Commonwealth would treat Indigenous people as equal citizens and recognise their rights. There was optimism about the discourse of Indigenous citizenship. The *Daily Mirror* (Sydney) Editorial stated on the eve of the referendum on 22 May 1967 that it represents ‘our chance to make some sort of amends [with Aboriginal people]. We still have a long way to go. But at least we can make a start at treating him [the Aboriginal person] as an equal’. When Prime Minister Gough Whitlam introduced the Aboriginal Land Rights legislation, he claimed that the ‘will of the Australian people, expressed overwhelmingly in the Referendum of 1967’ gave the Commonwealth Parliament ‘the opportunity and the responsibility to see that Aborigines have a right to land’.³⁰

Citizens (1997) 30.

²³ Bain Attwood and Andrew Markus, ‘(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia’ (1998) 29(111) *Australian Historical Studies* 267, 277.

²⁴ Will Sanders and Frances Morphy (eds), *The Indigenous Welfare Economy and the CDEP Scheme* (2004) ANU E Press, Canberra, 1.

²⁵ Evelyn Scott, ‘From Referendum to Reconciliation’ (Speech delivered at James Cook University, 19 October 1999).

²⁶ Sanders and Morphy, above n 24, 1.

²⁷ John Chesterman, ‘Defending Australia’s Reputation, How Indigenous Australians Won Civil Rights. Part I’, (2001) 116 *Australian Historical Studies* 20, 26.

²⁸ Thalia Anthony, ‘Reconciliation & Conciliation: The Irreconcilable Dilemma of the 1965 ‘Equal’ Wage Case for Aboriginal Station Workers’ (2007) 93 *Labour History* 15, 20-21, 28.

²⁹ Attwood and Markus, above n 23.

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 1973, 539

John Chesterman reminds us of the central role of Indigenous people in the civil rights movement. They ‘achieved a great deal in forcing a reluctant state into a new relationship with Indigenous people’.³¹ Indigenous people and civil rights activists fought for such rights over the course of the twenty-first century. Chesterman claims that the acquisition of civil rights by Indigenous Australians was a retreat from paternalist policies.

The Commonwealth Government’s universal quarantining of Indigenous welfare under the Northern Territory Intervention and the Queensland Government’s quarantining of selected Indigenous payments for welfare and Community Development Employment Projects (CDEP)³² signify the restoration of paternalist policies. The Government projects a view that Indigenous people have failed as citizens and are undeserving of equal social security entitlements. The Government also denies self-determination through disempowering communities in the Intervention process. The policy, therefore, is an affront to the both sides of the Indigenous citizenship coin (equality and special rights) and a return to the historical legal void for Indigenous people.

The reaction to this policy was expressed recently by the Yolŋu and Bininj communities in the Northern Territory. In a Communique given to Prime Minister Kevin Rudd at Yirrkala in July 2008, Yolŋu and Bininj peoples called on the Australian Government to:

Recognise and accept that Yolŋu, Bininj and many other indigenous people in the NT are committed to maintaining our culture, our identity and the protection of our land and sea estates. We have a fundamental human right to live on our land and practice our culture, and also a right to access our citizenship entitlements wherever we choose to live, and to benefit from the national wealth that our land and culture create.³³

Northern Territory welfare quarantining: the disavowal of the Indigenous citizen

(i) Application of the policy

In 2007, Northern Territory Indigenous people living in prescribed communities lost their ‘equal’ rights to social security. Rather than being paid in money, they were given credit that could be used only for specific items. This has become known as ‘welfare quarantining’. The former Coalition Government introduced the *Social Security Amendment Bill* in June 2007, which was passed in August 2007. The Act *inter alia* inserts Part 3B into the

(Gough Whitlam, Prime Minister).

³¹ John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (2005) 32.

³² The latter now applies to Queensland alone by virtue of the ensuing *Family Responsibilities Commission Act 2008* (Qld) s 8.

³³ Communique to the Australian Government from Yolŋu and Bininj Leaders at Yirrkala, 23 July 2008, 2.

Social Security (Administration) Act 1999 (Cth), which stipulates which Indigenous people will be affected and under what circumstances. Since coming to government in November 2007, the Labor Party has extended the reach of the policy.³⁴

The *Social Security Amendment Act* provides for blanket quarantining of welfare payments. All Indigenous welfare recipients in prescribed communities will have their welfare quarantined irrespective of their degree of ‘responsibility’. It applies to unemployment benefits, disability pensions, sickness benefits, old-age pensions, veteran entitlements, maternity allowances, ABSTUDY payments and family tax benefit instalments. It also subjects advances, lump sums and baby bonus instalments and family assistance payments to 100 per cent income management.³⁵

In the first year of the Northern Territory Intervention, 13,309 Indigenous people were income managed in 52 communities, associated outstations and 7 town camps.³⁶ It has since been increased to 73, involving 20,000 recipients.³⁷ If an Indigenous person enters a prescribed community, the income management will apply automatically. If the person leaves the community, income management will follow, ‘to ensure they cannot easily avoid the income management regime’.³⁸

The prescribed communities are those in which the Government views ‘normal community standards and parenting behaviours have broken down’.³⁹ The blanket approach is to provide that ‘communities are stabilised and normalised’,⁴⁰ rather than individuals alone. The intention of the policy is to:

... enable the income management regime to apply without delay in Indigenous communities where child abuse and neglect is occurring and where parents are not ensuring that welfare payments are providing appropriately for the care of their children.⁴¹

(ii) Substance of the policy

The *Social Security Amendment Act* automatically sequesters at least 50 per cent of the welfare of all Indigenous people in Northern Territory

³⁴ See: ABC Northern Territory, ‘Income management extended for NT Aboriginal communities’, 11 July 2008. Areas that come under the Act are defined under *Social Security Amendment Act* s123TD.

³⁵ See for example *Social Security Amendment Act* ss123XD, S123XH.

³⁶ Australian Government, Northern Territory Emergency Response – one year on (2008) 32.

³⁷ *Ibid*, 14. This represents 90 per cent of Indigenous Northern Territory communities.

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 7 (Mal Brough, Minister for Indigenous Affairs).

³⁹ *Ibid* 2.

⁴⁰ *Ibid* 7 (italics added).

⁴¹ Explanatory Memorandum, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* (Cth) 15.

communities. The sequestered portion of the payments can only be spent on items that are approved by government bureaucrats. Centrelink staff determine the 'priority needs' of welfare recipients, their family and dependants, and regulate spending accordingly.⁴² In addition to these baseline measures, the Government has the capacity to manage 100 per cent of the welfare income of Indigenous people where there is unsatisfactory school attendance or where the child is in need of protection.⁴³ Finally, welfare is automatically deducted to pay for school breakfast and lunch for Indigenous children.⁴⁴

Indigenous people's payments are placed in a personal 'income management account' with restricted access.⁴⁵ A 'stored value card' is given to Indigenous people that can be redeemed for particular goods and services in designated shops.⁴⁶ The management system promotes a closed market for the sale and purchase of commodities.

The income management accounts replicate the historical system of placing Indigenous people's monies in government trust accounts and raises questions about accountability. Reservations about government accountability are perpetuated by the fact that government decisions on quarantining are excluded from review by the Social Security Appeals Tribunal and Administrative Appeals Tribunal.⁴⁷

(iii) Process of policy implementation

An emergency discourse pervaded the policy-making process for the *Social Security Amendment Act* and related measures.⁴⁸ This discourse fulfilled three important roles. First, it diverted calls for debate and consultation on the legislation and its policy concerns. Sue Gordon, Chair of the Northern Territory Emergency Response Taskforce, explained, 'If you have an emergency like a tsunami or a cyclone, you don't have time to consult people in the initial phases'.⁴⁹ Second, it allowed for the rapid passage of the legislation.⁵⁰ Third, it justified the removal of rights, which this section will discuss in terms of suspending the *Racial Discrimination Act 1975* (Cth) and excluding rights to external review.

⁴² *Social Security Amendment Act* s123TH.

⁴³ *Ibid* ss123UC-UE, 123XI-XL.

⁴⁴ *Ibid* Division 6. See HREOC, *Social Justice Report* (2007), Chapter 3.

⁴⁵ *Social Security Amendment Act* ss123WA-WB.

⁴⁶ *Ibid* s123YE.

⁴⁷ *Social Security (Administration) Act 1999* (Cth) s144(ka) makes decisions relating to income management non-reviewable. Also, the *Administrative Appeals Tribunal Act 1975* (Cth) does not apply; see Standing Committee for the Scrutiny of Bills, Senate, *Ninth report of 2007* (2007) 362-369.

⁴⁸ See *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act 2007* (Cth).

⁴⁹ ABC Radio National, 'Northern Territory Indigenous Intervention Legislation', *The Law Report*, 21 August 2007.

⁵⁰ ABC, 'Intervention created in just 48 hours: Brough', *News*, 16 June 2008.

The *Social Security Amendment Act* was passed after a Senate Inquiry lasting only one day. The Inquiry was initiated by the minor parties after Government resistance. The Senate Committee stated its concern regarding the Minister's 'exceptionally broad power,' yet supported the policy on the basis that it was 'necessary in light of the urgency of the circumstances to be addressed'.⁵¹

The justification of urgency also served to exempt legislation from the *Racial Discrimination Act*.⁵² Section 4 of the *Social Security Amendment Act* states that a number of legislative measures are excluded from the operation of the *Racial Discrimination Act*.⁵³ This includes any act done with respect to income management in the Northern Territory⁵⁴ and an income management order by the Queensland Commission.⁵⁵ Additional comments by the Labor Senators noted that 'the *Racial Discrimination Act* is a basic principle for this country and a basic principle for the Indigenous community of this country', which the legislation undermined.⁵⁶ The Labor Party since coming to government has retained the suspension, although it has purported to repackage it as a 'special measure' under the *Racial Discrimination Act*.

In addition, ordinary rights to review a government decision by an appeals tribunal are removed for welfare quarantining decisions.⁵⁷ The Government justifies this on the basis that review of decisions 'would create unacceptable delays for what are short term emergency measures'.⁵⁸ The Senate Standing Committee for the Scrutiny of Bills has responded to this in the following terms:

In light of the possible duration of the emergency response, i.e. up to five years initially, the Committee remains concerned at the absence of merits review of these decisions. The Committee is of the view that these provisions may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.⁵⁹

Not only is the legislation disempowering for Indigenous people, but its implementation has also undermined community structures. There has been

⁵¹ Standing Committee on Legal and Constitutional Affairs, Senate, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills concerning the Northern Territory National Emergency Response (2007)* 32.

⁵² *Social Security Amendment Act* s4.

⁵³ HREOC explained why the suspension was necessary: 'the government has acknowledged that one of the reasons that this blanket exemption was inserted into the legislation is to address the consequences of section 10(3) of the RDA. Section 10(3) of the RDA makes it unlawful to manage the property of Aboriginal and Torres Strait Islander people without their consent or prevent them from terminating management by another of land owned by them: HREOC above n 44.

⁵⁴ *Social Security Amendment Act* s4(3).

⁵⁵ *Ibid* s4(4).

⁵⁶ Senate Standing Committee on Legal and Constitutional Affairs, above n 51, 45. The suspension was opposed in the Labor Senators' Report.

⁵⁷ See above n 47.

⁵⁸ Senate Standing Committee for the Scrutiny of Bills, above n 47, 369.

⁵⁹ *Ibid*.

scant engagement with communities to develop solutions, or strengthen current strategies, to the problems they face. This has meant that ‘program implementation fails in its prescriptive ‘one size fits all’ approach to management of issues as well as language difficulties’.⁶⁰ Implementation has been undertaken by government bureaucrats, including government business managers and Centrelink staff, who have poured into communities with no prior relationships. Indigenous leaders in the Northern Territory have described the process as the ‘intervention bureaucracy’.⁶¹ Medical director and researcher, Brown and Brown, also comment on the situation:

Activities have been poorly coordinated, poorly planned, and liable to change and backtracking. This has fuelled confusion and paranoia, and created enormous concern about the squandering of desperately needed resources, which are being used largely to install the bureaucracy rather than provide services.⁶²

The top-down implementation of the *Social Security Amendment Act* in the Northern Territory has been without Indigenous community engagement or basic citizenship and anti-discrimination rights. The Labor Government’s rhetoric of redressing this approach through consultation has not been realised as of mid-2009. However, the Government’s notion of consultation is set within the terms of the Government policy, rather than on the premise of empowering Indigenous communities. Accordingly, the policy process harks back to the protectionist era, when Indigenous communities were governed by paternal bureaucratic networks.

(iv) Ideology of welfare quarantining

The condemnation of Indigenous communities in the Northern Territory is not only implicit in the Commonwealth legislation. It is also explicit in the Government’s proclamations on the policy. The Government claimed that a blanket quarantining was needed to enforce the ‘normalisation’ of whole communities.⁶³ The former Indigenous Affairs Minister, Mal Brough, said in his Second Reading Speech,

Normal community standards, social norms and parenting behaviours have broken down and too many are trapped in an intergenerational cycle of dependency. ... This broad-based approach is needed to address a breakdown in social norms that characterises many of our remote Northern Territory communities.⁶⁴

The intention of income management is to deal with ‘the scourge of

⁶⁰ Get Up!, What you should know about the Northern Territory Intervention, <http://www.getup.org.au/files/campaigns/intervention_fact_sheet.pdf> .

⁶¹ ABC, ‘Indigenous leaders slam Rudd’s intervention policies’, *News*, 23 July 2008.

⁶² Alex Brown and Ngiare J Brown, ‘The Northern Territory intervention: voices from the centre of the fringe’ (2007) 187 *The Medical Journal of Australia* 621.

⁶³ HREOC, above n 44.

⁶⁴ Brough, above n 38, 2.

passive welfare’ and ‘to reinforce responsible behaviour’⁶⁵. Mal Brough said the legislation ‘limits the discretion that individuals exercise over a portion of their welfare and prevents them from using welfare in socially irresponsible ways’.⁶⁶ Choice is the problem in Indigenous communities because Indigenous people are incapable of exercising the freedoms of non-Indigenous citizens. Ron Merkel QC describes the Government agenda as one of ‘social engineering, seeking to fundamentally change Aboriginal society’.⁶⁷

Although references to child abuse abound in the Government rhetoric about the Northern Territory Intervention,⁶⁸ the welfare measures have little to do with children. Indeed, welfare is restricted for all Indigenous recipients in Northern Territory communities irrespective of whether they are a parent or not. Furthermore, even parents who the Government may regard as meeting standards of responsible parenting have their income managed. This clearly demonstrates that income management is about community control rather than responsible behaviour. As in the protectionist era, government control beyond the normal operation of Australian law is justified on the basis that Indigenous people as a whole are unable to manage their own money, or affairs, and undeserving of citizenship rights.

Cape York and failed citizens

The *Social Security Amendment Act* also applies to Cape York. Minister Brough stated, ‘The Australian government has committed to support and fund a proposal by the Cape York Institute to trial a new approach to welfare in four Cape York Indigenous communities’.⁶⁹ The Institute provided the Government its report, *From Hand Out to Hand Up: Cape York Welfare Reform Project*, on 19 June 2007.⁷⁰ The Government announced the income management policy two days later⁷¹ and the *Social Security Amendment Bill* was introduced to Parliament two weeks later, on 8 July 2007.

The Commonwealth-funded Cape York Institute is led by Noel Pearson, who asserts an ideology similar to that of the Federal Government. Pearson despairs at the failure of ‘passive welfare’ and the lack of responsibility in communities.⁷² The Institute supports income management on the basis that it

⁶⁵ Ibid.

⁶⁶ Ibid, 7.

⁶⁷ Cited in Lindsay Murdoch, ‘Macklin quarantines welfare, calls summit on intervention’, *The Age* (Melbourne) 11 December 2007.

⁶⁸ See for example, Department of Families, Community Services and Indigenous Affairs, *Emergency Response to protect Aboriginal children in the NT*, <http://www.facsia.gov.au/nter/>.

⁶⁹ Brough, above n 38, 8.

⁷⁰ Department of Families, Community Services and Indigenous Affairs, ‘Release of Cape York Institute Report: From Hand Out to Hand Up: Cape Welfare Project’ < <http://www.facs.gov.au/Internet/facsinternet.nsf/content/capeyork.htm>>.

⁷¹ Peter Yeend and Coral Dow (Parliamentary Library), Bills Digest: Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007, no.27 (2007) 4.

⁷² Noel Pearson, ‘Noel Pearson: Reciprocity resurrected’, *The Australian*, 12 May 2007.

would help revitalise ‘social norms, which mandate personal responsibility’.⁷³ This is commensurate to Hasluck’s assimilation approach to citizenship, where Indigenous people had to earn citizenship rights.

Income management in Cape York is conditional; it applies only where Indigenous people fail to meet certain standards. It contrasts with the blanket approach that prevails in the Northern Territory.⁷⁴ The Cape York Institute emphasises this difference with the Northern Territory Intervention.⁷⁵ The legislation that applies to Cape York does not seek to deny all Indigenous people citizenship rights, but put them on notice that their rights may be threatened if they deviate from social norms. This is arguably a more optimistic view of the citizenship capabilities of Indigenous people. The Cape York provisions are nonetheless equally discriminatory in the sense that they also require suspension of the *Racial Discrimination Act*.

(i) Substance of the policy

The Cape York model quarantines only the income of individual Indigenous people who fall below government standards of parental responsibility. Income is managed by up to 100 per cent where individuals in communities fail to meet a set of obligations.⁷⁶ In addition, Indigenous people in Cape York have their income from CDEP quarantined, unlike in the Northern Territory.⁷⁷ Trials are being conducted in the Indigenous communities of Hope Vale, Aurukun, Coen and Mossman Gorge. They commenced in 2008 and are expected to continue until the end of the 2011.

Although the extent of the ‘obligations’ for welfare recipients were not specified in the Commonwealth legislation, the *Family Responsibilities Commission Act 2008* (Qld) was more prescriptive. The Commonwealth Act provides for the recognition of a new body to be enacted under Queensland law. This body, the Queensland Family Responsibilities Commission, was established in 2008.⁷⁸ It is ultimately responsible for deciding whether Indigenous people are meeting their obligations. The Commission comprises a legally trained Commissioner, deputy-Commissioners and local Commissioners who are selected from Cape York communities.

The Queensland Act identifies who can notify the Commission of the irresponsibility of a welfare recipient or CDEP participant and in what circumstances. These broad provisions are likely to increase surveillance over Indigenous people’s lives. The Commission can receive notification about irresponsibility from:

⁷³ Cape York Institute, *From Hand Out to Hand Up: Cape York Welfare Reform Project* (2007) 7.

⁷⁴ *Social Security Amendment Act* ss123UF, 123XM-XQ.

⁷⁵ See: Cape York Institute, ‘Welfare Reform’, <<http://www.cyi.org.au/welfarereform.aspx>>.

⁷⁶ *Social Security Amendment Act* sS123UF, 123XM-XP.

⁷⁷ *Family Responsibilities Commission Act 2008* (Qld) s8.

⁷⁸ See *Family Responsibilities Commission Act 2008*; *Family Responsibilities Commission Regulation 2008* (Qld).

1. A school principal, if a student has been absent for three days in a school term without a reasonable explanation, or is not enrolled in school;⁷⁹
2. The child protection chief executive, if a child is allegedly harmed or at risk of harm.⁸⁰ This does not require that the allegation be proved, investigated, or even that the subject adult be notified;⁸¹
3. The clerk of the relevant magistrates court where a welfare recipient/s is convicted of an offence;⁸² and
4. A landlord if the welfare recipient tenant breaches their State or Council owned housing tenancy agreement.⁸³

The person for whom the notification applies is brought before the Commission. A discussion follows on why the person is the subject of a notice and what the appropriate response should be. The Explanatory Notes describe this as a ‘hearing’.⁸⁴ This raises concerns of double jeopardy. The Commission can either issue a reprimand, direct the individual brought before them to community support services or give Centrelink a notice to place all or part of their payments under an income management regime.⁸⁵ Its decision can be to manage the income of both parents.

The Commission has a great deal of discretion in determining whether the welfare recipient’s income is managed. Division 3 outlines the criteria for making decisions. Section 71 states that the Commission’s decision must have regard to helping ‘the person engage in socially responsible standards of behaviour’ and may have regard to ‘anything else the commission considers relevant’. The Commission has the authority to obtain information from State child protection authorities, courts and schools to assist it to determine whether there has been a breach of an obligation.⁸⁶

However, individuals retain their rights to appeal the application of welfare quarantining to tribunals, albeit on limited legal grounds.⁸⁷ The retention of rights to appeal, along with the selective approach to welfare quarantining, reflects a view that Indigenous people are seen as *capable* of being citizens. However, the power exercised by the Queensland Commission means that Indigenous people continue to be subject to different and potentially arbitrary conditions.

⁷⁹ *Family Responsibilities Commission Act* ss40-41.

⁸⁰ *Ibid* s42.

⁸¹ Explanatory Notes, *Family Responsibilities Commission Bill 2008 (Qld)* 10.

⁸² *Family Responsibilities Commission Act 2008 (Qld)* s43.

⁸³ *Ibid* s44.

⁸⁴ Explanatory Notes, *Family Responsibilities Commission Bill 2008 (Qld)* 4.

⁸⁵ *Ibid* 5.

⁸⁶ See *Family Responsibilities Commission Act 2008 (Qld)* s72(2).

⁸⁷ See Senate Standing Committee for the Scrutiny of Bills, above n 47, 384; Explanatory Notes, *Family Responsibilities Commission Bill 2008 (Qld)* 10.

(ii) Process and ideology of policy implementation

In determining the policy with regard to Cape York, the Commonwealth Government presented itself as open, consultative and responsive. Minister Brough claimed that the Cape York trials are ‘an expression of the desire of people in Cape York to ensure their children grow up in a safe home, attend school and enjoy the same opportunities as any other Australian child’.⁸⁸ This contrasted with the Government’s approach to the Northern Territory, where the policy was a *fate accompli* due to the perceived catastrophic failure of communities.

The Government was able to present itself as consultative due to a common ideology with the Cape York Institute. Mal Brough’s language resembles that in *Hand Out to Hand Up*. The Institute claims that its welfare reform proposals aim to ‘catalyse the restoration of social norms’.⁸⁹ Likewise, Minister Brough stated that the Cape York trials ‘aim to promote engagement in the real economy, reduce passive welfare and rebuild social norms’.⁹⁰ The Explanatory Memorandum explains that social norms will be rebuilt ‘by linking the receipt of welfare payments to fulfilment of socially responsible behaviours’.⁹¹

However, there is nothing unique in the Government’s ideology in relation to Cape York. It echoes the Government’s approach to Northern Territory communities and Western Australian communities (where it intends to extend quarantining).⁹² Therefore, its approach to Cape York communities cannot be considered as a grass-roots response to the issues facing those communities. Further, Cape York communities do not have the capacity to opt-out of these welfare arrangements, as they do with shared responsibility agreements. This challenges the view that Cape York Indigenous people are actively engaged in the income management policy.

Indigenous Queenslanders have criticised the policy for breaching their human rights.⁹³ One group of Queensland Aboriginal leaders argue that the welfare reforms are ‘designed by Noel Pearson in conjunction with Mal Brough’ and against the wishes of Aboriginal leaders in Queensland. In opposing the Commonwealth and Queensland Acts, the Aboriginal leaders:

... demand the Queensland Government publicly disclose its secret negotiations with Noel Pearson ... We also call upon Noel Pearson to present himself face to face with the Aboriginal communities to explain why he should be cutting payments to needy families while he is on a government payroll of \$200,000 per year.⁹⁴

⁸⁸ Brough, above n 38, 9.

⁸⁹ Cape York Institute, above n 73, 7.

⁹⁰ Brough, above n 38, 9.

⁹¹ Explanatory Memorandum, above n 41, 5.

⁹² Income management trials will begin in Cannington area of Perth, Western Australia in 2008/2009: See Australian Government, above n 36, 15.

⁹³ Les Malezer, Terry O’Shane, Bob Weatherall, Jacqui Katona, Victor Hart, ‘Aboriginals To Fight Queensland Invasion’ (Press Release, 21 December 2007).

⁹⁴ Ibid.

Concluding notes on citizenship and quarantining

The Cape York model is based on a view that citizenship has failed for some Indigenous people. Indigenous people as failed citizens require control to bring them back to the mainstream. Nonetheless, unlike the view of the Northern Territory, the Government does not view the problems in Cape York as inherent to Indigenous communities. Rather, individuals are assessed for income management on a case by case basis where only individuals who deviate from social norms have their welfare regulated. Notwithstanding this qualification, the procedure is invasive and underscored by a government policy of assimilation.

The indiscriminate policy in Northern Territory Indigenous communities treats Indigenous people as incapable of reaching the standards of citizens and undeserving of rights. Welfare quarantining applies regardless of proof of responsibility. The requirement is for whole communities to be ‘normalised’ rather than individuals. Ron Merkel, QC, said of the Northern Territory Intervention, ‘The main underlying purpose was to mainstream indigenous Australians from the Northern Territory’.⁹⁵ This has involved a paternal approach that resembles the universal approach to income management in the protectionist eras.

Both the Northern Territory and Cape York legislation depart from citizenship rights that were hard-won in the 1960s. Although these rights did not encapsulate fully Indigenous rights to their land, laws and culture, they began to bridge the legal void between Anglo-Australia and Indigenous-Australia. The impact of the *Social Security Amendment Act* is to return Indigenous people to an era where they fell within a legal void – where Indigenous people were both denied common citizenship rights and disempowered from self-governance of their communities.

⁹⁵ Cited in Murdoch, above n 67.