HISTORY WARS AND STRONGER FUTURES LAWS

A stronger future or perpetuating past paternalism?

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This article highlights the relationship between the history wars and the *Stronger Futures* laws. The dominant discourse in the history wars has promoted a narrative of benevolent colonists acting primarily for the benefit of Aboriginal peoples. This is interconnected with early colonial ideas about the superiority of Eurocentric culture and how the norms of that culture were benefits to be bestowed upon a supposedly inferior Aboriginal one. In 2007, following the *Little Children are Sacred* report,[1] there was a return to a discourse that disparaged Aboriginal culture in order to justify the Northern Territory Emergency Response (the Intervention). The 2007 Intervention was, as Irene Watson argues, founded upon the 'cultural profiling of the other as barbarian'.[2] In this sense, the laws and policies embodying the Intervention cannot be seen as divorced from the history wars. They have drawn upon a colonialist discourse stretching back to the earliest days of Australian colonisation.

This article maintains that the dominant discourse in the history wars set the tone for the 2007 Intervention laws, and the 2012 *Stronger Futures* laws enacted by the Labor federal government that extended the Intervention approach.[3] The 2012 laws have been described by the government in 'Orwellian' terms as promoting *Stronger Futures* for Aboriginal communities in the Northern Territory.[4] However, as Senator Payne aptly states, 'Just putting adjectives like "stronger" and nouns like "futures" in front of existing policy does not actually make it stronger — or new, for that matter.'[5] These laws bear a disturbing resemblance to past paternalistic laws which not only failed to create stronger futures, but led to much misery for many of those subject to them.

The Intervention laws and policies have had a significant impact upon those communities to which they apply. Although a minority of Northern Territory Aboriginal communities appear to desire some of the aspects of the Intervention, the majority of Northern Territory Aboriginal communities do not support the Intervention and its continuation via the *Stronger Futures* legislative package.[6] The Aboriginal voices who want the Intervention have enjoyed the full force of FaHCSIA's public relations media budget, and receive the continuing support of the Department of Social Services. As such, this article focuses on dissident Aboriginal voices not currently respected in the contemporary political environment, those for whom the Intervention represents another aspect in a long chain of paternalistic law and policy with a demoralising and degrading impact. This article focuses on past and present income management and alcohol prohibition as sites of analysis, and considers the impact of these laws on Indigenous peoples in the Northern Territory.

History wars

In recent decades there has been significant controversy over Australia's history and how that history should be interpreted. There have been hotly contested debates over whose version of history is to take ascendancy. For much of Australia's history the dominant view or 'old history' focused upon celebratory accounts of pioneering settlers and brave explorers who managed to tame a wild continent through agrarian and other commercial enterprises.[7] Australia's Indigenous peoples, if they featured at all, were typically portrayed unfavourably in such accounts, and depicted as 'savage'.[8] This dominant version of history, celebrating the 'pioneering' spirit of Australia's first 'settlers' and marginalising Indigenous peoples, is the version with which many living Australians are familiar.

Revisionist historians, such as Henry Reynolds, have played a central role in awakening the public to a different version of Australian history. This has been referred to as the 'new history',[9] which highlights the dehumanising treatment often meted out to Indigenous peoples during the 'civilising' process. The revisionist views of history met with a substantial conservative backlash during the Howard era (1996–2007). Conservative historians such as Geoffrey Blainey and Keith Windschuttle offered countering perspectives which have been labelled 'new right' history.[10] Like the dominant history that preceded it, the 'new right' history offers a more celebratory and self-congratulatory account of an Australian 'settler' narrative.

The debate over the history wars is of central importance in defining whose voices should be privileged and whose should be marginalised within the national historical narrative. The history wars play a significant role in Australia's discourse of colonialism and have a continuing impact upon Indigenous Australians. Indigenous authors have pointed out that the dominant and new right versions of history have attempted to silence Indigenous voices as part of an ongoing colonial propaganda process. For example, Irene Watson claims that Indigenous people who 'speak in opposition to white truths … are accused of having a blinkered or "black armband" view of history.'[11]

In Australia the urge to silence accounts of history that engage with Aboriginal perspectives in a culturally appropriate manner can be seen as an attempt to reinstitute a national 'forgetting' of Aboriginal history.[12] Thus 'the voices that command respect … and which will be heard' are frequently those that are more palatable to colonial authorities, even if there are other 'Aboriginal voices … speaking critically important things'.[13] By and large, the voices that are not being given respect in this controversy surrounding Australian history are those that emphasise the right of Aboriginal peoples to self-determination and sovereignty.[14]

Many Aboriginal peoples have long been concerned about self-determination and sovereignty. However, those who consider the laws and policies of Australia's earlier colonial period to have been largely successful see the revival of similar laws and policies in contemporary Australia as desirable, regardless of the desires and aspirations of many Aboriginal peoples for self-determination. Those who view Australia's more blatant assimilation laws and policies as the heyday of Aboriginal affairs have been eager to engage in an era of 'new paternalism'.[15] This is seen in the 'new right' perspectives that dominated the Howard era. These views influenced the development of the Intervention laws and policies of the federal government in 2007, which drastically affected Aboriginal people living in the Northern Territory.

The Intervention laws and policies are based upon the same sorts of negative colonial stereotypes of Aboriginal peoples that were prevalent throughout Australia's earlier colonial era.[16] These stereotypes portray Indigenous cultural practices as the demon to be cast out before Indigenous peoples can finally enter the mainstream.[17] Such stereotypes portray Aboriginal people as largely inca-

pable of governing their own lives, particularly their finances and alcohol consumption. This relationship between earlier negative colonial stereotypes and contemporary laws and policies can also be seen in the federal government's 2012 *Stronger Futures* legislation, which reinstates many of the discriminatory features of the 2007 Intervention legislation.[18] Consequently, past colonial laws and policies have a close connection with contemporary laws and policies put in place under the Howard government and continued, albeit with some slight modification, under the Rudd and then the Gillard Labor government. They now continue under the Abbott government.

Earlier colonial laws limiting access to cash and alcohol

Australia's earlier colonial laws for the Northern Territory contained provisions designed to restrict the access of Aboriginal people to cash payments and alcohol. Thus this type of colonial regulation to control Aboriginal peoples and transform their behaviour is not new. Under s 7(1) of the Schedule of the *Aboriginals Ordinance 1911* (Cth) wages due to an Aboriginal person could be paid to the government appointed 'Protector' instead. Under s 43(1)(a) of the *Aboriginals Ordinance 1918* (Cth) the 'Protector' was entitled to manage the personal or real property of any Aboriginal person, which included income from wages. Although this provision referred to obtaining the consent of the Aboriginal person concerned, the legislation allowed for such consent to be overridden if it was deemed 'necessary' by colonial authorities. It was assumed by colonial authorities that if Aboriginal people had full access to their finances they would misapply them and that stringent colonial control was required. The justification for such control was that Aboriginal people were presumed not to be capable of engaging in sound financial management.[19]

Sections 17 and 18 of the *Aboriginals Ordinance 1918* (Cth) were designed to prevent Aboriginal people from coming into contact with alcohol. These sections empowered the Protector and the police to issue orders to Aboriginal people to move on from places selling alcohol (ss 17(1) and s 18(1)). Failure 'to comply with any such order' was 'an offence' (s 17(3) and s 18(2)) and the penalty for breach of s 17(1) was 'imprisonment for three months'. Legislation such as this was seen as a necessary solution to poverty stricken Aborigines who were considered to be a threat to the pleasant ambiance of colonial townships.[20] The legislation was also considered to be beneficial for Aboriginal people and implemented for their 'protection'. The same protectionist approach was adopted in the 2007 Intervention, which has now been reframed as *Stronger Futures*.

The Stronger Futures laws limiting access to cash and alcohol

In June 2012, the federal government enacted the *Stronger Futures* legislative package. As was the case with its legislative forebears, the government intended this legislation to benefit those to whom it applies.[21] However, several features of the legislation remain highly controversial, both in terms of its content and the process by which it was brought about. It was brought into being after the federal government had engaged in a gravely inadequate consultation process with Indigenous peoples in the Northern Territory, a process which failed to conform to the international human rights standards by which Australia is bound.[22] These standards require the government to consult with Indigenous peoples in 'good faith' so as to ensure that they do not make laws and policies for Indigenous peoples without their 'free, prior and informed consent'.[23] However, the consultation process did not allow effective participation for Indigenous peoples, nor was it concerned with obtaining their consent.[24] Instead the consultations have been referred to as 'show consultations', where the government listened without hearing anything but the echo of its own predetermined policy objectives.[25] It rode roughshod over the rights of Aboriginal peoples to self-determination.

Despite the fact that these laws were to be put in place for another decade, a mere six weeks was dedicated to 'consultations' with Aboriginal peoples prior to the 2012 laws being enacted.[26] In many instances, Aboriginal people did not have accurate and adequate information that was an essential foundation for meaningful consultation; and 'consultations commenced only a few days after the discussion paper was released.'[27] This did not give those who were to be affected by these laws and policies much time to engage with the complex ideas presented in the discussion paper. The *Stronger Futures* Discussion Paper was not translated into Indigenous languages.[28] Furthermore, in some areas the consultations were clearly not attended by the majority of people living in those communities. These glaring deficiencies led Mick Gooda to state: '[w]hile the motivations behind the changes may be well-meaning, governments have repeatedly illustrated their lack of cultural competency'.[29] He stresses that 'consultations need to be conducted in a culturally competent manner' and they 'need to actually inform government policy.'[30]

It is important to note that income management was not even raised by the government in the *Stronger Futures* consultations as a topic worthy of consultation, despite the known opposition of many Aboriginal people to the government's imposition of compulsory income management.[31] Several features of the Intervention's income management scheme remain in place in the Northern Territory, such as compulsory income management for a person classified as a 'disengaged youth', 'long term unemployed' or 'vulnerable' welfare recipient.[32] However, some changes to the income management scheme are contained in the *Social Security Legislation Amendment Act 2012* (Cth) ('*SSLA Act*'). This Act permits compulsory income management to be extended via referral powers for State and Territory agencies,[33] and permits the Minister to specify an area to which compulsory income management will apply.[34]

The government considers that the broader scope of the income management scheme beyond the Northern Territory renders the scheme non-discriminatory and therefore in compliance with the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). The Liberal Federal government had chosen to suspend the *RDA* in 2007 as part of the Intervention. However, although the government claims that income management now complies with the *RDA* and is no longer racially targeted, approximately 90 per cent of those under income management in the Northern Territory are Indigenous.[35] This indicates that *indirect* racial discrimination continues to be problematic. Moreover, the *SSLA Act* provides that people who are subject to compulsory income management cannot avoid it by moving to another location, as authorities can now determine its applicability based upon 'the usual place of residence' of welfare recipients'.[36]

Interestingly, the Parliamentary Joint Committee on Human Rights ('PJCHR') recently examined several measures introduced by the *Stronger Futures* laws and considered whether these measures comply with Australia's international human rights obligations. They examined the alcohol prohibition and income management measures.[37] Significantly, the PJCHR stated that legislation will still be racially discriminatory according to human rights law if it 'overwhelmingly or disproportionately' affects 'members of a particular racial or ethnic group'.[38] In the context of income management, they stated that 'while the measures have been extended to communities that are not predominantly Aboriginal' they 'still apply overwhelmingly to … Aboriginal communities' which 'means … they will fall within the definition of racial discrimination in article 1 of the ICERD'.[39] They concluded that the only way such

measures could be rendered non-discriminatory is by evidence showing that income management is based on 'objective and reasonable grounds' and is 'a proportionate measure in pursuit of a legitimate objective.'[40] To date, the government has not provided unequivocal evidence of this nature.[41]

In many ways the alcohol restrictions in place under the *Stronger Futures* legislation are far more onerous and draconian than what was in place under the *Aboriginals Ordinance 1918* (Cth). Although the object of the *Stronger Futures in the Northern Territory Act 2012* (Cth) ('*SFNT Act*') contained in s 4 states that it 'is to support Aboriginal people in the Northern Territory to live strong, independent lives' the legislation promotes an extremely paternalistic approach to alcohol usage and is racially targeted. It is designed to affect the alcohol consumption of Indigenous people.

While it is acknowledged that the amount of alcohol consumption is a problem in some Northern Territory Aboriginal communities, the trouble with the government's unilaterally imposed 'solution' is that it does not necessarily offer a collaborative approach for communities to deal with alcohol related harm in their desired way. It can result in government orchestrated outcomes 'without adequate consultation'.[42] Indigenous communities are also subject to Ministerial approval of their Alcohol Management Plans under the *Stronger Futures* laws, hence Ministerial override.[43] This approach does not allow for Indigenous communities to be self-determining in terms of effectively and appropriately addressing these issues as they choose. Instead, the *Stronger Futures* laws impose an approach likely to lead to further criminalisation of Indigenous people.

Section 8 of the *SFNT Act* inserts a range of alcohol related offences into the *Liquor Act 1978* (NT). It inserts a new s 75B(1) which makes it an offence to possess alcohol in an alcohol protected area. The maximum penalty for breach of this provision is '100 penalty units or imprisonment for 6 months.' Under s 5, the definition section of the *SFNT Act*, a penalty unit has the same meaning as s 4AA of the *Crimes Act 1914* (Cth), which sets out that a penalty unit is $170. This means the applicable penalty for breach of this section could be one hundred times $170, an astounding $17,000 for possession of alcohol in one of the alcohol prohibited areas. This is likely to lead to further over-representation of Indigenous Australians in the criminal justice system[44] and further impoverish communities. It does nothing to treat the causes of alcoholism. Interestingly, 'Prior to the Intervention eighty percent of Homelands were considered to be "dry" communities.'[45] Yet the *Stronger Futures* legislation keeps perpetuating the racist colonial stereotype of the drunken Aboriginal person unable to moderate alcohol intake and in need of the pervasive paternalism of the state.

Section 8 of the *SFNT Act* also inserts a new s 75C(1) into the Northern Territory *Liquor Act* which makes it an offence to supply alcohol in an alcohol protected area. The maximum penalty for breach of this provision is '100 penalty units or imprisonment for 6 months.' However under s 75C(7)(a) 'If the quantity of ethyl alcohol involved in the commission of an offence … is greater than 1,350 ml the maximum penalty for the offence is 680 penalty units or imprisonment for 18 months'. Again, this provision is likely to lead to an increase in the over-representation of Indigenous Australians in custody. This is particularly so when these extreme fines are considered in conjunction with compulsory income management which restricts 50 per cent or more of a welfare recipient's income to expenditure on government approved priority needs. 'Priority needs' are defined in s 123TH(1) of the *Social Security (Administration) Act 1999* (Cth) and do not include the payment of fines, which is hardly helpful given that fine default can lead to incarceration. These sorts of Intervention measures have led to Aboriginal people in the Northern Territory finding it more difficult to pay for bail and fines 'due to a shortage of cash from Income Management.'[46]

Despite this, the government maintains that the alcohol measures enacted as part of the *Stronger Futures* laws are 'special measures' for the purposes of s 8 of the *RDA*. The High Court has recently adopted this same logic in *Maloney v The Queen*, where legislative provisions with a similar effect operating in Queensland affecting the Palm Island community were upheld by the majority as 'special measures' under s 8 of the *RDA*.[47] This indicates how the High Court would be likely to deal with a challenge brought in relation to similar provisions in the *Stronger Futures* laws. Yet arguably, this is paternalism at its most perverse — with the government effectively saying to Aboriginal communities with problematic alcohol consumption: 'we are criminalising you for your own good and protection'. The High Court engaged in a positivist approach in *Maloney*, and ignored contemporary international human rights jurisprudence about what constitutes 'special measures' for the purposes of international human rights law.[48] They took a rigid textual approach to international human rights jurisprudence, only giving credence to material available in 1975, the year the *RDA* was enacted. After *Maloney* was decided, interestingly, the PJCHR concluded that 'a measure which criminalises conduct by some members of the group to be benefited, in order to promote the overall benefit of the group, is not appropriately classified as a "special measure"' under international human rights law.[49]

Conclusion

There is a connection between the earlier colonial propaganda epitomised in the dominant and new right historical narratives and the contemporary *Stronger Futures* laws and policies. The *Stronger Futures* legislation continues Australia's trend of paternalistic legal and bureaucratic control over the lives of Indigenous peoples. The bureaucratic blindness to the damaging disempowerment embedded within the *Stronger Futures* laws and policies is likely to lead to further problems in remote Northern Territory Indigenous communities rather than achieve the government's stated aims. The *Stronger Futures* legislation is described by the government as legislation for the benefit of Indigenous peoples in the Northern Territory; however for many it is perceived as a thinly veiled disguise of an 'ongoing colonialism' cloaked as 'humanitarian intervention'.[50] The *Stronger Futures* legislation has been referred to as 'the Stolen Futures Legislation' by Deni Langman, a traditional owner of Uluru.[51] It represents yet another catastrophic failure on the part of the government to understand, acknowledge and respect the wishes of most Indigenous peoples living in the Northern Territory. Yet as Jon Altman rightly points out, '[g]lobal evidence suggests that stronger futures for Aboriginal people will require more self-determination … in accord with local values and aspirations, not imposed ones.'[52]

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