
SCORING THE INTERVENTION: FAIL GRADES ON CLOSING THE GAP, HUMAN RIGHTS

by Stephen Gray

Between 2014 and the start of 2016, Monash University's Castan Centre conducted a review of the Northern Territory Intervention ('the Intervention')—that is, the range of measures first introduced in 2007 in the Howard Government's 'Emergency Response', and later modified by the 'Stronger Futures' and other policies.¹ The Intervention's effectiveness was scored against a range of human rights and other standards. The Castan Centre released its review on 8 February 2016,² just prior to the 2016 Prime Minister's Closing the Gap Report ('the 2016 CTG Report').³ The major findings of the Castan Centre review were:

- Fail grades on Closing the Gap targets including: health and life expectancy (4/10); employment and economic participation (3/10); and community safety (4/10). Only education received a pass mark (5/10).
- Fail grade (0/10) for progress on lowering incarceration rates. Controversially, this is not a Closing the Gap target, and the Castan Centre strongly recommended that it should be.
- Fail grades on general compliance with human rights (4/10), and on other human rights standards including progress on implementing special measures (3/10), and respecting the right to self-determination (2/10). On these measures the Intervention received lower scores than it did on the Closing the Gap targets. The Castan Centre recommended that stronger and more explicit attention be paid to adhering to international human rights standards in framing Intervention-related policy.

The Castan Centre concluded that the Intervention is failing to achieve Australia's goal of closing the gap between Indigenous and non-Indigenous Australians. While this conclusion is consistent with other research conducted into the impact of the Intervention,⁴ it stands in marked contrast to the 2016 CTG Report, which while referring to 'mixed results' also picked out several positive changes.⁵

Of course, Closing the Gap reports are concerned with gaps at a national and not just a Northern Territory ('NT') level. Nevertheless, the difference in emphasis between official reports such as the Prime Minister's 2016 CTG Report and independent reports suggests a decrease in genuine government concern

with Indigenous affairs. In a climate of spin—or bureaucratic obfuscation—failure to be 'on track' to meet Closing the Gap or other targets is simply accepted as inevitable. We now lack the sense of 'emergency' which pervaded the early years of the Intervention. Instead, we are seeing an increase in bureaucracy, in which statistics are recycled, or cherry-picked.⁶ The suspicion that this is occurring becomes stronger if the 'mixed results' in the 2016 CTG Report are contrasted with the 'profound disappointment' expressed by former prime minister Tony Abbott in the 2015 Closing the Gap Report. After all, many, if not most, of the statistics from the 2015 CTG Report are replicated in the 2016 CTG Report.

EVALUATING THE INTERVENTION

The main challenge of evaluating the Intervention is making sense of the enormous and confusing quantity of information. Between 2007 and October 2012, according to researchers from the Australian National University Jon Altman and Susie Russell, a staggering 98 government and consultant reports into Indigenous people were produced.⁷

This figure includes only those reports that were specifically about the NT; there is a mass of further information concerning Indigenous affairs Australia-wide which also includes statistics from the NT. In February 2015, for example, the Prime Minister's seventh Closing the Gap report was closely preceded by a biennial report by a government steering committee, entitled *Overcoming Indigenous Disadvantage: Key Indicators 2014* ('OID Report'). It comprised 13 chapters, multiple appendices and came to 3200 pages in length.⁸

The Castan Centre evaluated the Intervention as a whole—that is, its effectiveness in the nine years since its announcement in August 2007 by the then Commonwealth Minister for Indigenous Affairs, Mal Brough. This means that some measures which have since been repealed, such as the explicit suspension of the *Racial Discrimination Act 1975* (Cth) in relation to some Intervention measures, were part of the evaluation. Also included were some newly announced measures, such as the Healthy Welfare Card, which are currently in the trial stage. It is obviously difficult to evaluate a new initiative,

but concerns expressed by communities and other stakeholders were taken into account.⁹

A major goal of the evaluation was to be accessible to ordinary people, not just ‘experts’. It is important to recognise complexity and maintain academic rigour, but accessibility to ordinary people is crucial. It is especially important that discussion about the Intervention’s measures be accessible to NT Indigenous peoples. A fundamental and continuing problem with the Intervention is that Indigenous people feel ‘a strong sense of disempowerment’, coupled with ‘a widespread view that communities are not being listened to and that they do not have an adequate say in decision-making’.¹⁰

EDUCATION: 5/10

In arriving at this grade, the Castan Centre referred to statistics suggesting an increase in Indigenous pre-school and primary school attendance. However, this has not been matched by increases in rates of Indigenous secondary school attendance. National Assessment Program – Literacy and Numeracy (NAPLAN) results show that a high percentage (64 per cent) of Indigenous students in the NT were below national standards, far higher than the percentage of non-Indigenous students in the NT (5–10 per cent). The gap worsens when considering remote or very remote Indigenous students.

Prime Minister Malcolm Turnbull’s introduction to the 2016 CTG Report referred to ‘an increasing proportion’ of Aboriginal and Torres Strait Islander students completing Year 12 at a national level. However, it also notes that:

the Northern Territory has the lowest proportion of Indigenous students at or above the NMS (national minimum standards) for each year level (of reading and numeracy). This result partly reflects the pattern by remoteness area, as the Northern Territory has a much higher proportion of Indigenous students in remote or very remote areas than any other jurisdiction.¹¹

EMPLOYMENT AND ECONOMIC PARTICIPATION: 3/10

In the NT, the major impact on Indigenous employment rates was the phased cancellation of the Community Development Employment Program, beginning in July 2009 before final closure in June 2015. This program had previously employed 7500 individuals. Other programs—notably the Remote Jobs and Communities Program—have since been introduced, including more recently, the Commonwealth’s workforce participation target and national Indigenous Procurement Policy.¹²

However, the gap between Indigenous and non-Indigenous unemployment rates in the NT still widened slightly, from 10 per

cent at the start of the Intervention to more than 11 per cent, in 2011. The income gap between Indigenous and non-Indigenous Territorians also increased, as did the number of Indigenous people on income support.

At a national level, the prime minister’s introduction to the 2016 CTG Report notes encouragingly that there is ‘almost no employment gap between Indigenous and non-Indigenous university graduates’. However, this obscures the less positive statistics buried deeper in the report. In particular, the Indigenous employment rate fell between 2008 and 2013, in the context of a general softening in the labour market which has especially adversely affected people with lower levels of education.¹³

In the NT, youth suicide and self-harm is an urgent problem. The suicide rate generally for 15–24 year old people in the NT was 3.5 times higher than the rest of the country, according to data released in 2012.

HEALTH AND LIFE EXPECTANCY: 4/10

For several years a decline in the Indigenous child mortality rate has been apparent. At a national level, this means that the COAG target of halving the gap in mortality rates for Indigenous children under five by 2018 is on track to be met.

It is indisputably a good thing that fewer Indigenous children are dying of preventable diseases than in the past. As do previous reports, the 2016 CTG Report headlines this statistic as a piece of good news. However, a couple of reservations should be expressed. First, the base for comparison is 1998, not 2008, when the COAG targets were set. Thus, the fact that the rate of improvement has slowed since 2006 is obscured. Second, Indigenous children are still twice as likely to die under the age of five compared to non-Indigenous children.

On other health measures, the news is less positive. At a national level, life expectancy statistics, last collected in 2012, show such a small decrease in the ‘gap’ between Indigenous and non-Indigenous life expectancy that without dramatic improvements there is next to no chance that the gap will close by the COAG target of 2031. In fact, at the current rate of narrowing (0.1 years between 2005–07 and 2010–12) it would take 495 years to ‘close the gap’ in life expectancy for women.¹⁴ The fact that non-Indigenous life expectancy rates are increasing makes the task of closing the gap even more difficult.

In the NT, the news on Indigenous life expectancy is even less positive. Male life expectancy is only 63 years, while female life expectancy actually fell in the years from 2005 to 2012–13. This means that not only do Indigenous people in the NT live six years less on average than Indigenous people elsewhere in Australia, but also that the NT has the largest gap between Indigenous and non-Indigenous life expectancy.¹⁵

Of real and distressing concern is the increase in mental health issues among Indigenous people. Nationally, according to the ABS health survey, 30 per cent of Indigenous adults reported high or very high levels of distress in 2012–13, about three times the rate for non-Indigenous adults.¹⁶ Rates of suicide and intentional self-harm among Indigenous people are also increasing, with Indigenous suicide rates almost twice those for non-Indigenous Australians, and hospitalisation rates for intentional self-harm having increased by almost 50 per cent between 2004–05 and 2012–13.¹⁷

In the NT, youth suicide and self-harm is an urgent problem. The suicide rate generally for 15–24 year old people in the NT was 3.5 times higher than the rest of the country, according to data released in 2012.¹⁸ There seems a clear link between this rate and high rates of incarceration:

In Alice Springs, suicide has occurred over the last five years following immediate release from prison, usually triggered by reconnecting with their former lives, mixed with alcohol misuse. Among people who have died by suicide, the second most frequent event preceding death was contact with the justice system.¹⁹

As to child sexual abuse, the NT statistics do not support the Howard Government's assertion that there was a 'national emergency'.

SAFER COMMUNITIES: 4/10

The perception of 'unsafe communities'—in other words, communities torn apart by violence and child sexual abuse—was the major impetus for the original Northern Territory National Emergency Response ('NTNER'). It is not a formal Closing the Gap target, but forms part of the Closing the Gap reports, which contain sections on prevention and reduction of crime rates, family violence, and alcohol and drug abuse.

As to child sexual abuse, the NT statistics do not support the Howard Government's assertion that there was a 'national emergency'. However, there was clearly a problem. According to an NT monitoring report,²⁰ there were 45 convictions for child sexual assault in the NTNER communities (that is, NT Aboriginal land, community living areas and town camps, as specified in the original NTNER legislation) over four years from 1 July 2007 to 30 June 2011. This compared to a total of 25 convictions in those communities in the four years prior to the commencement of the NTNER.

At the same time, there has been a rapid increase in child protection substantiation since the commencement of the NTNER, mostly in remote parts of the NT. Before the introduction of the NTNER, it was lower than the national average for Indigenous children; it is now higher.²¹

The introduction of the NTNER has coincided with an increase in reported crime rates in NT communities. There was an increase of 39 per cent in domestic violence-related incidents between 2007 and 2009, and a further increase of 31 per cent between 2010 and 2012. Of course, this is not necessarily the result of an increase in this crime, but may instead be the result of increased police numbers or of mandatory reporting.²²

At a national level, Aboriginal and Torres Strait Islander women are 34 times more likely than non-Indigenous women to be hospitalised for family-related assault, and Indigenous men are 28 times more likely than their non-Indigenous counterparts to be hospitalised.²³ In 2011–12, the homicide victimisation rate among Indigenous Australians was five times the rate for non-Indigenous Australians.²⁴ As hospitalisation rates are much higher in remote and very remote communities, the equivalent figures in the NT are likely to be much higher—an indication that the NTNER measures have not been successful in reducing family violence rates in the NT.

LOWERING INCARCERATION RATES: 0/10

Twenty-five years ago, the Royal Commission into Aboriginal Deaths in Custody drew national attention to the appallingly high incarceration rates suffered by Indigenous people at that time.²⁵ For several years after that report, all Australian governments, including the NT Government, produced reports in which they claimed to be implementing or be in the process of implementing the vast majority of the Royal Commission's recommendations. In fact, during this period, the imprisonment rate in the NT was rising slowly, not falling. In June 2003, it was 549 prisoners per 100,000 population. By 2006, it had risen to 551 per 100,000 adults, with the percentage of Aboriginal prisoners remaining generally steady at around 80 per cent of the NT's overall prison population.²⁶

After the Intervention, the NT's incarceration figures began to increase steeply. By 2009, the overall imprisonment rate had risen to 658 per 100,000 adults, with just under 82 per cent being Aboriginal people. During the first five years of the Intervention, there was a 41 per cent increase in incarceration rates. In the NT, Indigenous Australians now make up 86 per cent of the prison population and 96.9 per cent of the juvenile detention population.

The 2016 CTG Report recognises that Indigenous incarceration is an issue at a national level. The 'Safer Communities' section in the 2016 CTG Report notes that 27 per cent of the total Australian prison population is Indigenous, and that the imprisonment rate for Indigenous people increased by 77.4 per cent between 2000 and 2015.²⁷ However, not only are these figures buried deep in the report, there is no clear commitment to reducing incarceration rates, nor any reference to the Royal Commission's apparently forgotten report on ways in which this might be achieved.

Both the Close the Gap Steering Committee and the Social Justice Commissioner have recommended that incarceration rates should be included as a formal Close the Gap target. However, in an interview in February 2016, Indigenous Affairs Minister Nigel Scullion claimed that introducing a formal target would be 'foolish' and would 'undermine the credibility of Close the Gap'. His reason for this was that incarceration rates are an area of state and not federal responsibility, and are consequently an area in which the federal government has 'no control'.²⁸

This argument is patently weak. Health, education and employment are also areas of primary state responsibility, yet the federal government has no objection to including them as Close the Gap targets. In its application to the NT, the argument is even weaker. The Intervention was, and continues to be, a federal government initiative. The federal government has not hesitated to intervene in areas where it perceived the NT judiciary and legislature to be soft on crime; for example, its amendments to the *Crimes Act* preventing courts (except in rare instances) from paying heed to the impact of customary law in sentencing or bail decisions.

HUMAN RIGHTS

In the initial phase of the Intervention, the Howard Government argued strongly that human rights standards could justifiably be ignored. By casting the measures as an 'emergency response', the government equated them with wartime measures, or measures taken in response to a terrorist threat—situations in which it is generally argued if not always accepted that civil liberties may be curtailed for public security and the greater good.

Consequently, as is well known, many of the major measures introduced in the Intervention were exempted from the operation of the *Racial Discrimination Act 1975* (Cth). For example, the Income Management Regime was initially applied only to Indigenous people, as were various of the alcohol restriction measures, and measures enabling the compulsory acquisition of Aboriginal land.

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The *Racial Discrimination Act* was formally reinstated in 2010.²⁹ The Stronger Futures legislation, which replaces the original emergency response legislation, is similarly formally subject to the Act. However, the current Intervention legislation continues to receive extensive criticism for violating human rights standards. Characterising laws as 'special measures' is particularly controversial. A Parliamentary Joint Committee argued in 2013 that many of the Stronger Futures measures were inconsistent with the *United Nations Declaration on the Rights of Indigenous People*, for which the Rudd Labor Government announced its support in 2009.³⁰

Nevertheless, human rights standards do not form part of the Closing the Gap reports. Nor are they a significant part of the current federal government's general discourse on Indigenous affairs, although Prime Minister Turnbull does acknowledge the need for Indigenous people to be consulted and involved in measures affecting their lives.

Do human rights matter, other than as feathers with which international bodies such as the UN Special Rapporteur may slap Australia on the wrist? The Castan Centre's contention is that they do. As noted above, the major frustration expressed by Indigenous people about the Intervention is that they have not been consulted—that they are disempowered, and not involved in decisions.

Research shows that a sense of disempowerment is strongly linked to abusive, violent or anti-social behaviour, including self-harm and suicide. So is a sense of lack of connection to culture.³¹ Lack of educational achievement is also linked to alienation—to a sense that the education system is not designed for Indigenous people. Poor health choices like smoking or excessive drinking may also be seen as a self-destructive form of resistance to white authority,

taking the form of 'non-compliance' with the well-intentioned edicts of health professionals.³²

In the NT, these issues are particularly acute. Consequently, there is a practical and compelling need for those forming policy and laws pursuant to the Intervention to take greater account of human rights.

The Intervention is not meeting its target of 'Closing the Gap' between NT Indigenous people and other Australians. If the government is serious in searching for reasons for this failure, and in finding a viable way forward, then it needs to pay closer attention to those matters expressly flouted in the Intervention's early stages, and largely ignored since: NT Indigenous peoples' human rights.

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1 See *Northern Territory National Emergency Response Act 2007* (Cth) (now repealed), and further discussion below.

2 See <<http://www.monash.edu/law/centres/castancentre/our-research-areas/indigenous-research/the-northern-territory-intervention/the-northern-territory-intervention-an-evaluation>>.

3 Commonwealth of Australia, *Closing the Gap: Prime Minister's Report*, 2016.

4 See, for example, Jon Altman and Susie Russell, 'Too much 'Dreaming': Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012', (2012) 3 *Evidence Base* 1–28.

5 Above n 3. This report notes that 'as in previous years, there have been mixed levels of success in meeting the targets set by the Council of Australian Governments (COAG) in 2008' (Executive Summary, p 5).

6 The problem represented by this information is compellingly theorised by Foucault as 'governmentality', or the congenital failure of government's 'good intentions'. Foucault refers to government's 'eternal optimism': an optimism which, however, carries within it the seeds of its own downfall, since each new policy development is doomed by the 'conflicts and complexities arising from the sheer quantity and extent of official interventions'. See Michel Foucault, 'Governmentality', in G Burchell, C Gordon and P Miller (eds), *The Foucault Effect: Studies in Governmentality*, (University of Chicago Press, 1991).

7 As Altman and Russell argue, this 'evaluation fetishism' is a problem in itself, above n 4 at 7–8.

8 Commonwealth of Australia, *Closing the Gap: Prime Minister's Report*, 2015; see also Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission, Canberra, 2014.

9 See in particular the research and evidence cited in Mick Gooda,

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015*, Australian Human Rights Commission, 2015 at 58.

10 Aboriginal Peak Organisations NT, 'Putting Aboriginal people back in the driver's seat: a post Intervention roadmap for the NT', (2013) 118 *Precedent* 25–28 at 25.

11 Above n 3, 20.

12 Above n 9, 50.

13 Above n 3, 27.

14 For the figures on which this calculation is based, see OID Report, above n 8, 16.

15 See COAG Reform Council, *Indigenous Reform 2012/13: Five years of performance*, 2014, 20.

16 OID report, above n 8, 48 (figure 8.7).

17 OID Report, above n 8, 49 (figure 8.8).

18 See Wendy Morton, NTCOSS Submission, National Children's Commissioner, *Intentional self-harm and suicidal behaviour in children*, May 2014, 4.

19 Ibid, 6.

20 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: Monitoring Report: January–June 2012*, 24–5.

21 Ibid, 25.

22 Ibid, 24.

23 Above n 3, 51.

24 OID Report, above n 8, 218 (para 4.93).

25 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

26 See discussion and figures in Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory*, (Federation Press, 2nd ed, 2012) 40.

27 Above n 3, 51.

28 Calla Wahlqvist, 'Nigel Scullion scoffs at proposed national target on Indigenous jail rates', *The Guardian*, 12 February 2016.

29 For the 2010 changes, see the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth).

30 See Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012*, eleventh report of 2013, Commonwealth of Australia, 2013.

31 See for example NTCOSS Submission, above n 8. Right to culture is, of course, an international human right.

32 Ian Kerridge, Michael Lowe and Cameron Stewart, *Ethics and Law for the Health Professions*, (Federation Press, 4th ed, 2013) 996–7.