FOREWORD

Megan Davis*

This edition of the *Australian Indigenous Law Review* is focused on the theme of 'Formal Equality, Substantive Equality and Special Measures'. This topic - especially 'special measures' as they relate to Indigenous peoples - is the subject of considerable misunderstanding in the wider community. The distinction between special measures and concrete measures is an example of this. Each of the articles in this edition provides a new contribution to the ongoing scholarly discussion about 'Formal Equality, Substantive Equality and Special Measures' as it exists both in Australia and in other jurisdictions.

The Commonwealth *Racial Discrimination Act* ('RDA') - the domestic expression of the United Nations' *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') - is and has been fundamental to the achievement of equality for Indigenous peoples in Australia. Yet the recent High Court decision in *Maloney*, illustrated the difficulties that emerge when Australian jurisprudence fails to interpret domestic law consistent with international jurisprudence on CERD and Indigenous rights. This makes for a complicated legal environment in which Aboriginal and Torres Strait Islander communities are forced to grapple – in the midst of an ever-changing, frequently punitive and often discriminatory policy environment with limited-to-non-existent access to legal resources as explored by Fiona Allison.

Even so the various manifestations of the RDA, some of which are visited in this special edition, have had a profound impact on Indigenous peoples' lives in Australia. It ended the last vestiges of the protection era and saw the introduction of the types of measures that have led to a growing Indigenous middle class for whom no longer should access such measures. Some of the issues surrounding this are ventilated in this edition by Barac and Kelly. Another related challenge is that posed by Gordon Chalmers in his essay which problematises the legal construct of 'aboriginality' as against Yanyuwa conceptions of aboriginality. Chalmers challenges the essentialist approach of the RDA.

Still the RDA has been an important avenue of legal recourse in the absence of treaties and other constructive agreements and arrangements, as well as a constitutionally entrenched racial non-discrimination clause. This is why the current iteration of constitutional reform seeks to entrench non-discrimination in the Constitution. It derives from concrete examples of legal discrimination without recourse from the Ngarrindjeri women and heritage protection, to the Native Title Amendment Acts in 1998 to the Northern Territory Intervention in 2007. While Emmanuelle Richez's article on Canadian Supreme Court jurisprudence captures the limitations of rights-based judicial review for Aboriginal peoples seeking self-government, the Canadian experience, particularly section 35, is virtually incomprehensible to the situation in Australia.

* Director of the Indigenous Law Centre and Professor of Law at the University of New South Wales. Megan is also a UN Expert member of the United Nations Permanent Forum on Indigenous Peoples and she holds portfolios including Administration of Justice and Gender and Women.