INDIGENOUS LAW CENTRE

Monday 15 June 2009

National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Consultation Committee,

SUBMISSION ON INDIGENOUS RIGHTS

The Indigenous Law Centre is pleased to make a brief submission of its views to the National Human Rights Consultation based on the terms of reference:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

The Indigenous Law Centre was established in 1981 to develop and coordinate research, teaching and information services in the multi-disciplinary area of Indigenous peoples and the law. The twin goals of the Indigenous Law Centre are research contribution and community contribution. Our aim is to provide important resources for advocates, policy makers, researchers and others who will be able to affect better legal, policy and program outcomes, based on high quality information, for Indigenous Australians.

Our submission is written specifically in relation to the human rights issues of Aboriginal and Torres Strait Islander peoples in Australia.

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Background

It is widely accepted that Aboriginal and Torres Strait Islander peoples are the most disadvantaged community in Australia today.[1] Furthermore the fundamental human rights of Aboriginal and Torres Strait Islander peoples are insecure, frequently violated and vulnerable to the political party of the day.

There are many examples of the way in which the fundamental human rights of Aboriginal and Torres Strait Islander peoples are violated by the Australian state. This has been recognised by United Nations committees on numerous occasions, for example, the 1998 amendments to the *Native Title Act 1998* (Cth) were in violation of Australia's human rights obligations not to discriminate against a group of people on the basis of race.[2] Most recently, the measures taken in the Northern Territory Emergency Response have been deemed to be in breach of Australia's international obligations.

Recognising Indigenous specific rights

Unlike comparative contemporary liberal democracies of Canada and New Zealand, Aboriginal and Torres Strait Islander in Australia struggle to assert legitimacy within the Australian polity in terms of being "first peoples". Unlike Indigenous peoples in Canada or New Zealand, who have comparatively better health, employment and education outcomes, Aboriginal and Torres Strait Islander peoples have not had the benefit of a Treaty agreement or any constructive negotiated agreement with the state that has established early the legitimacy of Indigenous rights within a democratic system.

Establishing the collective cultural rights of Aboriginal and Torres Strait Islander peoples as legitimate in Australia is critical to 'Closing the Gap'. This is because contemporary market-based liberal democracies like Australia are deeply influenced by utilitarianism. This manifests itself in a political and public policy culture where decisions are formulated on the basis of *the greatest satisfaction of the greatest number*. This political culture questions and rejects minority interests expressed in those policies and laws designed specifically for Indigenous peoples because they are viewed as diminishing opportunities or diverting resources away from measures that should be aimed at increasing the satisfaction of the majority of non-Indigenous individuals.

1 See, most recent statistics of socio-economic disadvantage cited in Aboriginal and Torres Strait Islander Commissioner, 2009 Social Justice Report statistics.

2 CERD, Decision 2(54) on Australia, 54th Session A/54/18 (1999).

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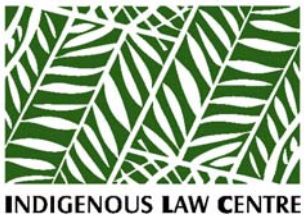

For this reason Indigenous rights, insecurely protected by legislation, will always be subject to parliamentarians and the political whim of the day. While we appreciate that Parliament is directly accountable to the people and this reflects fundamental principles of democratic accountability and the rule of law, this is not an effective argument for a group that constitutes roughly 2% of 20 million people. The 1998 *Native Title Act* amendments are one example of the way in which Aboriginal opportunities for economic development and social mobility are diminished when Aboriginal and Torres Strait Islander peoples' rights are compromised for this reason.

This is why many liberal democracies enact measures to counter the utilitarian or majoritarian impact of 'democratic deliberation' or 'democratic compromise' upon the rights of small numbered, powerless groups. Internationally, these measures have included post-colonial treaties, statutory recognised Indigenous rights and constitutionally entrenched rights.

This background is important for the National Human Rights Consultation Committee to consider when addressing how Australia can better protect the human rights of its first peoples because any measures aimed at securing the recognition and protection of Indigenous rights, for example, the right to self-determination, will be viewed as divisive or anti-democratic.

Finally, with the General Assembly's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*, the international community has finally given agreement to international standards pertaining to Indigenous peoples including the right to self-determination.[3] This provides further evidence of the importance of recognising Indigenous peoples rights in Australia.

The fundamental question for Aboriginal and Torres Strait Islander peoples is what model of human rights protection in Australia will actually ***make a difference*** to how people live their daily lives.

1. WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?

Australia has an international obligation to promote and protect the rights that it commits to in international treaties. These include the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the

[3] G.A. Res. 61/295,U.N. Doc. A/RES/47/1 (2007).

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Convention on the Elimination of All Forms of Discrimination Against Women, the *Convention on the Rights of the Child*.

The Indigenous Law Centre advocates that those rights contained in the ICCPR and ICESCR be recognised in statutory form.

Furthermore given the specific needs and exigencies of the Aboriginal and Torres Strait Islander community, there are some rights in CEDAW and CROC that should be recognised in a federal legislation protecting human rights.

The evolution of the right to self-determination

For many Aboriginal and Torres Strait Islander peoples, the right to self-determination is critical to improving the lives of Indigenous peoples and the survival of Indigenous cultures in Australia. The Indigenous Law Centre has no particular position on whether the right to self-determination should be protected and promoted in any future human rights instrument. However, there is misinformation about what the right to self-determination means and how it is implemented.

As stated above the *United Nations Declaration on the Rights of Indigenous Peoples* has been adopted by the General Assembly and supported by the Federal government. The *United Nations Declaration on the Rights of Indigenous Peoples* is an expression of what Indigenous peoples right to self-determination looks like in practice.

The right to self-determination internationally is no longer mired in the out-dated debates about decolonisation and territorial integrity. The development of the right to democratic governance in international law since the end of the Cold War signalled a change in the international understanding of the right to self-determination from decolonisation to democratisation.

Thus in international law there has been a distinct shift in the way in which self-determination is viewed. The right to self-determination is the right of peoples to determine their political destiny 'in a democratic fashion and is therefore at the core of the democratic entitlement'.[4]

[4] Thomas Franck 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Gregory H Fox, 'The right to political participation in international law in Gregory H Fox and Brad R Roth (ed), *Democratic Governance and International Law* (2000) 48-90; James Crawford, 'Democracy and the body of international law' in Gregory H Fox and Brad R Roth (ed), *Democratic Governance and International Law* (2000) 91-120; Roland Rich, 'Bringing Democracy into International Law' 12 *Journal of Democracy* (2001) 20-34; Henry Steiner, 'Political Participation as a Human Right *Harvard Human Rights Year Book* (1988) 77.

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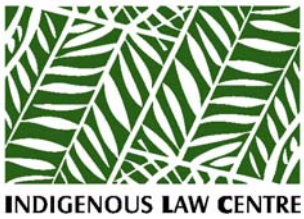

This norm is said to be derived from the international principle of the right to self-determination, the 'oldest democratic entitlement'. The norm of democratic governance is also said to derive from the right to political participation as established in the UN Charter, Article 21 of the UDHR and Article 25 of the ICCPR.[5]

The right to self-determination could facilitate special political arrangements within the state in order to enhance the way in which Indigenous peoples determine their lives internally. This usually takes the form of a representative body that interacts with communities and the state and the *United Nations Declaration on the Rights of Indigenous Peoples* clearly assists states in the implementation of the Indigenous right to self-determination within a democratic system without disrupting public institutions or the rule of law.

The Indigenous Law Centre emphasises that the right of the self-determination as recognised in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* is subject to the territorial safeguard clause from the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (Friendly Relations Declaration) in the text.[6] Article 46, known as the savings clause, has become a catch all provision to arrest state fears about the implications of the recognition of cultural rights for municipal legal systems and concerns about the impact of such a Declaration upon the rule of law.

Article 46 reads:

> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights

[5] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. See also, Human Rights Committee, General Comment no 25 on article 25 (1996): Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

[6] GA Res 2625, UN GAOR, 25th sess, UN Doc A/Res/2625 (1970).

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obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The safeguards in the Declaration are Article 3 and 4 which seek to limit self-determination to "internal" self-determination and the savings clause of Article 46 which protects state sovereignty and territorial integrity. The remaining articles in the operative section of the text explain what the right to self-determination means in actual practice. As stated above, the right self-determination is the cornerstone of the Declaration and this is reflected in the operative provisions. The Declaration contains forty six articles and it is a very clear exercise in translating the right to self-determination from international law into the domestic context.

Thus in contemporary international human rights law the right to self-determination is about procedure and process. Fundamentally for Aboriginal and Torres Strait Islander communities it is about consultation and being consulted on the decisions that affect their lives as individuals and communities.

In translating Article 3's self-determination into practical steps, the Declaration is a combination of positive rights for Indigenous peoples and negative rights for states that are divided into a number of themes: threats to the survival of indigenous peoples; cultural, religious, spiritual and linguistic identity; education and public information; participatory rights; lands and resources.

It is important to note that Article 46 of the Declaration renders all the articles subject to existing international and domestic law. This means that the rights are relative and must be balanced with the rights of others.

Responsibilities

The Indigenous Law Centre recognises that all human rights attract responsibility. It is fundamental to the notion of human rights that individuals should respect and recognise the fundamental human rights of others.

The importance of responsibility in terms of rights is recognised in the preambles to both the International Convenant on Economic, Social and Cultural Rights as well as the International

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Covenant on Civil and Political Rights: 'the individual is under a responsibility to strive for the promotion and observance of the rights recognised'.[7]

2. ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

The Indigenous Law Centre submits that human rights are not sufficiently protected or promoted in Australia. Australia's protection and promotion of human rights is ad hoc and piecemeal. Human rights are protected across constitutional, statutory and common law.

Many comparative liberal democracies have enacted statutory instruments or constitutionally entrenched fundamental human rights as a way of implementing their international human rights obligations into domestic law.

Australia remains one of the few countries to not have done so.

As referred to above, in 1998 the UN Committee on the Elimination of Racial Discrimination found that the Government's amendments to the *Native Title Act 1993* (Cth) breached the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The federal government subsequently refused to repeal the 1998 amendments and as a result was subject to 'early warning' monitoring by the UN for acts of racial discrimination.

It is relevant to the National Consultation that the CERD committee **noted the lack of entrenched basic human rights in the Australia legal system**. The CERD committed noted that the paucity of rights protection in Australia means that the parliament can override any statutory rights such as those contained in the *Racial Discrimination Act 1975* (Cth).

This makes rights, such as prohibition of racial discrimination, subject to the political tenor of the day and easily overridden. It effectively enables government to legislate against Indigenous interests on the basis of their race. Furthermore this capacity is arguably supported by the race's power in the Australian constitution.

[7] Preamble, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; Preamble, *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

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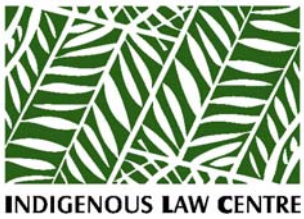

Whether a legislatively enacted instrument can prevent such a situation occurring will ultimately depend on the model adopted.

The Indigenous Law Centre believes that nominal recognition of human rights does not necessarily result in adequate protection and promotion of human rights. This is a problem for many liberal democracies. For rights to be effective there must be adequate remedies where a violation of rights has occurred. There also needs to be resources allocated by the state in order that these rights be adequately protected and promoted.

3. HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

The Indigenous Law Centre emphasises that constitutional entrenchment of fundamental human rights is preferable to statutory protection of rights.

One of the main reasons promoted by supporters of a statutory model (Charter of Rights supporters) for having a Charter is the ***limitations of parliamentary democracy*** in recognising and promoting human rights and the way in which decisions on human rights are made on the basis of political reasons.

The Indigenous Law Centre has identified non-discrimination and equality before the law as the most important rights for Aboriginal and Torres Strait Islander communities.

Specifically, the Indigenous Law Centre argues that the constitutional recognition of *non-discrimination* and *equality before the law* would be most beneficial to Aboriginal and Torres Strait Islander peoples.

The Indigenous Law Centre is acutely aware of the difficulties inherent in suggestions for constitutional amendment in Australia. However this is the only way that Aboriginal and Torres Strait Islander rights can be protected from political agendas. A Charter of Rights will continue in the vein that elected representatives will still weigh up whether or not it is electorally viable for them to recognise Indigenous rights. While it is true that any such decision will be more ***scrutinised*** by the media, the public and Parliament, we are not confident that when it comes to Aboriginal and Torres Strait Islanders the outcome will be any different. We say this to bring it to the Committee's attention that this is a real concern of Aboriginal and Torres Strait Islander communities (again, who are roughly 2% of a 20 million population).

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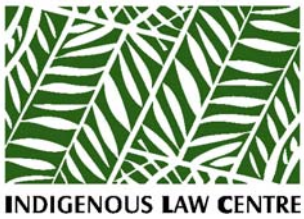

The Indigenous Law Centre acknowledges the pragmatism and practicality of having a statutory model of rights protection prior to constitutional entrenchment. For example, in Canada there was a statutory instrument before it was constitutionally entrenched.

As a more likely alternative to constitutional reform, a federal statute of rights is especially useful to the extent of community education. Improved community education and knowledge of human rights is extremely important for the ongoing campaigns toward addressing Unfinished Business between Aboriginal and Torres Strait Islander peoples and the state.

Improved community knowledge about the way in which Aboriginal and Torres Strait Islander rights have been historically violated and how that continues today can only assist Aboriginal and Torres Strait Islander communities in their law reform efforts. Improved community knowledge as a consequence of a federal statute of human rights may even bolster perennial Indigenous claims for a treaty between the state and Indigenous peoples.

We refer to Chapter 2 of the Aboriginal and Torres Strait Islander Social Justice Commissioner's 2008 Social Justice report, which refers to a Charter of Rights as one important measure toward an Aboriginal and Torres Strait Islander human rights protection framework for the 21st century (that includes constitutional reform).

The Indigenous Law Centre prefers constitutional recognition of fundamental human rights especially non-discrimination and equality before the law. As an alternative the Indigenous Law Centre supports the educative role that a statutory Charter of Rights will provide.

Conclusion

One concern expressed frequently to the Indigenous Law Centre by members of the Aboriginal and Torres Strait Islander community is how a statutory non-discrimination clause will relate to Section 51(xxvi) of the Australian Constitution. Section 51 (xxvi) permits the Federal Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws. We now know from High Court jurisprudence that the power can be used to make laws to ***the benefit and detriment*** of Aboriginal people.[8]

It is utterly unacceptable for a modern liberal democracy like Australia to have a power that may permit discriminatory legislation in the Constitution. Particularly with contemporary discussions about a Charter of Rights and Australia's renewed respect for human rights and the

[8] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

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rule of law, the races power would be at odds with a non-discrimination clause in any statutory human rights instrument.

Thus, the insecure protection of non-discrimination in Australia and the existence of the races power continue to inform Indigenous advocacy for constitutional reform. Ultimately the Indigenous Law Centre supports constitutional protection of human rights. The Indigenous Law Centre understands, however, that this is not the brief of the National Consultation and therefore as an alternative approach the Indigenous Law Centre supports a statutory protection of human rights in the form of a charter of rights, mainly on the grounds that it would serve an educative role in the Australian community pertaining to human rights.

The Indigenous Law Centre has sought to draw your attention in this brief submission to some of the issues arising in the Aboriginal and Torres Strait Islander community in relation to the National Human Rights Consultation.

If you have any questions please do not hesitate to contact us.

Kind regards

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