

# Chapter 2

## An Aboriginal and Torres Strait Islander human rights protection framework for the 21st century

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All Australians are equally entitled to enjoy the rights, benefits and responsibilities of citizenship. In our society, every person should feel free from discrimination of any kind and have the right to share in the nation's land, resources and wealth. The entitlements and freedoms of all people are recognised in human rights instruments, many of which have been freely signed and ratified by Australia, and in some instances are now a part of Australian law.

However, it is an unavoidable reality of our past that Aboriginal and Torres Strait Islander peoples have not had the opportunity to fully enjoy their human rights. This is because of the process of colonisation, the dispersal, removal and dispossession of many Aboriginal and Torres Strait Islander peoples, and a history of discrimination.

The full exercise and enjoyment of the human rights of the Aboriginal and Torres Strait Islander peoples is an essential foundation for reconciliation.<sup>1</sup>

Council for Aboriginal Reconciliation – *Roadmap to Reconciliation* (2000)

## Part 1: Introduction

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Australia has much that it can be proud of. Over the past 220 years, our strong traditions of liberal democracy, an independent judiciary and a vibrant media sector have secured our ongoing political stability and our prosperity. For the majority of Australians, these strong traditions have also been sufficient to protect their basic rights and freedoms. But this is not true for all Australians.

A commitment to human rights in Australia means working towards justice for every citizen, and not simply for the popular majority. By this measure, I believe there is still much work to be done – particularly for Aboriginal and Torres Strait Islander peoples.

Indigenous peoples continue to live with the consequences of their human rights not being fully protected. Appendix 2 of this report shows how

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1 Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000). At [http://www.austlii.edu.au/au/orgs/car/recognising\\_rights/pg3.htm](http://www.austlii.edu.au/au/orgs/car/recognising_rights/pg3.htm) (viewed 31 January 2009).

Indigenous peoples continue to enjoy a substantially lower quality of life in relation to their health, education, housing, land, and have a higher engagement with the criminal justice system, child protection systems and welfare.

Clear deficiencies have also been identified in our existing system of human rights protection for more than a decade. No action has been taken to redress this, leaving Indigenous peoples either without protection or with protection that is vulnerable to being overridden by competing priorities.

The new Commonwealth government has announced a broad national consultation process to consider the adequacy of human rights protections in Australia. The Prime Minister has also raised the possibility of constitutional reform to recognise Indigenous peoples and has identified processes to improve Indigenous representation – two key issues that will impact on the adequacy of rights protection for Indigenous peoples.

It is therefore timely to consider an agenda to ensure adequate protection of Indigenous peoples rights into the future. There are six main areas where reform is needed to ensure full protection for Indigenous peoples and to modernise our human rights system. These are as follows:

1. Commonwealth Government to formally declare its support for and implement the *UN Declaration on the Rights of Indigenous Peoples*;<sup>2</sup>
2. A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights;
3. Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination;
4. The establishment of a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making that affects our interests;
5. The establishment of a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation; and
6. A focus on human rights education and the building of a culture of human rights recognition and respect.

Such a reform agenda will take a number of years to realise. Collectively, however, these measures provide the necessary components of a foundation for Indigenous rights protection in the twenty-first century and beyond.

## 1. Unfinished business – the need for reform has been clearly identified

Since 1788, Indigenous peoples have consistently asserted our rights. We have repeatedly and publicly called upon governments to formally recognise our human rights and to protect us from racial discrimination.<sup>3</sup>

Some of the most powerful and well-known calls for Indigenous rights protections have been made at the community level and include:

- In 1938 the Aborigines Progressive Association made a 10-point statement to the Prime Minister requesting the establishment of a federal Department

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2 *United Nations Declaration on the Rights of Indigenous Peoples* GA Resolution 61/295, UN Doc A/61/L.67 (2007) ('Declaration').

3 For a thorough historical account of calls for Indigenous rights protection, see B Attwood and A Markus, *The Struggle for Aboriginal Rights* (1999).

of Aboriginal Affairs with the objective of 'rais[ing] all Aborigines throughout the Commonwealth to full Citizen status and civil equality with the whites in Australia';<sup>4</sup>

- In 1939 the Yorta Yorta peoples living at Cumeragunja station led a walk off to protest their living conditions, the leasing of their land without their consent, and the oppressive laws governing the reserve system;
- In 1963 the Yolgnu people presented the Yirrkala Bark Petition to the Commonwealth government to protest the failure to consult Indigenous peoples about mining developments on their lands;
- Between 1966 and 1975, Gurindji, Ngarinman, Bilinara, Walpiri and Mudbara peoples led the Wave Hill Walk Off to protest against the labour rights and conditions of Indigenous peoples, and demand the return of traditional lands;
- In 1988 the Barunga Statement requested that the Commonwealth Parliament pass legislation guaranteeing a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs. The statement also requested that the Government negotiate a constitutional treaty recognising Indigenous peoples' prior ownership and continued occupation and sovereignty over Australia;<sup>5</sup>
- In July 2008 a paper-bark Declaration was presented to the Prime Minister at a community cabinet held in Yirrkala. Like the Barunga statement, the *Yolngu and Bininj Leaders' Statement of Intent* called upon the Prime Minister to initiate a process of constitutional reform to recognise and protect Aboriginal rights to culture, lands and waters, and self-determination.<sup>6</sup>

Proposals for rights recognition have also been advanced by Indigenous peoples and their organisations operating at the policy level:

- In 1979, the National Aboriginal Conference, which had been established by the Commonwealth Government two years earlier, requested that a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government, and developed an ongoing special committee to advance Indigenous views of what should be included in a 'Makarrata' agreement.
- In 1995, the Aboriginal and Torres Strait Islander Commission set out a comprehensive strategy entitled *Recognition, Rights and Reform* which set out some of the fundamental elements of rights recognition, including:
  - an increased commitment to supporting international instruments which reinforce Indigenous rights;
  - support for measures to define, recognise and extend Indigenous rights including new initiatives in areas such as communal title and assertion of coextensive rights;
  - promotion and advancement of the constitutional reform agenda;
  - Indigenous representation in Parliament;

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4 'Our Ten Points: Deputation to the Prime Minister' *Australian Abo Call*, No. 1, 1938. At <http://asset0.aiatsis.gov.au:1801/webclient/DeliveryManager?&pid=20373> (viewed 12 December 2008).

5 The full text of the Barunga Statement is available at: Australian Institute of Aboriginal and Torres Strait Islander Studies, Treaty, <http://www1.aiatsis.gov.au/exhibitions/treaty/barunga.htm> (viewed 26 November 2008).

6 The full text of the communiqué is available at: Reconciliation Australia, *Communiqué: Yolngu and Bininj Leaders' Statement of Intent*. At [http://www.reconciliation.org.au/downloads/755/APPENDIX\\_A.pdf](http://www.reconciliation.org.au/downloads/755/APPENDIX_A.pdf) (viewed 4 February 2009).

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- processes to start work on compensation issues; and
- support for initial work to develop a framework for a treaty and negotiation arrangements.<sup>7</sup>

A number of strategies for Indigenous rights reform and protection have also been recommended by an extensive number of inquiry and consultation processes. Table 1 below captures a number of the most significant of these recommendations.

<b>Year</b>	<b>Inquiry/Report</b>	<b>Select Recommendations</b>	<b>Outcome</b>
1988	Final Report of the Constitution Commission <sup>8</sup>	<p>That a comprehensive statement of constitutionally protected rights and freedoms be inserted in a new Chapter of the constitution, including the following section:</p> <ul style="list-style-type: none"> <li>▪ 124G. (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic origin, sex, marital status, or political, religious or ethical belief.</li> <li>▪ (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.<sup>9</sup></li> </ul> <p>That section 25 of the <i>Constitution</i> should be removed.<sup>10</sup></p>	Not implemented
1991	Royal Commission into Aboriginal Deaths in Custody <sup>11</sup>	<p>That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.<sup>12</sup></p>	Implemented to the extent that the reconciliation process, headed by the Council for Aboriginal Reconciliation, was established in response.

7 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report To Government On Native Title Social Justice Measures* (1995).

8 Australian Constitutional Reform, *Final Report of the Constitutional Commission: Summary 1988* (1988). At <http://www.ausconstitution.info/ConComm88/start.shtml> (viewed 26 November 2008).

9 Australian Constitutional Reform, *Final Report of the Constitutional Commission: Summary 1988* (1988) p 39. At <http://www.ausconstitution.info/ConComm88/start.shtml> (viewed 26 November 2008).

10 Australian Constitutional Reform, *Final Report of the Constitutional Commission: Summary 1988* (1988) p 15. At <http://www.ausconstitution.info/ConComm88/start.shtml> (viewed 26 November 2008).

11 Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). See in particular, Volume 5, chs 36–38.

12 *Royal Commission into Aboriginal Deaths in Custody* (1991) recommendation 188.

Year	Inquiry/Report	Select Recommendations	Outcome
		That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged. <sup>13</sup>	
1997	<i>Bringing them home</i> report <sup>14</sup>	To address the social and economic disadvantages that underlie the contemporary removal of Indigenous children and young people the Council of Australian Governments: <ol style="list-style-type: none"> <li>1. in partnership with ATSIC, the Council for Aboriginal Reconciliation, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner and Indigenous community organisations dealing with Indigenous family and children's issues, develop and implement a social justice package for Indigenous families and children, and</li> <li>2. pursue the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody which address underlying issues of social disadvantage.<sup>15</sup></li> </ol>	Not implemented
2000	Council for Aboriginal Reconciliation <sup>16</sup>	The Commonwealth Parliament prepare legislation for a referendum which seeks to: <ul style="list-style-type: none"> <li>▪ recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the <i>Constitution</i>; and</li> </ul>	Not implemented

13 Royal Commission into Aboriginal Deaths in Custody (1991) recommendation 339.

14 Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the national Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

15 Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the national Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), recommendation 42.

16 Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/pg3.htm> (viewed 2 December 2008).

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Year	Inquiry/Report	Select Recommendations	Outcome
		<ul style="list-style-type: none"> <li>▪ remove section 25 of the <i>Constitution</i> and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.<sup>17</sup></li> </ul>	
2008	2020 Summit <sup>18</sup>	<ul style="list-style-type: none"> <li>▪ Australia adopt a statutory charter of rights for all Australians, including Indigenous Australians.<sup>19</sup></li> <li>▪ The <i>Constitution</i> be amended to include a preamble that formally recognises Indigenous peoples' custodianship of land and waters.<sup>20</sup></li> <li>▪ That the <i>Constitution</i> be amended to remove any language that is racially discriminatory.<sup>21</sup></li> <li>▪ That a national process is conducted to consider a compact of reconciliation between Indigenous and non-Indigenous Australians.<sup>22</sup></li> </ul>	Government response forthcoming

These strategies set out comprehensively the elements of reform to guide land settlement processes and service delivery to Indigenous peoples, and to ensure the adequate recognition of Indigenous peoples' human rights.

Former Australian of the Year Professor Fiona Stanley argued in the 2008 Hawke Lecture that the 'missing link' in Indigenous policy-making has not been a lack of commitment by Indigenous peoples to achieving reform, or a lack of evidence-based proposals. The 'missing link' has been a lack of political will on the part of governments to fully implement the reforms that have been recommended by various inquiries or articulated by Indigenous peoples.<sup>23</sup>

17 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2000) recommendation 3. At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm> (viewed 2 December 2008). Constitutional reform was also identified as an essential component of the proposed 'Social Justice Package' to be developed in response to the *Mabo* decision in 1995: see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1995*, ch 4; Aboriginal and Torres Strait Islander Commission, *Recognition, rights and reform: a report to Government on native title social justice measures* (1995).

18 Australia 2020, *The future of Australian governance* (2008). At [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 26 November 2008).

19 Australia 2020, *The future of Australian governance* (2008) p 350. At [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 26 November 2008).

20 Australia 2020, *The future of Australian governance* (2008) p 307. At [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 26 November 2008).

21 Australia 2020, *The future of Australian governance* (2008) p 350. At [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 26 November 2008).

22 Australia 2020, *The future of Australian governance* (2008) p 350. At [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 26 November 2008).

23 F Stanley, The Greatest Injustice: why we have failed to improve the health of Aboriginal people (Speech delivered at the Adelaide Town Hall, 6 November 2008). At [http://www.unisa.edu.au/hawkecentre/ahl/2008AnnualHawkeLecture\\_FionaStanley.pdf](http://www.unisa.edu.au/hawkecentre/ahl/2008AnnualHawkeLecture_FionaStanley.pdf) (viewed 20 January 2009).

The past decade has left many Indigenous peoples disenchanted about the possibility of progress. Yet the passage of time has not removed the fundamental need for improved systems of protection for human rights for Indigenous peoples.

## 1.1 Inadequate human rights protections are currently in place

Many people are surprised when they learn that Australia has endorsed and supported human rights standards for over forty years in the international arena and yet we have failed to give practical meaning and protection to many of them in our domestic legal system.

This is not simply a failure that sits at the international level. It is a failure to deliver on commitments to the Australian public about the basic standards of treatment that they can expect at all times.

We have parked most human rights at the door leaving Australian citizens in the unenviable position that in relation to the majority of rights, we don't have any formal mechanisms for considering how laws and policies impact on people's rights or for providing redress where rights are abused.

As an example, we have very limited enshrinement in our legal system of the rights contained in the two main international human rights treaties, on economic, social and cultural rights and civil and political rights.

While this affects all Australians, the consequences of such a lack of protection impacts the most on those who are the most vulnerable and marginalised in our society – such as Indigenous peoples.

The end result is a legal system that offers minimal protection to human rights and a system of government that treats human rights as marginal to the day to day challenges that we face.

We need better protection of human rights in our legal system as well as mechanisms to ensure that the courts, the executive and the Cabinet have human rights at the forefront of their thinking at all times.

Democratic accountability, parliamentary scrutiny and a strong separation of powers in Australia did not prevent Aboriginal peoples being disenfranchised and excluded from the national census for the best part of the 20<sup>th</sup> century.

The protections of the common law did not prevent the removal of Aboriginal and Torres Strait Islander children from their families and has since provided limited redress for the ill treatment of children removed.

As recently as 1998, the Commonwealth Solicitor-General argued in the High Court that our *Constitution* could feasibly be used to introduce 'Nuremberg'/Nazi style laws that discriminate against Indigenous peoples or other racial groups.<sup>24</sup>

Indigenous human rights violations are also not confined to historical examples. Australia's primary federal instrument for the prevention of racial discrimination, the *Racial Discrimination Act 1975* (Cth) ('RDA'), is currently suspended with regard to the measures enacted under the Northern Territory Intervention legislation and in relation to welfare quarantining trials in Queensland for Indigenous people only.<sup>25</sup>

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24 Transcript of proceedings, *Kartinyeri v Commonwealth* (High Court of Australia, Kirby J and Griffith QC, 5 February 1998).

25 For further discussion of these measures, see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 3.

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The lack of formal protections for human rights in Australia also means that Australia is not fulfilling its legal obligations under international human rights law. This has been noted by a number of United Nations human rights committees. In particular:

- The UN Committee on the Elimination of Racial Discrimination has expressed concern ‘over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories’;<sup>26</sup>
- The United Nations Committee on the Elimination of Discrimination Against Women has questioned the absence of any ‘entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men’;<sup>27</sup>
- The UN Committee on the Rights of the Child has noted its concerns that the Convention ‘cannot be used by the judiciary to override inconsistent provisions of domestic law’;<sup>28</sup> and
- The UN Human Rights Committee<sup>29</sup> and the UN Committee Against Torture<sup>30</sup> have both expressed concerns about the absence of entrenched protections of human rights, such as constitutional or legislative protection of human rights at the national level, and the absence of remedies for breaches of a range of human rights.

The acceptance of international human rights obligations is not merely a rhetorical action. It places legal obligations on government to put in place formal measures and resources to ensure the protection and enjoyment of rights within Australia. This includes incorporating the human rights standards into domestic law (such as through constitutional and legal recognition) and allowing for people to seek an enforcement of these rights before national courts and tribunals.<sup>31</sup> The Human Rights Committee has noted that these legal obligations also require governments to ‘refrain from violation of... rights’ and to ‘adopt legislative, judicial, administrative, educative and other appropriate measures’ to secure recognition and protection of rights.<sup>32</sup>

### 1.2 Human rights protections – overcoming Indigenous disadvantage

A deceptively complex issue that we face in adequately protecting Indigenous peoples’ human rights is to recognise that eradicating poverty and overcoming Indigenous disadvantage is one of the most profound human rights challenges that we face in Australia. We must redefine how we conceive of poverty so it is squarely addressed as a human rights issue.

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26 Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101 (2000) par 6.

27 Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) pars 12–13.

28 Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) par 9.

29 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

30 Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), par 9.

31 Committee on Economic Social and Cultural Rights, *General comment No. 9 – The domestic application of the Covenant*, UN Doc HRI/GEN/1/Rev.6 (1998).

32 Human Rights Committee, General Comment No. 31 – Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) pars 6 and 7.



For too long now, we have heard it argued that a focus on Aboriginal and Torres Strait Islander peoples' rights takes away from a focus on addressing disadvantage.

This approach is in my view seriously flawed for a number of reasons. It represents a false dichotomy – as if poorer standards of health, lack of access to housing, lower attainment in education and higher unemployment are not human rights issues or somehow they don't relate to the cultural circumstances of Indigenous peoples.

Separating disadvantage from human rights also makes it too easy to disguise any causal relationship between the actions of government and any outcomes therefore limiting the accountability and responsibilities of government.

In contrast, human rights give Aboriginal and Torres Strait Islander peoples a means for expressing their legitimate claims for equal access to goods and services, most importantly equal protections of the law – and a standard that government is required to measure up to.

The focus on 'practical measures' was exemplified by the emphasis the previous Commonwealth government placed on the 'record levels of expenditure' annually on Indigenous issues.

As I have previously asked, since when did the size of the input become more important than the intended outcomes? The Howard government never explained what the point of the record expenditure argument was – or what achievements were made.

Bland commitments to practical reconciliation have hidden the human tragedy of families divided by unacceptably high rates of imprisonment, and of too many children dying in circumstances that do not exist for the rest of the Australian community.

The fact is that there has been no simple way of being able to decide whether the progress made through 'record expenditure' has been 'good enough'. So the 'practical' approach to these issues has lacked any accountability whatsoever.

It has also dampened any expectation from among the broader community that things should improve. So we have accepted as inevitable horror statistics of premature death, under-achievement and destroyed lives.

I am sure history will show that this past decade was one of significant under-achievement in addressing Indigenous disadvantage – and quite inexplicably, under-achievement at a time of unrivalled prosperity for our nation.

If we look back over the past five years in particular, since the demise of ATSIC, we can also see that a 'practical' approach to issues has allowed governments to devise a whole series of policies and programs without engaging with Indigenous peoples in any serious manner. I have previously described this as the 'fundamental flaw' of the Commonwealth government's efforts over the past five years. That is, government policy that is applied to Indigenous peoples as passive recipients.

Our challenge now is to redefine and understand these issues as human rights issues.

We face a major challenge in 'skilling up' government and the bureaucracy so that they are capable of utilising human rights as a tool for best practice policy development and as an accountability mechanism.

We have started to see some change with the Close the Gap process on Indigenous health equality. The new Australian government and all Australian Governments, through the Council of Australian Governments (or COAG), have agreed to a series of targets to be achieved over the next five to ten years to start the process to close the gap in health status and ultimately in life expectancy, as well as across a range of other measures.

In March this year, the Prime Minister, the Leader of the Opposition, Ministers for Health and Indigenous Affairs, every major Indigenous and non-Indigenous peak

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health body and others signed a *Statement of Intent to Close the Gap on Indigenous Health Equality* which sets out how this commitment would be met. It commits all of these organisations and government, among other things, to:

- develop a long-term plan of action, that is targeted to need, is evidence-based and is capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by 2030;
- ensure the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs;
- work collectively to systematically address the social determinants that impact on achieving health equality for Aboriginal and Torres Strait Islander peoples;
- respect and promote the rights of Aboriginal and Torres Strait Islander peoples; and
- measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.<sup>33</sup>

These commitments were made in relation to Indigenous health issues but they form a template for the type of approach that is needed across all areas of poverty, marginalisation and disadvantage experienced by Indigenous peoples.

They provide the basis for the cultural shift necessary in how we conceptualise human rights in this country. Issues of entrenched and ongoing poverty and marginalisation of Indigenous peoples are human rights challenges. We need to lift our expectations of what needs to be done and of what constitutes sufficient progress to address these issues in the shortest possible timeframe so that we can realise a vision of an equal society.

This will be deceptively hard to achieve and it will take a generation. But it is a vital part of the human rights challenge for all Australians.

For government, this is important because a human rights based approach to Indigenous policy informs the most sustainable means of improving socio-economic outcomes. As both international and Australian research has documented extensively, improvements to the general wellbeing of Indigenous peoples are most effectively achieved in a framework that recognises Indigenous rights and culture, and supports Indigenous governance mechanisms.<sup>34</sup>

In contrast, a failure to recognise and respect Indigenous rights ultimately undercuts the basis on which meaningful partnerships between Indigenous peoples and governments can be sustained. It is for these reasons that the international program of action for the Second Decade of the World's Indigenous Peoples sets out a human rights framework for the full and effective participation of Indigenous peoples within the states in which they live.

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33 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008). At [www.humanrights.gov.au/social\\_justice/health/statement\\_intent.html](http://www.humanrights.gov.au/social_justice/health/statement_intent.html) (viewed 28 January 2009).

34 See, for example, J Hunt and D Smith, *Further Key Insights from the Indigenous Community Governance Research Project 2006*, Centre for Aboriginal Economic and Policy Research (2007) p 5. At [https://www.anu.edu.au/caepr/Projects/Key\\_Insights\\_ICGP\\_2006.pdf](https://www.anu.edu.au/caepr/Projects/Key_Insights_ICGP_2006.pdf) (viewed 20 January 2009); S Cornell, C Curtis and M Jorgensen, *The Concept of Governance and its Implications for First Nations*, Joint Occasional Papers on Native Affairs, No 2004–02 (2004). At [http://www.jopna.net/pubs/jopna\\_2004-02\\_Governance.pdf](http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf) (viewed 6 August 2008); M Chandler and Travis Proulx, 'Changing Selves in Changing Worlds: Youth Suicide on the Fault-Lines of Colliding Cultures' (2006) 10 *Archives of Suicide Research* 125.

**Text Box 1: Objectives of the Second Decade of the World's Indigenous Peoples<sup>35</sup>**

- Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, programmes and projects;
- Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;
- Redefining development policies that depart from a vision of equity and that are culturally inappropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
- Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;
- Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

### 1.3 An Aboriginal and Torres Strait Islander human rights agenda for the 21st century

For Indigenous peoples, human rights provide us with a means for expressing our legitimate claims to equal goods, services, and most importantly, the protections of the law. Strong protections for human rights also entrench standards that governments are required to measure up to over the long term.

In the *Social Justice Report 2006*, I identified that there was a 'protection gap' between Australia's nominal commitment to human rights at the international level, and the lack of mechanisms for the implementation and protection of those rights in the domestic sphere.<sup>36</sup> I recommended that the government allocate specific funding for the conduct of activities for the Second Decade in order to bridge that gap.<sup>37</sup>

Regrettably, the government's efforts to date in meeting that recommendation have been piecemeal. At both the federal and state/ territory levels, the past year has seen new policies and programs continue to be developed at a rapid pace – in relation to areas as diverse as Community Development Employment Projects (CDEP), welfare programs, education, Indigenous corporations, native title, water rights, environmental protection and climate change – all without the significant engagement and participation of Indigenous peoples, and without express regard to domestic and international human rights standards.

As I documented in the *Social Justice Report 2007*, the government's enactment of the Northern Territory Intervention measures was perhaps the starkest example in

35 *Program of Action for the Second Decade of the World's Indigenous Peoples GA Resolution 59/174 (2005)*

36 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006) ch 4.

37 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006) recommendation 6.

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recent years of the specific human rights ‘protection gap’ to which Aboriginal and Torres Strait Islander peoples are exposed.<sup>38</sup> Although the Intervention was not the first example of the Australian Government failing to comply with international human rights standards, it was a prescient reminder that the doctrines of representative and responsible government in Australia are at their weakest when relied upon to provide adequate safeguards for Indigenous rights protection in Australia.

The calls for reform by Indigenous peoples, the continuing experiences of violations of Indigenous rights in Australia and inequality in wellbeing of Indigenous and non-Indigenous peoples has persuaded me that a more comprehensive package of formal measures must be undertaken in Australia to close the Indigenous rights ‘protection gap’.

In this chapter, I will set out the ‘action agenda’ needed to achieve this level of protection of rights. It involves six main areas for action:

1. Commonwealth Government to formally declare its support for and implement the *UN Declaration on the Rights of Indigenous Peoples*;
2. A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights;
3. Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination;
4. The establishment of a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making that affects our interests;
5. The establishment of a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation; and
6. A focus on human rights education and the building of a culture of human rights recognition and respect.

It is my belief that each of the processes that I will describe are mutually re-enforcing, and that all of them must be undertaken to achieve a comprehensive rights protection framework for Australian Indigenous peoples.

The current Commonwealth government has stated that it is committed to improving domestic human rights protection, and a number of processes that I see as necessary are already underway.

While such developments are welcome, an ongoing challenge for governments, Indigenous communities and civil society will be to ensure that Indigenous voices are well represented in processes designed to improve human rights protection for the broader Australian community. A failure to do so could mean yet another missed opportunity to improve formal human rights protection mechanisms in a sector of Australian society where they are needed the most.

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38 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 3.

## Part 2: The United Nations Declaration on the Rights of Indigenous Peoples: a framework for Australian Indigenous rights protection

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Since the formation of the League of Nations, Indigenous peoples have looked to the international arena as a place to seek protection of their rights.<sup>39</sup> While the response of early international bodies to Indigenous peoples' concerns was often dismissive, Indigenous peoples have effectively continued to fight for their rights at the international level. This engagement has over time also influenced the development of Indigenous law and policy at the domestic level.

The past two decades have seen a number of significant developments made in Indigenous rights protection at the international level:

- Between 1982 and 2006 the Working Group on Indigenous Populations has reported upon the progress of the United Nations and its partners in advancing the fundamental rights and freedoms of indigenous peoples to the Sub-Commission on the Promotion and Protection of Human Rights – a subsidiary organ of the Commission on Human Rights.
- Between 1995 and 2004, recommendations made as a component of the First International Decade of the World's Indigenous Peoples saw the establishment of the United Nations Permanent Forum on Indigenous Issues.
- In 2001, a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was appointed to report on the human rights situation of indigenous peoples.
- The United Nations Expert Mechanism on the Rights of Indigenous Peoples – an expert advisory body to the Human Rights Council – conducted its first session in Geneva in October 2008.

But of all of the developments, perhaps the most significant milestone for indigenous rights at the international level came with the passage of the *UN Declaration on the Rights of Indigenous Peoples* ('Declaration') through the UN General Assembly in September 2007.

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39 F A Ruffin, '10 Stories The World Should Hear More About Indigenous Peoples: Living in Voluntary Isolation' (2004) 41(2) *UN Chronicle*. At <http://www.un.org/Pubs/chronicle/2004/issue2/0204p18.asp> (viewed 20 January 2009).

### **Text Box 2: The passage of the *Declaration* through the United Nations system**

The *Declaration* has been one of the most highly negotiated and contentious instruments to make its way through the United Nations system. Taking as its starting point the Martínez Cobo Report on the Problem of Discrimination Against Indigenous Populations<sup>40</sup> the *Declaration* was progressively developed as a comprehensive statement of indigenous peoples' human rights over a period of approximately 20 years.

In perhaps the first example of an international instrument being drafted by the rights holders themselves, a variety of indigenous advocates worked alongside governments in the Working Group on Indigenous Populations, and in the open-ended inter-sessional Working Group on the Draft *Declaration* to progress various drafts of the *Declaration*. After being adopted by the United Nations Human Rights Council in 2006,<sup>41</sup> the *Declaration* was presented as a Resolution to the United Nations General Assembly.

On 13 September 2007, the *Declaration* was passed with overwhelming state support: with 143 countries voting in favour; 11 abstaining; and four countries voting against (Australia, Canada, New Zealand and the United States of America). Importantly, even while the states which voted against the adoption of the *Declaration* cited concerns with the wording of particular articles, they also expressed a general commitment to the core principles of the *Declaration*.<sup>42</sup>

In the *Social Justice Report 2006* I stated that the *Declaration* (then in its draft form) must be regarded as the centrepiece of Indigenous rights protection at the international level.<sup>43</sup>

### **Text Box 3: The content of the *Declaration***

The *UN Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on 13 September 2007.<sup>44</sup> The *Declaration* has 46 substantive articles and 24 preambular paragraphs. The *Declaration* is divided into the following broad thematic areas:

- *Over-arching principles* (Articles 1–6): The rights of indigenous peoples to the full enjoyment of all human rights, non-discrimination, self-determination and autonomy, maintenance of indigenous institutions, and the right to a nationality.

40 Commission on Human Rights, *Study on the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/476 (1981).

41 Human Rights Council, *Working group of the Commission on Human Rights to elaborate a draft Declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, UN Doc A/HRC/RES/1/2 (2006).

42 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN Doc A/HRC/9/9 (2008) p 12.

43 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006) ch 4.

44 The full text of the *Declaration on the Rights of Indigenous Peoples* is available at: <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 4 February 2009).

- *Life, integrity and security* (Articles 7–10): Freedom from genocide, forced assimilation or destruction of culture, forced relocation from land, right to integrity and security of the person, and right to belong to an indigenous community or nation.
- *Cultural, spiritual and linguistic identity* (Articles 11–13): Rights to practice and revitalize culture and the transmission of histories, languages etc; and the protection of traditions, sites, ceremonial objects and repatriation of remains.
- *Education, information and labour rights* (Articles 14–17): Right to education, including to run their own educational institutions and teach in their language; cultures to be reflected in education and public information; access to media (both mainstream and indigenous specific); and rights to protection of labour law and from economic exploitation.
- *Participatory, development and other economic and social rights* (Articles 18–24): Rights to participation in decision-making, through representative bodies; rights to their own institutions to secure subsistence and development; special measures to be adopted to address indigenous disadvantage and ensure non-discriminatory enjoyment of rights; guarantees against violence and discrimination for women and children; right to development; and access to traditional health practices and medicines.
- *Land, territories and resources rights* (Articles 25–32): rights to maintain traditional connections to land and territories; for ownership of such lands and protection of lands by State; establishment of systems to recognize indigenous lands; rights to redress and compensation for lands that have been taken; conservation and protection of the environment; measures relating to storage of hazardous waste and military activities on indigenous lands; protection of traditional knowledge, cultural heritage and expressions and intellectual property; and processes for development on indigenous land.
- *Indigenous institutions* (Article 33–37): Rights to determine membership and to maintain institutions (including judicial systems), to determine responsibilities of individuals to their communities, to maintain relations across international borders, and right to the recognition of treaties, agreements and other constructive arrangements with States.
- *Implementation of the Declaration* (Articles 38–42): States and UN agencies to implement the provisions of the *Declaration*, including through technical and financial assistance; access to financial and technical assistance for indigenous peoples to implement the *Declaration*; and conflict resolution processes to be established that are just and fair.
- *General provisions of the Declaration* (Articles 43–46): The provisions of the *Declaration* are recognized as minimum standards and apply equally to indigenous men and women; the standards recognized in the *Declaration* may not be used to limit or diminish indigenous rights, and must be exercised in conformity with the *UN Charter* and universal human rights standards; the provisions in the *Declaration* to be interpreted in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.<sup>45</sup>

45 For a detailed description of the *Declaration's* structure (prior to the changes accepted by the Human Rights Council) see: S Pritchard, *An analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, ATSIC (1999); and C Charters 'The rights of Indigenous peoples' (2006) *New Zealand Law Journal*, October 2006, pp 335–337.



The *Declaration* does not create any new legal standards under international law. Instead, it enunciates and explains the particular entitlement of indigenous peoples to existing universal human rights standards under instruments such as the *UN Charter*, the *Universal Declaration of Human Rights*, and international human rights treaties.

The *Declaration* addresses both individual and collective rights. It recognises the obligation of States to protect indigenous cultural rights and identity, the rights to education, health, employment, traditional languages, and the right to self-determination. It outlaws discrimination against indigenous peoples, and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct groups, and to pursue their own priorities in economic, social and cultural development based upon the principle of free, prior and informed consent.

While articulating rights to separate development and cultural identity, the *Declaration* also explicitly encourages harmonious and cooperative relations between states and indigenous peoples. Most notably, article 46(1) of the *Declaration* states:

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.<sup>46</sup>

The *Declaration* also provides guidelines for how indigenous rights should be protected in national legal systems. Article 38 provides that:

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this *Declaration*.<sup>47</sup>

Following its adoption by the General Assembly, the *Declaration* is now an active international legal instrument. According to the *UN Charter*, this means that all states are now bound to consider the *Declaration* in their dealings with indigenous peoples.

### 1. Australia's position on the *Declaration*

At the time of its passage, Australia was one of only four countries to vote against the *Declaration* in the UN General Assembly. Prior to the 2007 federal election, the Australian Labor Party stated that its official position if it were elected would be to maintain its long-term policy of support for the *Declaration*.<sup>48</sup>

Since taking office, the Government has been undertaking consultations on what steps should be formally taken to support the *Declaration*, and it is anticipated that a formal statement of commitment will be made by the government.

Under the UN Charter all states are already bound to consider the *Declaration* in their dealings with indigenous peoples and to act consistently with it. A national statement of support remains important, however, for substantive and symbolic reasons. A statement of support makes clear to the international community and to all Australians

46 *United Nations Declaration on the Rights of Indigenous Peoples GA Resolution 61/295*, UN Doc A/61/L.67 (2007) article 46(1).

47 *United Nations Declaration on the Rights of Indigenous Peoples GA Resolution 61/295*, UN Doc A/61/L.67 (2007) article 38.

48 Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13 (Respecting Human Rights and a Fair Go for All) par 44. At [http://www.alp.org.au/platform/chapter\\_13.php](http://www.alp.org.au/platform/chapter_13.php) (viewed 4 August 2008).



that the government takes the Declaration seriously and is a demonstration of good faith and of a desire to enter into genuine partnership with Indigenous peoples.

## 2. How should the Commonwealth government support the *Declaration*?

Between March and August 2008 my office consulted with a range of Indigenous peak bodies, as well as those organisations with a history of participation in international matters, to seek their feedback on how the Commonwealth government should support the *Declaration* within Australia. Two clear principles emerged regarding how the government should act to support the *Declaration*. These were:

- that the government must take a range of social and cultural steps to support the use of the *Declaration* as a standard within Australia; and
- that the government should use the *Declaration* as a tool to guide legal reform for Australian human rights protection mechanisms.

One of the most important ways in which the government should act is by widely publicising their support for the *Declaration*, recognising it as a positive document that sets out ambitions for a new partnership and relationship between Indigenous peoples and the government, based on the principle of self-determination.

By publicly committing to the *Declaration*, the government would make it unambiguous to Aboriginal and Torres Strait Islander peoples and to the world that Australia does respect international rights and standards with respect to indigenous peoples. Such a commitment to the *Declaration* would also assist in restoring the reputation of Australia within the UN as a country that sits at the forefront of promoting and protecting human rights.

As the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples has pointed out, the realisation of Indigenous peoples' rights at the domestic level will also heavily depend on the capacity of different actors working in mainstream policies and programs to understand and apply the various provisions of the *Declaration*.<sup>49</sup>

In order to promote understanding and use of the *Declaration*, the government should fund widespread human rights education in Australia. In Part 7 of this chapter, I discuss a more general need for human rights education as necessary to achieve a human rights culture. However, to promote the *Declaration* specifically, it would be useful for the government to:

- incorporate its terms into basic training curricula for high school students, lawyers, public servants, parliamentarians, and others with significant input into policy-making processes; and
- encourage state, territory and federal departments to publicly commit to the *Declaration* to guide their own operations, and encourage non-government organisations with which they have partnerships to follow suit.

Through application and awareness building about the *Declaration* in these areas, I believe that government and the bureaucracy will gain the skills and awareness to be able to start using human rights standards to guide their policy development.

Article 39 of the *Declaration* provides that 'indigenous peoples have the right to access financial and technical assistance from States and through international cooperation

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49 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples*, UN Doc A/HRC/9/9 (2008) p 17.

for the enjoyment of the rights contained in the *Declaration*<sup>1</sup>. As such, the government also has a responsibility under the *Declaration* to commit training and resources to develop the capacity of organisations external to its own operations that can advance and promote Indigenous rights protection.

Funding and resources for the *Declaration* to be summarised in plain English and in Aboriginal languages for distribution in metropolitan, regional and remote communities would also remedy the Australian community's generally low level of understanding about the existence and effects of the *Declaration*.

The Government should also establish monitoring mechanisms on the uptake of the *Declaration* in Australia in order to allow government and community progress in advancing its standards to be tracked effectively. Over time, this would also facilitate adjustments in strategies to enhance awareness and implementation of the *Declaration*. In this regard, the *Declaration* elaborates a clear role for national human rights institutions,<sup>50</sup> as do the Objectives of the Second International Decade of the World's Indigenous Peoples.<sup>51</sup>

Amending the powers of the Australian Human Rights Commission so that it could take the *Declaration* into account in exercising its functions would therefore be an important step in strengthening the operation of the *Declaration* in Australia. In order for this to take place, the Federal Attorney General could declare that the *Declaration* is an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act*.<sup>52</sup> This would allow the Commission to:

- Examine laws and proposed laws to assess whether they are consistent with the *Declaration*;
- Inquire into acts and practices that may be inconsistent with or contrary to the *Declaration*;
- Promote public understanding, acceptance, and discussion of the *Declaration* in Australia;
- Undertake research and educational programs to promote the *Declaration*;
- Report to the Attorney General about laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to the *Declaration*;
- Report to the Attorney General about the action Australia needs to take to comply with the provisions of the *Declaration*;
- Publish guidelines for the avoidance of acts or practices done by or on behalf of the Commonwealth that would breach the *Declaration*; and
- Intervene, with the leave of the Court, in proceedings involving the *Declaration*.<sup>53</sup>

Finally, to promote the *Declaration* as a protective mechanism, the Commonwealth government should not only comply with, but also advance, the terms of the *Declaration*. Such action is called for by Article 42 of the *Declaration* itself, which provides:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote

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50 *United Nations Declaration on the Rights of Indigenous Peoples GA Resolution 61/295, UN Doc A/61/L.67 (2007) articles 38–40.*

51 *Program of Action for the Second Decade of the World's Indigenous Peoples, UN Doc A/60/270 (2005).*

52 The power to make such a *Declaration* is conferred upon the Attorney General under s 47 of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

53 *Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 11.*

respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.<sup>54</sup>

The Chair of the UN Permanent Forum on Indigenous Issues spoke about the importance of states implementing the *Declaration* in her statement to the UN General Assembly on the occasion of the adoption of the *Declaration*:

The correct way to interpret the *Declaration* is to read it in its entirety or in a holistic manner and to relate it with existing international law.

This is a *Declaration* which sets the minimum international standards for the protection and promotion of the rights of Indigenous Peoples. Therefore, existing and future laws, policies, and programs on indigenous peoples will have to be redesigned and shaped to be consistent with this standard.<sup>55</sup>

The government should be guided by the recommendations of sessions of the United Nations Permanent Forum on Indigenous Issues (which have now developed detailed sets of recommendations regarding the advancement of the *Declaration* in the areas of economic and social development, culture, environment, health and human rights) as well as the recommendations of the United Nations Expert Mechanism on the Rights of Indigenous Peoples (which conducted its first session in October 2008). Text Box 4 below outlines some of the recommendations made by these bodies during their sessions in 2008.

**Text Box 4: Recommendations from the Permanent Forum on Indigenous Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples for the advancement of the *UN Declaration on the Rights of Indigenous Peoples*<sup>56</sup>**

*Permanent Forum on Indigenous Issues*

128. The Forum thus invites the international community as a whole, States, indigenous peoples, non-governmental organizations, the private sector, academia and the media to promote the *Declaration* and apply it in their policies and programmes for the improvement of indigenous peoples' well-being around the world.

54 *United Nations Declaration on the Rights of Indigenous Peoples GA Resolution 61/295*, UN Doc A/61/L.67 (2007) article 42. The commitments of the *Declaration* also inform and strengthen a number of other international instruments that Australia is bound to consider in its development of policies and programs for Aboriginal and Torres Strait Islander peoples, including: the *Program of Action for the Second Decade of the World's Indigenous Peoples GA Resolution 59/174* (2005); the *UNESCO Universal Declaration on Cultural Diversity* (adopted by the General Conference of UNESCO, 2 November 2001); Agenda 21, the international program of action that accompanies the *Rio Declaration on Environment and Development – Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (1992); the *Revised draft plan of action for the first phase (2005–2007) of the World Programme for Human Rights Education*, UN Doc A/59/525/Rev.1 (2005); and the *UN Decade of Education for Sustainable Development (A/RES/57/254)* (Adopted by the General Assembly 21 February 2003).

55 V Tauli-Corpuz, *Statement of Victoria Tauli-Corpuz Chair Of The UN Permanent Forum on Indigenous Issues on the Occasion of the adoption of the UN Declaration on the Rights Of Indigenous Peoples* (Speech delivered at UN General Assembly, New York, 13 September 2007). At [http://www.un.org/esa/socdev/unpfi/documents/Declaration\\_ip\\_vtc.doc](http://www.un.org/esa/socdev/unpfi/documents/Declaration_ip_vtc.doc) (viewed 31 January 2009).

56 Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April–2 May 2008)*, UN Doc E/2008/43, E/C.19/2008/13 (2008). At <http://daccessdds.un.org/doc/UNDOC/GEN/N08/338/82/PDF/N0833882.pdf?OpenElement> (viewed 31 January 2009); Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its First Session (1–3 October 2008)*, UN Doc A/HRC/10/56 (2009). At <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/1st/docs/A-HRC-10-56.pdf> (viewed 31 January 2009).

130. The Permanent Forum decides to hold an international expert group meeting to discuss in greater detail the way in which the Forum should address its mandate under article 42 of the *Declaration*.

134. The Permanent Forum calls for the cooperation of all States, indigenous peoples, the United Nations system and other intergovernmental organizations in its task of ensuring that the *Declaration* reaches indigenous peoples in their communities by appropriate dissemination of the text in indigenous peoples' own languages.

139. The Permanent Forum ...encourages all States to submit substantive information on measures taken to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.

144. The Permanent Forum recommends that the United Nations system promote understanding of the *United Nations Declaration on the Rights of Indigenous Peoples* among decision makers, public officials, justice systems, national human rights institutions and non-governmental organizations.

145. The Permanent Forum recommends that national human rights institutions and other relevant national and regional bodies, including the African Commission on Human and Peoples' Rights, promote the rights of indigenous peoples and monitor the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, and ensure that the international standards on indigenous peoples' rights are translated into national laws.

148. The Permanent Forum recommends that the United Nations system continue to build the capacities of indigenous peoples' organizations and to develop their knowledge and skills to have their rights respected, protected and fulfilled.

150. The Permanent Forum recommends that the Office of the United Nations High Commissioner for Human Rights and relevant United Nations agencies and organs establish specific units for indigenous peoples' issues to contribute to the implementation of the *Declaration* in accordance with its articles 41 and 42.

151. The Permanent Forum recommends that States include representatives of indigenous peoples in the national consultation process for the preparation of national reports to be submitted to the Human Rights Council for universal periodic review.

*UN Expert Mechanism on the Rights of Indigenous Peoples – First session report*

23. The *United Nations Declaration on the Rights of Indigenous Peoples* was unanimously seen as a vital instrument providing a normative framework to guide the work of the Expert Mechanism.

24. The opportunity for the Expert Mechanism to establish effective collaboration and contribute substantially to the work of the Council was emphasized. Some recommended that the *United Nations Declaration on the Rights of Indigenous Peoples*, as an international instrument adopted by the Council and the General Assembly, be used as a reference in the context of the universal periodic review process. It was also suggested that the Expert Mechanism engage with other international human rights mechanisms, including the treaty bodies, as well as with regional and national human rights bodies, in particular national human rights institutions and the Working Group on Indigenous Populations/ Communities of the African Commission on Human and Peoples' Rights.

28. The indigenous caucus, on behalf of all indigenous observers, proposed that the agenda of the Expert Mechanism include a permanent item on the *United Nations Declaration on the Rights of Indigenous Peoples*. Three thematic issues were identified as possible sub-agenda items for the second session: (a) the right to self-determination and the right to development; (b) free, prior and informed consent; and (c) adjudication, remedies, repatriation and redress.

### 3. How can Indigenous Australians use the *Declaration* now?

One of the most effective ways that Indigenous Australians can use the *Declaration* is simply by referring to it as an applicable standard. This is because, as is the case with the *Universal Declaration of Human Rights*, the rights set out in the *Declaration* will be most effectively protected in Australia when they become a standard that is recognised and referred to by the community at large.

Although the *Declaration* does not have the force of an international treaty, as indigenous peoples and State parties begin to demonstrate a continuous pattern of use for the *Declaration*, its moral and legal significance as a source of international state obligations will continue to grow. Even prior to the passage of the *Declaration* through the General Assembly, legal commentators had argued that aspects of the draft *Declaration* already generated customary international obligations for states, because of the extensive manner in which the draft *Declaration* and its components was referenced by governments, UN bodies, academics, international courts, and Indigenous peoples themselves.<sup>57</sup>

In recognition of this process, a number of land councils in Western Australia have already committed to using the *Declaration* as the basis for negotiation with mining companies.<sup>58</sup> I would encourage other Indigenous organisations to ‘adopt’ the *Declaration*, and use it as a framework for engagement and partnership with governments and third parties in a similar way. Through building up patterns of consistent usage, standards such as free, prior and informed consent will, over time, be built into ordinary protocols for engagement with Indigenous communities, whether for land or development initiatives, or for other negotiations on policy decisions that affect Indigenous rights.

Another way in which the *Declaration* can be used by Indigenous peoples at the state and territory level is in relation to the existing human rights guarantees provided by *Human Rights Act (2004)* in the ACT and the *Charter of Human Rights and Responsibilities Act (2006)* in Victoria.

According to the legal mechanisms that exist under these Acts, the full ambit of international law – including the *Declaration* – can be brought to bear on judicial interpretations of the terms under the human rights legislation.

As an example, the *Victorian Charter of Human Rights and Responsibilities Act* aims to improve the work of government by, for example, compelling decision-makers to act compatibly with human rights. Section 32(1) provides that ‘[s]o far as is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.’ Section 32(2) states that ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right...[t]o...be considered when interpreting a statutory provision’.

The *UN Declaration on the Rights of Indigenous Peoples* is part of the body of international law referred to in section 32(2) meaning that there is an obligation on decision makers to interpret their human rights obligations consistent with the UN Declaration. The application of the *Declaration* to Human Rights Acts is discussed further in Part 3 of the chapter.

It may also be possible for Indigenous peoples to bring actions under the (*Racial Discrimination Act 1975 (Cth)* (‘RDA’) for any abrogation of their rights as set out by the

57 S James Anaya, *Indigenous Peoples in International Law* (2004) p 65–68.

58 See, for example, the Mining Policy statement of the Goldfields Land and Sea Council: Goldfields Land and Sea Council, *Our Land is Our Future* (2008). At [http://www.glc.com.au/pu\\_xx/Mining%20Policy%20@%20April08.pdf](http://www.glc.com.au/pu_xx/Mining%20Policy%20@%20April08.pdf) (viewed 20 January 2009).

*Declaration*. The RDA provides protection for a person's human rights and fundamental freedoms on an equal footing with persons of other races. The case law on the scope of terms 'human rights' and 'fundamental freedoms' under the RDA suggests that the international rights contained in the *Declaration* may fall within the ambit of those entitlements protected by section 9 and section 10 of the RDA.

### Text Box 5: How is the *Declaration* being used in other legal systems?

Over the past year, the use and application of the *Declaration* has considerably progressed:

- The Supreme Court of Belize considered and applied the standards of the *Declaration* in considering Mayan entitlements to land rights and resources;<sup>59</sup>
- The Republic of Ecuador passed a new constitution that was directly informed by the *Declaration*, with the third chapter of the constitution declaring the applicability of collective rights as they pertain to indigenous peoples;<sup>60</sup>
- Article 13 of the interim constitution of Nepal now commits the country to the principle of equality before the law, while recognising the benefits of affirmative action programs for indigenous peoples and other minority groups;<sup>61</sup> and
- the *Declaration* has also been used as a reference point for ongoing constitutional reform processes in a number of UN member states.<sup>62</sup>

International bodies have also begun to apply the *Declaration*, even to member states that voted against its passage in the General Assembly. For example, in its concluding comments on the United States' periodic report to the Committee on the Elimination of Racial Discrimination in 2008, the Committee noted the position that the United States had taken in the General Assembly, but nevertheless recommended that the *Declaration* be used as a guide to interpret the State party's obligations to the United States' First Nations peoples.<sup>63</sup>

2008 also saw the Permanent Forum on Indigenous Issues restructure its agenda and develop new methods of engaging others in its work in order to take up its new mandate of promoting and implementing the *Declaration*. Specifically, the forum committed to:

- adopting the *Declaration* as the Forum's legal framework;
- making the implementation of the *Declaration* one of the Forum's mandated areas;
- integrating the *Declaration* into the Forum's recommendations on its prior mandated areas;
- creating a new agenda item allowing for dialogue between the Forum and other UN agencies and funds on their uptake of the *Declaration*; and

59 *Manuel Coy at al I v Attorney General (Belize)* Claim Nos 171 and 172, 2007.

60 *República del Ecuador, Constituciones de 2008*, ch III: Constitutional Guarantees.

61 *Interim Constitution of Nepal (2007)* art 13.

62 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples*, UN Doc A/HRC/9/9 (2008) p 16.

63 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc: CERD/C/USA/CO/6 (2008) par 29.



- committing to every even calendar year being termed a ‘policy year’ (where a ‘special theme’ is discussed) and each odd calendar year being termed a ‘review year’ (where the implementation of the Forum’s past recommendations on specific themes is reviewed).<sup>64</sup>

## 4. Ratification of ILO Convention 169

The adoption of the *Declaration* by the UN General Assembly settles once and for all a range of issues relating to the status of indigenous peoples in international law. Of most significance is that it recognises that indigenous peoples – wherever they live – have an ongoing collective livelihood as distinct groups, and that governments have obligations to recognise and protect this.

This collective status of indigenous peoples is affirmed through Article 1 of the *Declaration* which states that:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

The significance of this recognition is most clearly put in Article 3 of the *Declaration*. This states that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Prior to the adoption of the *Declaration*, this issue of collective rights was disputed by some. All international instruments created prior to the *Declaration* have not provided clear recognition of the collective rights of Indigenous peoples or of our entitlement as peoples to self-determination.

With this question now settled in the *Declaration*, and settled with an overwhelming majority view of states, it is time for Australia to revisit ratifying the *International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries* (‘ILO Convention 169’).

ILO Convention 169 is a comprehensive treaty that creates binding legal obligations on governments. It requires that governments introduce or amend processes for engagement with Indigenous peoples to ensure that they fully respect the rights of Indigenous peoples, as set out in the convention. It also provides regular international scrutiny and reporting mechanisms to identify whether a country is meeting its obligations or falling short.

The drafting of the convention in the late 1980s had been controversial. This was primarily due to the fact that the convention does not recognise the collective status of indigenous peoples or our right to self-determination.

Article 1.3 of the Convention reads:

The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

64 International Service for Human Rights, ‘Permanent Forum on Indigenous issues: 7th Session’ *Human Rights Monitor Series*. At [http://www.ishr.ch/hrm/nymonitor/new\\_york\\_updates/permanent\\_forum/nyu\\_perm\\_forum\\_7session\\_a\\_fresh\\_approach.pdf](http://www.ishr.ch/hrm/nymonitor/new_york_updates/permanent_forum/nyu_perm_forum_7session_a_fresh_approach.pdf) (viewed 4 December 2008).

Because of this, indigenous peoples in many regions of the world have been opposed to the Convention as not providing sufficient or appropriate levels of protection of our rights.

However, with the passage of the *Declaration*, the deficiencies of the *ILO Convention 169* have now been remedied. This is because the recognition of the collective rights and self-determination of indigenous peoples through the *Declaration* fundamentally changes the meaning of the phrase 'indigenous peoples' throughout *ILO Convention 169*. With this deficiency addressed, the *ILO Convention 169* now provides a framework for implementing the *Declaration* and ensuring that Indigenous peoples' rights are fully respected and protected in Australian law.<sup>65</sup>

### Text Box 6: The Content of the ILO Convention 169<sup>65</sup>

The International Labour Organisation (ILO) has been a specialised agency of the United Nations (UN) since 1946. It promotes international recognition of human rights and labour rights by formulating international labour standards and providing practical assistance to governments to implement these.

The *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries* was adopted in 1989. The convention consists of 44 articles. It is based on respect for indigenous cultures and their way of life, the traditions and customary laws of indigenous and tribal peoples.

The underlying principle of the Convention is that indigenous and tribal peoples will continue to be distinct parts of their national societies with their own structures and traditions. It also recognises that indigenous and tribal peoples have a right to take part in the decision-making processes of the States in which they live; be consulted through appropriate procedures and representative institutions, on measures which may affect them directly.

The convention prohibits discrimination against indigenous peoples and identifies obligations for States to recognise and protect indigenous peoples' rights in areas such as: land and natural resources, employment and training, handicraft and rural industries, social security, health, and education.

The ratification of ILO Convention 169 would confirm that the commitment of the Australian government to the protection of Indigenous peoples rights is more than a rhetorical or symbolic action, and that it is something that will underpin a new relationship with Indigenous peoples. It would lay the foundations for a new partnership based on mutual respect, good faith and recognition of human rights. For this reason, I have also included a recommendation in this report relating to ILO Convention 169.

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<sup>65</sup> The full text of the ILO Convention 169 is available at: <http://www.unhcr.ch/html/menu3/b/62.htm> (viewed 4 February 2009).



## 5. Recommendations

**Recommendation 1**

That the Commonwealth Government make a statement of support in the UN General Assembly and UN Human Rights Council for the *UN Declaration on the Rights of Indigenous Peoples* as a matter of priority.

**Recommendation 2**

That the Commonwealth Attorney General schedule the UN Declaration on the Rights of Indigenous Peoples to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

**Recommendation 3**

That the Joint Standing Committee on Treaties conduct consultations, including with Indigenous peoples, on the desirability of ratifying *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*.

## Part 3: A Human Rights Act for Australia: Recognising and protecting Indigenous rights

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It comes as a surprise to many Australians when they realise that in Australia we have one of the weakest systems for the protection of human rights in the western world.

In 2008, Australia remains the only democratic country in the world without a national bill of rights or charter of rights<sup>66</sup> in some form. We have not implemented in domestic legislation more than half of the international legal obligations that we have undertaken to respect through ratifying international human rights treaties.

### Text Box 7: Rights and Responsibilities

Human rights are for everyone, everywhere, every day.

Human rights recognise our freedom as people to make choices about our life and develop our potential as human beings. They are about living a life with equality and dignity, free from fear, harassment or discrimination.

There are many human rights, such as: the right to life, freedom from torture and other cruel and inhuman treatment, rights to a fair trial, free speech and freedom of religion, rights to health, education and an adequate standard of living.

Human rights are written down in international agreements called 'covenants' and 'conventions' or treaties. These are made by representatives of national governments at the United Nations and reflect international agreement on what human rights principles and standards should be recognised and protected. They are common standards of achievement.

The first and most important international statement on human rights and the principles of equality, dignity and freedom was the *Universal Declaration of Human Rights* adopted in 1948.

In addition to the *Universal Declaration*, our human rights are set out in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) and several other conventions. All Australians have the human rights described in the agreements and ratified by Australia.

Human rights also involve responsibilities and duties toward other people and the community. Individuals have a responsibility to ensure that they exercise their rights in a manner that does not infringe for the rights of others. For example:

- when a person exercises their right to freedom of speech, they are not entitled to infringe someone else's right to privacy or to racially vilify another person; or
- Everyone has a right to be free from violence and intimidation, and a person cannot breach this right on the basis that they are exercising their culture.

66 The distinction in terminology between a Bill of Rights and a Charter of Rights refers to the distinction between constitutional entrenchment of rights (e.g. the Bill of Rights in the US *Constitution*) and legislative entrenchment of rights (i.e. The UK *Human Rights Act*). In this report the legislative forms of entrenchment of rights will be referred to as 'Human Rights Acts'.

Governments also have a responsibility to ensure that people are able to enjoy their rights fully. Governments cannot themselves conduct actions that breach people's rights. They are required to establish and maintain laws that prevent others from breaching the rights of individuals. They are also required to deliver services that enable people to access their rights on a basis of equality and non-discrimination.

There is a growing momentum to address the current lack of protection and for human rights to be legislatively entrenched in Australia at all levels of government. Human Rights Acts have now been introduced in one state and one territory, with inquiries looking into establishment of similar Acts conducted in two other states. In 2009, whether there should be a national Human Rights Act will be a central discussion in the Australian community.

The primary question I will explore here is to what extent Indigenous peoples' rights are reflected and protected in these emerging Human Rights Acts, and to what extent they could be protected in a national Human Rights Act.

Based on an analysis of what different state and territory community consultations for a legislative entrenchment of human rights have identified in this regard, I explore some of the of the key human rights that Indigenous peoples have identified as necessary to recognise and protect. I also comment on the processes that are essential to undertake in the development of a Human Rights Act to ensure adequate Indigenous participation.

### **Text Box 8: What is a Human Rights Act?**

A Human Rights Act is an ordinary piece of legislation (or statute). It is sometimes referred to as a statutory charter of rights.

A Human Rights Act contains a statement of the human rights that are protected. Examples of rights that can be protected include:

- right to equality and non-discrimination
- right to life
- right to self-determination
- right to be free from torture and other cruel or degrading treatment
- right to be free from slavery and forced labour
- right to liberty and to be free from arbitrary arrest or detention
- right to freedom of movement
- right to be treated equally by the courts, to be presumed innocent until proven guilty and to be tried without delay
- rights to effective participation in decision making and free, prior and informed consent
- right to live with your family
- right to work and to be treated well at work
- right to form and join a trade union
- right to an adequate standard of living, including adequate food, clothing and housing
- right to access appropriate health care
- right to a basic education

- right to maintain culture and language
- right to access services regardless of race, gender, age, disability
- right to privacy
- right to think what you like and practise any religion
- right to say what you like (without inciting hatred or violence)
- right to vote and participate in public affairs
- right to be treated equally by the law

A Human Rights Act also contains processes to ensure that these rights are protected. This can include processes for:

- Ensuring that all new federal laws are put through a 'human rights test' by:
  - requiring that each bill introduced into Parliament be accompanied by a human rights compatibility statement;
  - requiring Parliament to scrutinise each bill to ensure its compatibility with the Human Rights Act (for example through a special Parliamentary Human Rights Committee); and
  - requiring Parliament to publicly explain the justification if it enacts a law that is inconsistent with the Human Rights Act.
- Ensuring that all government policy-making consider the human rights implications, by requiring that all cabinet submissions be accompanied by a Human Rights Impact Assessment.
- Ensuring that all public authorities (for example Centrelink, the Australian Taxation Office and Medicare) respect the human rights protected in the Human Rights Act by:
  - requiring them to take the rights into account in decision-making and policy-setting processes;
  - requiring them to prepare internal Human Rights Action Plans;
  - requiring them to report annually on compliance with the Human Rights Act.
- Providing for the review of any law found to be incompatible with the Human Rights Act by:
  - giving courts the power to issue a *Declaration* of incompatibility;
  - requiring that all *Declarations* be tabled in Parliament;
  - requiring Parliament to consider whether the law in question should be changed.
- Ensuring that courts and tribunals interpret legislation in a manner that is consistent with the human rights protected in the Human Rights Act.
- Providing individuals whose human rights under the Human Rights Act have been breached with access to remedies, which might include:
  - internal complaint handling mechanisms within federal public authorities;
  - conciliation of complaints regarding human rights breaches;
  - legal remedies such as an injunction or *Declaration*;
  - a cause of action in the courts; and
  - the right to seek reparations, including compensation where necessary and appropriate.

## 1. The emerging momentum for Human Rights Acts

Since 2004, the momentum for legislative entrenchment of human rights in Australia at the state, territory and national levels has been building.<sup>67</sup> Since 2004, positive recommendations and enactments of charters of rights have included:

- In 2004 the Australian Capital Territory enacted the *Human Rights Act 2004 (ACT)*;
- Victoria adopted the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* which commenced on 1 January 2007;
- In 2006 the Tasmanian Law Reform Institute held community consultations on the enhancement of human rights protection in Tasmania and recommended that a Charter of Human Rights and Responsibilities be enacted in Tasmania;<sup>68</sup>
- In 2007, following community consultations, the Committee for a Proposed WA Human Rights Act recommended that a Human Rights Act be enacted in Western Australia.<sup>69</sup>

In the absence of a national or state/ territory Human Rights Act, some local governments have also passed their own charter of rights. For example, in 2004 the Hume City Council passed the Hume Social Justice Charter which includes a citizens' bill of rights.<sup>70</sup>

The development of a Human Rights Act in states and territories has in all cases involved community consultations being held to establish the level of community support in the state/ territory on whether there is support for a Human Rights Act, what rights it should include and what processes for enforcement it should contain.

Since the election of the Rudd government, there have been growing expectations of the Commonwealth Government to act on the Australian Labor Party commitment to 'initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians.' This commitment was made in the 2007 ALP National Platform.<sup>71</sup> At the *2020 Summit* in April 2008 one of the priority themes identified for the future of Australian governance was a charter of rights:

### 9.3 Charter of rights:

- 9.3.1 that Australia is a country where respect and protection of the human rights of all people are maintained and strengthened
- 9.3.2 that a national process is conducted to consult with all Australians as to how best protect human rights
- 9.3.3 that there be a statutory charter or Bill of Rights (majority support) or a parliamentary charter of rights or an alternative method (minority support).<sup>72</sup>

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67 For a timeline of federal attempts to introduce human rights laws and charters of rights at the federal and state/territory levels see, Gilbert + Tobin Centre of Public Law, *History of Charters of Human Rights in Australia* (2008). At <http://www.gtcentre.unsw.edu.au/Resources/cohr/historyChartersofHumanRights.asp> (viewed 20 January 2009).

68 Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007).

69 Consultation Committee for a proposed WA Human Rights Act, *A WA Human Rights Act* (2007).

70 Hume City Council, *Hume Social Justice Charter 2004* (2004). At <http://www.hume.vic.gov.au/Files/SocialJusticeCharter2004FINALwCover.pdf> (viewed 20 January 2009).

71 Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13 (Respecting Human Rights and a Fair Go for All) par 7.

72 Commonwealth of Australia, *Australia 2020 Summit-Final Report* (2008), p308. At: [http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc) (viewed 1 December 2008).

In October 2008 the Attorney General indicated the government's intent to act on this commitment and conduct a consultation to seek community views on how best to protect and promote human rights and responsibilities.<sup>73</sup>

This momentum has now culminated in the Commonwealth government's announcement on 10 December 2008 that national community consultations will be held on the protection and promotion of human rights in Australia. The national consultation will look at three key questions:

1. Which human rights and corresponding responsibilities should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

An independent committee has been appointed to conduct the national consultation, consult broadly with the community, and report to the government by 31 July 2009.<sup>74</sup>

A Human Rights Act has been identified by many human rights organisations as the central plank of any reform to our system of human rights protection in Australia.

## 2. Recognition of Indigenous rights in existing Human Rights Acts in Australia

Indigenous peoples are entitled to the full range of human rights along with every other member of society.

Indigenous peoples will benefit from having formal protections for non-discrimination, equality before the law, self-determination as well as the full range of civil, political, economic, social and cultural rights in a Human Rights Act.

While all such rights apply generally to all members of the Australian community, they have a particular importance for Indigenous peoples. This is due to the overwhelming levels of disadvantage faced by Indigenous peoples, placing us among the most vulnerable to our human rights being breached, as well as the ongoing impacts of our historical treatment as a peoples.

For this reason, a Human Rights Act must be comprehensive in its scope and include economic, social and cultural rights (such as the rights to health, education and housing) in addition to civil and political rights.

The need for such comprehensive coverage in a Human Rights Act is demonstrated by examining the work of the Social Justice Commissioner over the past decade. The vast majority of research and recommendations that have been made by the Commissioner are to address outstanding human rights issues faced by Indigenous peoples relate to economic, social and cultural rights and rights to effective participation in decision making that relates to the interests of Indigenous peoples.

A Human Rights Act that does not address these issues will be less relevant to Indigenous peoples and risks being less effective in addressing some of the key human rights challenges facing Indigenous peoples and Australia.

I discuss options for ensuring that the scope of a Human Rights Act is adequate from an Indigenous perspective further below.

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73 R McClelland, *Protecting Human Rights Conference* (Speech delivered at Protecting Human Rights Conference, Melbourne, 3 October 2008). At: [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_3October2008-ProtectingHumanRightsConference](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_3October2008-ProtectingHumanRightsConference) (viewed 11 December 2008).

74 National Human Rights Consultation, <http://www.humanrightsconsultation.gov.au> (viewed 23 December 2008).

There is, however, a second set of issues facing Indigenous peoples in relation to the scope of a Human Rights Act. This is whether such protection should consist entirely of general protections which apply to all Australians or whether it should additionally contain protections that specifically address the acute human rights issues faced by Indigenous peoples.

Under international law, all human rights protections are required to be applied consistently with other human rights instruments. Consequently, the Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all forms of Racial Discrimination (CERD) have been interpreted consistently with indigenous peoples' rights. The CERD Committee noted in their General Comment 23 on indigenous peoples:

1. The Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.
4. The Committee calls in particular upon States parties to:
  - (a) Recognize and respect indigenous peoples distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
  - (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
  - (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
  - (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
  - (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.
5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>75</sup>

The UN Human Rights Committee has also noted that the protection of minority group rights and protection of culture (in Article 27 of the ICCPR and Article 30 of the Convention on the Rights of the Child) applies to indigenous peoples and protects their unique characteristics include connection to land, environment and culture. Article 27 of the ICCPR reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In General Comment No. 23 the Human Rights Committee observed that under Article 27 group minority rights also apply to indigenous peoples as follows:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of

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<sup>75</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UN Doc A/52/18, annex V (1997) pars 1,2 and 5. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument) (viewed 5 February 2008).

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indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>76</sup>

With the adoption of the *UN Declaration on the Rights of Indigenous Peoples*, it can be expected that all human rights covenants and conventions will even more explicitly be interpreted in light of the specific protections contained in the *Declaration*.

At the domestic level, the Human Rights Acts in the ACT and Victoria also provide for the Acts to be interpreted consistently with international law.<sup>77</sup> This includes such sources as the ICCPR, other human rights treaties to which Australia is a party, general comments and views of the United Nations human rights treaty monitoring bodies, declarations and standards adopted by the United Nations General Assembly that are relevant to human rights and judgments of domestic, foreign and international courts and tribunals.

This provides for even where indigenous rights are not explicitly recognised. There is still a requirement that a decision be made consistently with internationally recognised indigenous rights.

To date, in the consultations on Human Rights Acts at the state and territory level, there has been an active debate on whether such Acts should also contain additional specific protections for Indigenous peoples.

Such specific protections might include recognition of Indigenous peoples' relationship to land; preservation of language; rights to participation, including to self-government, and protection of traditional knowledge and biodiversity.

In the Human Rights Acts enacted to date in Australia, there has been limited specific or distinct recognition of Indigenous human rights. Text Box 9 below contains the current specific references to Indigenous rights in existing Human Rights Acts in Australia.<sup>78</sup>

### **Text Box 9: Indigenous Peoples' rights in existing Human Rights Acts in Australia**

#### *1. Human Rights Act 2004 (ACT)*

Preamble

7. Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

#### *2. Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter)*

Preamble

Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

76 Human Rights Committee, *General Comment No. 23: The Rights of Minorities*, UN Doc CCPR/C/21/rev.1/Add.5 (1994) para 7. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument) (viewed 5 February 2008).

77 *Human Rights Act 2004 (ACT)*, section 31 and *Charter of Human Rights and Responsibilities Act 2006 (VIC)*, s 32.

78 Internationally, Indigenous peoples have only been specifically recognised in the Canadian Charter of Rights and Freedoms (Preamble, s 25); but the South African *Constitution* also recognises the importance of supporting indigenous languages (s 6) and recognises traditional leaders and customary law (ch 12).



19 Cultural rights

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

How best to protect Indigenous rights in a Human Rights Act was an issue of discussion and debate that emerged in all the state and territory consultation processes for Human Rights Acts to date.

## 2.1 Australian Capital Territory

In the ACT the terms of reference for the ACT Bill of Rights Consultative Committee<sup>79</sup> specifically required the Committee to consider whether Indigenous rights should be included in a Human Rights Act. The Committee consulted with representative groups and sectors of the Indigenous community, and also received submissions from Indigenous people in their personal capacity.

In its 2003 report the Committee noted that several respondents to the ACT community consultations identified the lack of protections for Indigenous peoples' rights as a particular concern, noting the vulnerability of Indigenous peoples to having their rights violated.

There was overwhelming support for a bill of rights in the ACT from Indigenous peoples and their representative organisations. This support derived from a sense that ACT laws did not adequately protect the rights of Indigenous people.<sup>80</sup>

A range of views were expressed on whether Indigenous rights should be specifically recognised in the Act. The report noted that some respondents requested that specific Indigenous rights be recognised in a Human Rights Act including:

- the right to land;
- the right to have control of resources and determination in financial matters that come from those resources;
- the right to heritage; and
- protection against genocide.<sup>81</sup>

However, other respondents were concerned that there was insufficient public support for explicit references of Indigenous rights to be included. They felt that protections for Indigenous peoples could be sufficiently found in strong, general equality and non-

79 One of the four Committee members was Aboriginal: Larissa Behrendt, Professor of Law and Indigenous Studies and Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney and member of the Council of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

80 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) par 5.50. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

81 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) par 5.56. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

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discrimination clauses based on those found in the International Convention on the Elimination of all forms of Racial Discrimination and the International Covenant on Civil and Political Rights.<sup>82</sup>

The Committee consequently recommended that the ACT Human Rights Act include a preamble that recognises the special historical context of Indigenous peoples in the Act and rather than recognising specific Indigenous rights, that the general rights be interpreted to respond to the concerns of the ACT Indigenous communities.<sup>83</sup>

Although not making any express reference to Indigenous peoples, the Committee also recommended that a general right to self-determination be included in the Act:

### Clause 12 Self-determination

12.1 All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

12.2 All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law.

12.3 The human rights set out in this Schedule shall not be interpreted as impairing the inherent right of all peoples to enjoy and freely utilise their natural wealth and resources.<sup>84</sup>

The Committee also felt that it was important that the Act should support the special agreements already existing between Indigenous peoples and the ACT government for service delivery, land agreements and protection of other rights and development of protocols.<sup>85</sup>

To ensure there was an opportunity for the effectiveness of this approach to be reviewed, the Committee further recommended that a five year review of the proposed Act consider: the effectiveness of the legislation in protecting Indigenous rights; and whether specific Indigenous rights should be included in the legislation.<sup>86</sup>

## 2.2 Victoria

In Victoria the Human Rights Consultation Committee<sup>87</sup> sought submissions in response to a Discussion Paper. Specific materials were developed for Indigenous communities that provided a background to the issues, as well as specific information on human rights issues relevant to Indigenous Victorians. The Committee also undertook specific consultations with Indigenous peoples.<sup>88</sup>

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82 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) p 100–104. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

83 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) par 5.62. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

84 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) app 4, p 22. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

85 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) par 5.63. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

86 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) p 59. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

87 None of the four Committee members were Indigenous.

88 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 143.

The Victorian Committee noted many respondents to the Victorian consultations had called for more specific rights for Indigenous peoples to be recognised in a Human Rights Act. Racism, discrimination, land rights and cultural identity were the key human rights issues for which Indigenous respondents felt there was inadequate protection.<sup>89</sup>

However, the Victorian Committee recommended that the initial focus of the Act should be ‘democratic rights that apply equally to everyone’<sup>90</sup> with the proviso that a mechanism for review and change be incorporated to enable these rights to be considered again at a later stage.<sup>91</sup> Specifically, the Committee recommended that a future review consult with Indigenous communities on whether a right to self-determination should be included in the Charter, and what the appropriate definition and scope of that right should be.<sup>92</sup>

The extent to which the Victorian Committee recommended that there should be a reflection of Indigenous rights in the Act included that:

- the Charter’s preamble emphasise that the rights, responsibilities and respect recognise the special significance of human rights to Indigenous peoples as the traditional owners of the land;<sup>93</sup>
- a right to self-determination not be included as a free-standing right, but should be reflected in the preamble;<sup>94</sup>
- the right to culture should specifically recognise ‘the right of Indigenous peoples to enjoy their own culture, profess and practise their own religion and use and enjoy their own language’.<sup>95</sup> This was in light of the strong support for such recognition among Indigenous respondents:

278 petitions, organised by the Victorian Aboriginal Legal Service, in support of a Charter of Human Rights advocated for the inclusion of the right to self-determination for Indigenous peoples and the protection of their culture.<sup>96</sup>

It was also in light of the Committee noting that a recognition of Indigenous peoples’ right to culture would be consistent with Australia’s obligations under article 27 of the ICCPR, which the United Nations Human Rights Committee had interpreted as extending to the cultural rights of Indigenous peoples.<sup>97</sup>

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89 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 8.

90 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p iii.

91 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p iii.

92 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 137.

93 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 24.

94 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 46.

95 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 41.

96 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 146.

97 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 41.

## 2.3 Tasmania

In Tasmania, the Tasmanian Law Reform Institute established a Human Rights Community Consultation Committee to undertake a four month community consultation process on the need for a Human Rights Act.<sup>98</sup> Their report noted that respondents highlighted the lack of human rights protections available to Indigenous Tasmanians<sup>99</sup> and the need for further protection of Indigenous Tasmanians' rights including the preservation of individual and community identity, cultural and spiritual identity, and the preservation of culture.<sup>100</sup>

The Institute recommended that a Tasmanian Human Rights Act include the specific right of Indigenous Tasmanians to 'maintain their distinctive identity, culture, kinship ties and spiritual, material and economic relationship with the land'.<sup>101</sup> It further recommended that the Act contain: a right to self-determination modelled on clause 12 of the ACT Bill of Rights Consultation Committee's draft Human Rights Bill appended to its report; and a provision protecting the cultural rights of Indigenous Tasmanians and other minority cultural groups modelled on section 19 of the Victorian Charter.<sup>102</sup>

With regards to the right to self-determination, the Institute noted that although the right was couched in terms which would have a general application, it will nevertheless 'have particular significance and, therefore, particularly strong implications for Tasmanian Indigenous communities'.<sup>103</sup>

## 2.4 Western Australia

In Western Australia (WA) the Consultation Committee for a Proposed Human Rights Act<sup>104</sup> was engaged in 2007 to seek the community's views on a draft Bill of Rights issued for discussion. The WA Committee developed a draft Bill for their consultations and held public forums in rural and remote areas. They received submissions from Indigenous representative bodies and government bodies and advisors working on Indigenous issues.

The draft Bill provided for Indigenous peoples to have distinct cultural rights to:

- (a) enjoy their identity and culture;
- (b) maintain and use their language; and
- (c) maintain their kinship ties.

However, the WA Committee received many submissions that called for the incorporation of additional specific rights for Indigenous peoples including: right to self-determination; right to cultural security; right to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs; and freedom to

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98 None of the six Committee members were Indigenous.

99 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) p 26.

100 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) par 4.16.2.

101 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) p 124.

102 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) p 12.

103 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) par 4.16.47.

104 One of the four committee members was Aboriginal: Colleen Hayward, Manager, Kulunga Research Network, Telethon Institute for Child Health Research.

establish, maintain, protect and access places of worship and religious or spiritual significance and a freedom from desecration or damage to such places.<sup>105</sup>

The WA Committee felt that these issues required further consideration than was possible within the scope of its consultations and recommended that the requirement for reviews of the Act should expressly require consideration of the inclusion of the right to self-determination and the other specific rights identified above.<sup>106</sup>

However, the WA Committee did recommend the following specific rights of Indigenous peoples be included in an Act:

- the right for Indigenous Western Australians to work in partnership with the Government in setting priorities for, and in the development, implementation and review of, policies, programs and services as they impact on Indigenous peoples;
- the right of Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.<sup>107</sup>

The WA Committee also recommended that a preamble could acknowledge the special status of Indigenous Western Australians.<sup>108</sup>

## 2.5 Community models

Although not considered here in detail, I note that the model Human Rights Bill 2006 proposed by the Australian Human Rights Group, and which was developed through consultations with community groups, recognises Indigenous peoples' rights as follows:

36 The rights of Indigenous peoples

(1) Indigenous peoples have the collective right to live in freedom, peace and security and to full guarantees against genocide or any other act of violence.

(2) Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

(3) Indigenous peoples have the right to practise and revitalize their spiritual and cultural traditions, customs and ceremonies.

(4) These rights may not be exercised in a manner inconsistent with any of the human rights set down in this Act.<sup>109</sup>

## 3. Recognition and protection of Indigenous rights in a national Human Rights Act

I have been a strong advocate for a national Human Rights Act as a means of strengthening the recognising recognition and protection of Indigenous rights. In

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105 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 95.

106 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 97.

107 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 97–98.

108 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007), p 128.

109 Australian Human Rights Group, <http://www.humanrightsact.com.au/2008/about-a-hr-act/> (viewed 22 December 2008).

a speech I delivered in April 2008 I noted that democracy alone does not prevent politicians and public authorities from pursuing policies that override the collective or individual rights of minority groups. When you are 2 percent of the total population, majority rule does not guarantee that your rights will be protected – especially if the interests of more powerful or prominent interests in society are affected.<sup>110</sup>

In the environment created by the Prime Minister's National Apology in 2008, I believe that a Human Rights Act in Australia could provide greater protection of rights for Indigenous peoples.

In all the state and territory community consultations on Human Rights Acts to date there has been widespread support for such legislation to be enacted. This has included positive support from Indigenous respondents. However, the state and territory consultations have also brought to light a range of views on what kinds of Indigenous rights should be protected through Human Rights Acts.

As foreshadowed in this chapter to date, there are three main areas to consider to ensure adequate protection of human rights for Indigenous peoples in a Human Rights Act,:

- i. recognition of Indigenous peoples in the preamble of a Human Rights Act;
- ii. the scope of general human rights protections in a Human Rights Act; and
- iii. additional specific recognition of Indigenous human rights in a Human Rights Act.

The critical distinction between the state and territory consultations to date and the national consultation underway currently is that the national consultation is the only one that has been conducted since the adoption of the *UN Declaration on the Rights of Indigenous Peoples* ('*Declaration*').

The significance of this is two-fold. First, as outlined in Part 2 of this chapter, the *Declaration* provides an internationally agreed-upon set of human rights standards for indigenous peoples, which Australia needs to now incorporate in our law. A Human Rights Act provides an effective means of enabling these rights to be recognised and enforced within Australia. An important means of achieving this would be to schedule the *Declaration* to a national Human Rights Act as a specific instrument that has to be taken into account in interpreting the provisions of a Human Rights Act.

Second, the *Declaration* outlines what human rights mean within indigenous contexts. This provides a valuable guide for informing how indigenous rights could be articulated in an Australian Human Rights Act.

## 4. Preambular recognition of Indigenous peoples in Human Rights Acts

The state and territory community consultations on a Human Rights Act to date demonstrate that there is widespread support for the recognition of Indigenous peoples in the preamble of a Human Rights Act. In the most recent consultation, the proposed wording provided by the WA Committee was:

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110 T Calma, *Indigenous Rights and the Debate over a Charter of Rights in Australia* (Speech delivered at the Human Rights Law Resource Centre's Annual Human Rights Dinner, Melbourne, 4 April 2008). At [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2008/20080404\\_charter.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080404_charter.html) (viewed 22 December 2008).

Human rights have a special importance for the Aboriginal people of Western Australia, as descendants of Australia's first peoples, with their diverse spiritual social, cultural and economic relationship with their traditional lands and waters.<sup>111</sup>

This wording is drawn from the preambles of both the ACT's *Human Rights Act* and the Victorian *Charter*. In the ACT the benefit of this recognition was deemed to be that 'this acknowledges that the equal protection of rights in the ACT community requires considering special needs of Indigenous people'.<sup>112</sup>

I note that Indigenous peoples have previously been recognised in the preambles of other federal legislation, most notably in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), the *Native Title Act (1993)* (Cth) and the *Aboriginal and Torres Strait Islander Act (2006)* (Cth). Extracts from these preambles are included in section 4 below.

Such recognition of Indigenous peoples in Commonwealth legislation affirms the existing formal recognition of Indigenous peoples by government within a human rights framework. Notably, both these preambles recognise that through the acceptance of the *Universal Declaration on Human Rights* and the ratification of the Covenants on civil and political rights and economic, social and cultural rights, the government is also acting to protect the rights of Indigenous peoples.

## 5. The scope of general human rights protections in a Human Rights Act

Indigenous peoples can certainly benefit from better protection of human rights that apply generally to all sectors of Australian society. The ACT Consultation Committee noted the value of generally expressed rights for Indigenous peoples as follows:

The case of *Kruger v The Commonwealth* shows how a particularly Indigenous experience – removal from the family motivated by assimilationist policies – can be explained in terms of rights that are not specifically labelled Indigenous [e.g. freedom of movement, the right to the freedom of religion, legal equality and due process].<sup>113</sup>

This can prevent misconceptions and controversies arising from Indigenous peoples being given special rights, and help to develop united support for a Human Rights Act.<sup>114</sup>

The challenge of relying upon rights that are generally applicable to everyone, and not specific to Indigenous peoples, is ensuring that the coverage of rights is sufficiently broad to encompass subject areas where Indigenous peoples practically experience rights violations on a daily basis.

There are two main subject areas where this is of particular significance for Indigenous peoples:

- Economic, social and cultural rights; and
- Rights to effective participation and self-determination.

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111 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) App G.

112 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) App 4, par 5.62.

113 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) App 4, par 5.53.

114 J Hartley, 'Indigenous Rights under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2007) 11(3) *Australian Indigenous Law Review*, p 10.



## 5.1 Economic, social and cultural rights

While there has been widespread support for a Human Rights Act to recognise general rights such as economic rights, social rights and cultural rights, such recognition is yet to take occur.<sup>115</sup>

In Victoria, 41 percent of submissions wanted the Charter to also include economic, social and cultural rights such as the right to food, health, housing and education – even though the Statement of Intent issued for consultations specifically excluded economic, social and cultural rights from the scope of the consultations.<sup>116</sup>

In Western Australia 88 percent of respondents to the public opinion survey either ‘strongly supported’ or ‘supported’ human rights legislation protecting economic and social rights, while 77 percent of 162 participants surveyed during a consultation with the disadvantaged supported the inclusion of economic, social and cultural rights.<sup>117</sup>

Although economic and social rights would be recognised as general rights in a Human Rights Act, the high levels of disadvantage faced by Indigenous peoples in the areas of health, housing and education, means that such protection would be of particular value to Indigenous peoples:

the most urgent and pressing concerns of Indigenous peoples cluster around our economic, social and cultural rights; our rights to a decent standard of health, housing, water, education...[T]he rights which most Australians probably overlook because they can take them for granted. We do not have that privilege. Any framework that is currently being developed to protect rights will have to span all categories of rights.<sup>118</sup>

The WA Committee concluded that one of the reasons for supporting the inclusion of economic, social and cultural rights was that:

some of the biggest human rights issues in Western Australia relate to ESC rights, which are not enjoyed by a large number of people and in particular are often not enjoyed by the disadvantaged and marginalised in our society, such as ...Aboriginal people.<sup>119</sup>

Indigenous peoples would face specific benefits in being able to access remedies for violations of their economic and social rights. The ACT Committee concluded that the general rights to self-determination and economic, social and cultural rights are of particular significance to Indigenous peoples.<sup>120</sup>

A Human Rights Act that protects economic, social and cultural rights, as well as political and civil rights, would contribute positively to the much-needed recognition of Indigenous rights.

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115 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 95.

116 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 27.

117 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 64.

118 M Dodson 'The Unique Nature of the Australian Indigenous Experience' *Without Prejudice*, No 9 (June 1996) p 4.

119 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, WA Department of the Attorney General (2007) p 76.

120 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services (2003) App 4, par 5.62.



## 5.2 Right to self-determination

Another general right of relevance for Indigenous peoples is the right to self-determination. This right is a collective right of 'peoples'. Ordinarily, the peoples will be represented by the nation state and through ordinary democratic processes.

The *UN Declaration on the Rights of Indigenous Peoples*, however, affirms that the pre-existing systems of governance of Indigenous peoples qualifies us as entitled to such a collective status *within* the nation state of Australia.

The *Social Justice Report 2002* examined the history of the right to self-determination, its use in Australia and what specifically is meant by Indigenous self-determination.<sup>121</sup>

### Text Box 10: What is the right to self-determination?

The right to self-determination is a right for all peoples, and is recognised in common Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence;
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The same right of self-determination is contained in Article 3 of the *UN Declaration on the Rights of Indigenous Peoples*:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

By definition, the right to self-determination is '***an ongoing process of choice for the achievement of human security and fulfillment of human needs...***[that can take] the form of guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity'.<sup>122</sup>

In articulating what the right to self-determination means in the context of indigenous peoples, Professor Erica-Irene Daes, a Former Chair of the United Nations Working Group on Indigenous Populations spoke of it in terms of:

121 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), ch 2.

122 UNESCO, 'Conclusions and recommendations of the conference' in M Walt van Praag (ed) *The implementation of the right to self-determination as a contribution to conflict prevention* (1999) p19.

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[s]elf-determination means **the freedom for indigenous peoples to live well**, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours... [Indigenous peoples'] goal has been achieving the freedom to live well and humanly – and to determine what it means to live humanly. In my view, no government has grounds for fearing that.<sup>123</sup>

Professor James Anaya, who was appointed the UN Special Rapporteur on Indigenous Peoples in 2008, has also identified five elements which constitute the right to self-determination in the context of indigenous peoples:

- non-discrimination,
- cultural integrity;
- lands and natural resources;
- social welfare and development; and
- self-government.<sup>124</sup>

The *Social Justice Report 2002* identified several factors essential to the realisation of the right to self-determination for indigenous peoples. Some of these included:

2. Respect for distinct cultural values and diversity is fundamental to the notion of self-determination.
3. The protection of self-determination unquestionably involves some kind of collective political identity for indigenous nations and peoples, i.e. it requires official recognition of their representatives and institutions.
4. Respect for Indigenous peoples' relationship to land and resources is an integral component of self-determination, from an economic, social, political and cultural dimension.
6. Essential to the exercise of self-determination is choice, participation and control. The essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned.
9. A notion of popular participation is inherent to self-determination.
11. The existence in democratic societies of structural and procedural barriers which inhibit the full participation of indigenous peoples must be recognised. The nature of participation and representativeness required by self-determination necessitates going beyond such sameness of treatment and to strive for institutional innovation.<sup>125</sup>

What these definitions highlight is that the right to self-determination for indigenous peoples is about guaranteeing full, free and effective participation in all aspects of public life, particularly government decision-making.<sup>126</sup>

Accordingly, the essential requirement for self-determination is that it corresponds to the choice, participation and control of the people concerned<sup>127</sup> and what has been recognised in the *Declaration* as the principle of free, prior and informed consent.

Many governments, including the Australian government, have resisted recognising the right to self-determination. The key concerns have centred on the extent to which the right to self-determination can allow for secession or the creation of separate

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123 E Daes 'Striving for self-determination for Indigenous peoples' in Y Kly and D Kly (eds), *In pursuit of the right to self-determination* (2000), p 58.

124 S James Anaya, *Indigenous Peoples in International Law* (2004).

125 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), p 28–30.

126 S James Anaya, *Indigenous Peoples in International Law* (2004).

127 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), p 20.

Indigenous states.<sup>128</sup> As outlined in the *Social Justice Report 2006*, these concerns are not legally based.<sup>129</sup>

There are clearly recognised limits in international law on the rights to self-determination that prevent it from extending to issues of sovereignty or territorial integrity.

The *Social Justice Report 2002* cites examples such as the *Friendly Relations Declaration*, which states that the recognition of the right of all peoples to self-determination shall not 'be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.<sup>130</sup> Equally, *territorial integrity* is subject to *States meeting their responsibility to be representative and accountable in accordance with the right of self-determination*.

Article 46 of the *Declaration* serves to recognised Indigenous peoples' right to self-determination (Article 3) but qualify the right to self-determination in a way that guarantees the territorial integrity of States:

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.

The right to self-determination is an important right to recognise in any Human Rights Act. The recognition of the right to self-determination underlies and supports the recognition of all other rights in a Human Rights Act. Through its inclusion in a Human Rights Act, the right to self-determination would also generate greater participation in decision-making processes, and create a space for dialogue between government and community. Where people have participated in the process they are often more supportive and dedicated to the outcomes, thus generating greater respect for representative democratic institutions and processes and greater social solidarity overall.<sup>131</sup>

For Indigenous peoples particularly, given the history of lack of consultation, lack of participation and lack of engagement in government policy making and program development to date, the recognition of the right to self-determination in a Human Rights Act would provide an important foundation that would promote Indigenous peoples' democratic inclusion and improved accountability.<sup>132</sup>

The Council for Aboriginal Reconciliation supported self-determination as the guiding principle for government policy in Indigenous affairs.<sup>133</sup> Incorporating the right to self-determination within a Human Rights Act provides a strong legislative basis for the right to self-determination informing government policy.

It was also recommended by the ACT Charter of Rights Consultative Committee that the right to self-determination be recognised as a general right in the ACT, while

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128 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2002), p 237.

129 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2002), p 238–242.

130 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), p 23.

131 M Castan and D Yarrow, Castan Centre for Human Rights Law, Memorandum to R Inglis, Victorian Aboriginal Legal Services, 1 February 2006.

132 M Castan and D Yarrow, Castan Centre for Human Rights Law, Memorandum to R Inglis, Victorian Aboriginal Legal Services, 1 February 2006.

133 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander rights – Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights*, (2000). At: [www.austlii.edu.au/au/other/IndigLRes/car/2000/9/](http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/) (viewed 31 January 2009).

recognising that it has specific meaning for Indigenous peoples. The Tasmanian Institute also supported the ACT's general approach to the right to self-determination, arguing that:

Despite the concerns of the Victorian Human Rights Consultation Committee, the Tasmanian Law Reform Institute agrees with the approach of the ACT Human Rights Consultative Committee and recommends that a right to self-determination be included in a Tasmanian Charter of Human Rights. This right should be of general application. Nevertheless, it will have particular significance and, therefore, particularly strong implications for Tasmanian Indigenous communities.<sup>134</sup>

In drafting the right to self-determination for a Human Rights Act, the *Declaration* should be used as the benchmark for articulating the right to self-determination in ways that are meaningful for Indigenous peoples.

## 6. Additional specific recognition of Indigenous human rights in a Human Rights Act

In 1996, the former Social Justice Commissioner, Michael Dodson, spoke on the protection of Indigenous rights through a Human Rights Act. He argued that a Human Rights Act in Australia would need to contain a combination of citizenship rights (or general rights), which are accorded to all in society as well as specific Indigenous rights, such as rights to land, to practise culture, preservation of languages and protection of traditional knowledge and biodiversity.<sup>135</sup> He stated:

It is because Indigenous rights encompass both categories [citizenship rights, and distinct Indigenous rights] that a comprehensive recognition of Indigenous rights requires a balancing act; holding in one hand the principle of equality or equity, and in the other the principle of difference.<sup>136</sup>

Of the possible specific rights recognised internationally, the Indigenous right to culture is the only right that has so far been recognised in a Human Rights Act in Australia, namely in the Victorian Charter (section 19). The Victorian Charter's section 19 is reflective of Article 27 of the International Covenant on Civil and Political Rights and similar provisions in the Convention on the Rights of the Child (Article 30) and the *UN Declaration on the Rights of Indigenous Peoples* (Article 25).

In the second reading speech for the Victorian Bill, the importance of this recognition was noted:

Recognising the special importance of the Aboriginal people as descendants of Australia's first people, the bill provides for indigenous people to maintain their kinship ties, and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources to which they have a connection under traditional laws and customs.<sup>137</sup>

By contrast in the ACT a right to culture is recognised in section 27 of the *Human Rights Act*, but without any specific reference to this being a specific right of Indigenous peoples. The result is the grouping of Indigenous rights within 'minority rights' rather than a recognition of the distinct rights of Indigenous peoples.

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134 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) par 4.16.47.

135 M Dodson 'The Unique Nature of the Australian Indigenous Experience' *Without Prejudice*, No 9 (June 1996) p 3–8.

136 M Dodson 'The Unique Nature of the Australian Indigenous Experience' *Without Prejudice*, No 9 (June 1996) p 5.

137 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, p 13 (The Hon Robert Hulls MP, Attorney General).

The Tasmanian Institute supported the recognition of Indigenous peoples' specific right to culture. But they highlighted the need to distinguish between the cultural rights of the Indigenous community and those of other ethnic minorities and to give recognition to the distinct and special position of Indigenous Tasmanians.<sup>138</sup>

On the recognition of specific Indigenous rights in a Human Rights Act the Tasmanian Institute noted that:

without explicit provision being made in a Tasmanian Charter for the protection of the rights of Aboriginal Tasmanians, their participation, on an equal footing, in the rights enjoyed by the majority may not be realised. Protections that are often mentioned in this regard are of cultural heritage and language, the right to self-determination and the recognition and protection of Indigenous people's land rights.<sup>139</sup>

The UN Human Rights Committee has noted the necessity of positive legal measures of protection and measures to be put in place to protect this right and to ensure Indigenous peoples' effective participation in decisions that affect them.<sup>140</sup>

As the process of consultations occurs on a national Human Rights Act, it is vital to ensure that Indigenous peoples can articulate the type of specific protections they consider should be considered in such an Act, or whether they are satisfied that the general protections contained in the legislation are sufficient to protect their cultures and way of life.

I believe that at minimum, a national Human Rights Act should have the *UN Declaration on the Rights of Indigenous Peoples* scheduled to it as a relevant international instrument. That way, all of the general provisions of the Human Rights Act would be required to be interpreted consistently with the *Declaration* and the specific articulation of Indigenous peoples rights contained in the *Declaration*.

## 7. Ensuring Indigenous participation in the Human Rights Act consultations

The different state and territory consultations for a Human Rights Act have highlighted the barriers Indigenous peoples can face in engaging with such processes. Text Box 11 below outlines some of these challenges. Understanding these barriers can assist in ensuring future processes for the development of a Human Rights Act can maximise Indigenous peoples' engagement.

### Text Box 11: Challenges for Indigenous Peoples

#### 1. Engaging in community consultations for Human Rights Acts

Engagement must be structured to increase awareness among Indigenous peoples of what human rights are, as well as enable Indigenous peoples to identify what rights they want protected and how. At least two of the consultative processes to date have identified limitations of the process undertaken in this regard:

138 Dr Julie Debeljak, *Submission to the Tasmanian Law Reform Institute inquiry into a Charter of Rights for Tasmania*, cited in Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) par 4.16.54.

139 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Tasmania Law Reform Institute, Report No. 10 (2007) p 131.

140 Human Rights Committee, *General Comment 23 – The Rights of Minorities (Article 27)* UN Doc CCPR/C/21/Rev.1/Add.5 (1994), par 7. At <http://www.unhcr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> (viewed 19 January 2008).

- in the ACT the Consultative Committee acknowledged that the cultural protocols of consultation with Indigenous communities often require a longer consultation period than provided for;<sup>141</sup>
- in Victoria the Committee noted that some respondents had commented that there was insufficient community awareness about the consultation project. Some submissions were also critical of the time constraints placed on the consultation noting that six months was not long enough for the consultation. Other respondents noted that the priority on written submissions excluded particular disadvantaged people;<sup>142</sup>
- the Public Interest Law Clearing House made the point in the Victorian consultations that community education should be particularly directed towards those who are most vulnerable to rights abuses;<sup>143</sup>
- engagement with Indigenous peoples can be assisted by having Indigenous members of the consultative committee they can engage with. Only two of the four Consultative Committees had Indigenous members. In Victoria some submissions noted the lack of representation of Indigenous people on the Committee.<sup>144</sup> By contrast, the committee for the national consultations on human rights protections does include an Indigenous woman (Tammy Williams) as one of its four members.<sup>145</sup>

The development of the *UN Declaration on the Rights of Indigenous Peoples*, undertaken with the full participation of Indigenous peoples, provides a model of good practice that could be also followed for the development of a national Human Rights Act. Full and proper consultation with Indigenous peoples for a national Human Rights Act is particularly important given the historical exclusion of Indigenous peoples from the drafting of fundamental nationhood documents such as the *Constitution* and other federal legislation.

## *2. Insufficient recognition of rights relevant for Indigenous peoples*

As well as providing only limited recognition of specific Indigenous rights, none of the Human Rights Acts to date have recognised economic, social and cultural rights. Many Indigenous peoples experience breaches of their economic, social and cultural rights, most commonly due to our comparative disadvantage in areas such as housing, health and education.<sup>146</sup>

141 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services, 2003, par 5.49. At <http://www.jcs.act.gov.au/prd/rights/reports.html> (viewed 22 December 2008).

142 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 143.

143 Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 96.

144 Public Interest Law Clearing House, *Submission to the Human Rights Consultation Committee's Consultation on Human Rights*, Submission 1043, cited in Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, Victorian Department of Justice (2005) p 143.

145 National Human Rights Consultation Website, *Who's Who*, [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who\\_Who](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_Who) (viewed 31 January 2009).

146 The ACT Committee noted that 'almost all responses that were concerned with protecting Indigenous rights mentioned the need for equal access to ... health, education and housing': ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, ACT Department of Urban Services, 2003, par 5.57.

*3. Lack of access to justice*

A lack of access to affordable and culturally appropriate information and legal representation continues to prevent Indigenous peoples from having equal access to justice. I believe this lack of access equally prevents Indigenous peoples' from engaging with Human Rights Acts.

Inadequate engagement with Indigenous peoples during community consultations and inadequate recognition of Indigenous rights in a Human Rights Act (in the preamble and as specific Indigenous rights) will see Human Rights Acts placed beyond the reach of Indigenous peoples.

## 8. Recommendations

***Recommendation 4***

That the Commonwealth Government commits to comprehensive support for engagement with Indigenous peoples in the consultation process for a national Human Rights Act.

***Recommendation 5***

That the Commonwealth Government adopt a Human Rights Act that is comprehensive in its scope and includes:

- recognition of Aboriginal and Torres Strait Islander peoples in the preamble;
- the right to self-determination;
- economic, social and cultural rights and civil and political rights;
- specific protections for Indigenous peoples where required; and
- the *UN Declaration on the Rights of Indigenous Peoples* scheduled as a relevant international instrument.



## Part 4: Constitutional reform

.....

The historical injustices that marked the framing of the *Constitution* affected many sectors of Australian society. Aboriginal and Torres Strait Islander peoples were completely excluded from the debates that preceded the drafting of the *Constitution* in the 1890s. Women were also entirely absent from the processes on which the modern state of Australia was founded.

Unsurprisingly, the drafters of Australia's *Constitution* saw no reason to place the rights of Indigenous peoples on the constitutional agenda. Not only did the founding documents of the new nation fail to adequately recognise Indigenous peoples' unique social and political place within the life of the nation, they also actively facilitated the means by which governments could exclude and discriminate against us.

The *Constitution* of Australia as enacted in 1900 contained two sections that explicitly discriminated against Indigenous peoples:

51. The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

(xxvi) The people of any race, **other than the aboriginal people in any State**, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

And one section that discriminated on the basis of race:

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted. persons of any race are disqualified from voting at elections.<sup>147</sup>

This provision justified excluding Indigenous people from possessing voting rights – a situation that was not finally resolved until the 1960s in some parts of Australia.

Australia's framework of constitutional governance has remained largely unchanged since the time of Federation, particularly as it pertains to Indigenous peoples.

In part, this gap has been due to the structural difficulties in amending the *Constitution*, with section 128 requiring that a referendum must be passed by a majority of people in a majority of states, as well as by an overall national majority of the nation's population.

Since 1901, only eight constitutional amendments have succeeded at referenda, and only one of those, in 1967, was intended to improve the legal and political position of Aboriginal and Torres Strait Islander peoples.

Through the 1967 referendum, the *Constitution* was amended to remove the words '... other than the aboriginal people in any State...' from section 51(xxvi) and to entirely remove section 127.

This did not remove all the discriminatory provisions from the *Constitution*, as Section 25 still remains today. There have also not been any successful attempts to positively recognise Indigenous peoples in the *Constitution*.

The need for Constitutional reform to adequately protect Indigenous peoples rights and recognise the special place of Aboriginal and Torres Strait Islanders in our nation

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147 Commonwealth of Australia Constitution Act 1900 (Cth).

remains unfinished business. Calls for constitutional reform revolve around the following issues:

- Recognition of Indigenous peoples in the preamble to the *Constitution*;
- The removal of existing discriminatory provisions in the *Constitution*;
- Ensuring the ‘Races Power’ in section 51(xxvi) is used for beneficial purposes; and
- Removing the ability of the federal Parliament under the *Constitution* to introduce laws that discriminate or that authorise the states and territories to discriminate.

These issues are now on the table for discussion among the Australian community. The Australian Labor Party’s (ALP) National Platform commits a Labor Government to exploring options for constitutional reform. It includes the following commitments:

- **Para 5:** Labor recognises the fundamental rights and entitlements of Aboriginal and Torres Strait Islander Australians as the original owners of this land;
- **Para 49:** Labor will work towards a lasting settlement with Indigenous Australians. Labor will build public support to meet the goal of providing constitutional recognition of the First Nations status of Indigenous Australians and their custodianship of land and waters;
- **Para 97:** Labor recognises that a commitment was made to implement a package of social justice measures in response to the High Court’s Mabo decision. Labor will honour this commitment.<sup>148</sup>

The ALP National Platform also commits an ALP government to ‘implement the recommendations made in 2000 by the Council for Aboriginal Reconciliation’<sup>149</sup>. These recommendations are included in the text box below and also reflect the need for constitutional reform.

**Text Box 12: Council for Aboriginal Reconciliation’s recommendations for constitutional and legislative implementation**

1. Formal legal recognition of the status and rights of Aboriginal and Torres Strait Islander peoples (e.g. with the agreement of Indigenous peoples and governments, include statements recognising the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia).
2. The design of a legislative framework for identifying and negotiating outstanding issues in the recognition of the rights of Aboriginal and Torres Strait Islander peoples (e.g. Government to consult with Indigenous communities to establish the basis for negotiation with governments and agree on representative structures through which they will undertake those negotiations; the Commonwealth Parliament legislate to establish a framework for negotiation and agreement on the unresolved issues of reconciliation).

148 Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13 (Respecting Human Rights and a Fair Go for All). At [http://www.alp.org.au/platform/chapter\\_13.php](http://www.alp.org.au/platform/chapter_13.php) (viewed 4 August 2008).

149 Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13 (Respecting Human Rights and a Fair Go for All) par 48. At [http://www.alp.org.au/platform/chapter\\_13.php](http://www.alp.org.au/platform/chapter_13.php) (viewed 4 August 2008).

3. Development of a legislated Bill of Rights (i.e. a Human Rights Act) that guarantees the rights of all Australian citizens and protects the rights of Aboriginal and Torres Strait Islander peoples (e.g. the process should include specific consideration of the rights of Aboriginal and Torres Strait Islander peoples and their protection in its Terms of Reference and provide for the involvement of Aboriginal and Torres Strait Islander peoples as witnesses and as specialist advisers).
4. Constitutional changes that provide protection against discrimination in the Australian Constitution.
  - A. The Commonwealth Parliament initiate and support a referendum to:
    - (i) provide a new preamble to the Constitution which, among other things, recognises Aboriginal and Torres Strait Islander peoples as the original owners and custodians, and acknowledges the history of dispossession that many have suffered since colonisation;
    - (ii) entrench the *Australian Declaration Towards Reconciliation*;
    - (iii) amend section 51(26) of the Constitution to authorise the Commonwealth to make special laws only for the benefit of any particular race; and
    - (iv) remove section 25 of the Constitution, and insert a new section making it unlawful to adversely discriminate on the grounds of race.
  - B. The Commonwealth government make every effort to obtain bi-partisan support and adequate and accurate community education programs to ensure that a referendum to change the Constitution takes place in a thoughtful and informed environment.

In considering the suitability of Constitutional reform we need to be mindful that:

- As it stands, the *Constitution* is an instrument that has traditionally excluded and discriminated against Indigenous peoples;
- Changing this situation is politically difficult (due to the difficulty of achieving change through referendums);
- There may be a mix of processes outside the *Constitution* that are more dynamic and easier to achieve that can recognise and protect Indigenous peoples' rights (such as through a national Human Rights Act, agreements at the Council of Australian Governments or other processes); and
- Any constitutional change would need to be carefully framed so that it actually leads to tangible outcomes for Indigenous peoples (particularly given the 1967 Referendum has resulted in an outcome entirely contrary to its purpose: namely, authorising the federal government to directly discriminate against Indigenous peoples if it so chooses).

Bearing these considerations in mind, my time as Aboriginal and Torres Strait Islander Social Justice Commissioner has reinforced my belief that constitutional change is an essential ingredient in providing adequate rights protection into the future.

It is not a panacea and will not address all of the outstanding human rights challenges that we face.

But it is critical and must not be set aside simply because it is complex and hard to achieve.

It is about ensuring that our founding document sets out ambitions and expectations for all Australians that reflect a modern, twenty first century Australia by providing a

legal foundation for reconciliation, where human rights are respected at all levels of government.

Without constitutional change, Aboriginal and Torres Strait Islander peoples will continue to be vulnerable to the enactment of racially discriminatory laws in Australia. No other reform to our legal system can address this fundamental problem.

## 1. Constitutional recognition of the unique rights and status of Indigenous peoples in the preamble

It is widely considered part of the 'unfinished business' of reconciliation to provide recognition of the first nations status of Indigenous peoples in the preamble to the *Constitution*. Such a change would be of great symbolic importance to Indigenous peoples. There is currently bipartisan support for this to occur.

The Council for Aboriginal Reconciliation has recommended that a new preamble should recognise Aboriginal and Torres Strait Islander peoples as the original owners and custodians, and acknowledge the history of dispossession that many have suffered since colonisation.<sup>150</sup> In making this recommendation, the Council stated that:

The full exercise and enjoyment of the human rights of the Aboriginal and Torres Strait Islander peoples is an essential foundation for reconciliation.<sup>151</sup>

On 23 July 2008, the Prime Minister was presented with the *Yolngu and Bininj Leader's Statement of Intent* and a Declaration on the occasion of the convening of a federal government community Cabinet meeting at Yirrkala. The Declaration called upon the Prime Minister to:

Secure within the Australian Constitution the recognition and protection of our full and complete right to:

- Our way of life in all its diversity;
- Our property, being the lands and waters of east Arnhem land;
- Economic independence, through the proper use of the riches of our land and waters in all their abundance and wealth;
- Control of our lives and responsibility for our children's future.<sup>152</sup>

Upon being presented with this statement, the Prime Minister stated

While our priority now remains, this practical challenge of closing the gap, we will also give attention to detailed, sensitive consultation with Indigenous communities about the most appropriate form and timing of constitutional recognition.<sup>153</sup>

The Prime Minister also noted in his Apology speech that he hoped that an area for a bipartisan policy approach would be securing a new preamble for the *Constitution* that recognises Indigenous peoples. This comment reflects the commitment of the

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150 A technical note: The Australian *Constitution* is contained within section 9 of an Imperial Act of the British Parliament, the *Commonwealth of Australia Constitution Act 1900*. This preamble may not be competently amended by an Australian referendum. Accordingly, a previous attempt to recognise Indigenous peoples in the preamble sought to insert an additional preamble for the Constitution that was intended to be inserted at the beginning of the section of the Act comprising the *Constitution*.

151 Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000). At [http://www.austlii.edu.au/au/orgs/car/recognising\\_rights/pg3.htm](http://www.austlii.edu.au/au/orgs/car/recognising_rights/pg3.htm) (viewed 2 December 2008).

152 The full text of the communiqué is available at: Crikey, *Communiqué: Yolngu and Bininj Leaders' Statement of Intent*. At <http://www.crikey.com.au/Media/docs/COMMUNIQUE---Final-46d50e58-932f-4383-acc7-59f6a79f880c.pdf?source=cmailer> (viewed 26 November 2008).

153 'Rudd pledges Indigenous recognition in the *Constitution*', ABC PM, 23 July 2008. At <http://www.abc.net.au/pm/content/2008/s2312531.htm> (viewed 2 December 2008); Prime Minister, 'Joint Press Conference with the Chief Minister of the Northern Territory, Paul Henderson' (transcript of media conference, 24 July 2008). At [http://www.pm.gov.au/media/Interview/2008/interview\\_0378.cfm](http://www.pm.gov.au/media/Interview/2008/interview_0378.cfm) (viewed 20 January 2009).

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former Coalition government that if re-elected, they would introduce legislation within 100 days of the election that would propose to recognise Aboriginal and Torres Strait Islander people in the preamble to the *Constitution*.<sup>154</sup>

In my view, amending the preamble to the *Constitution* would be of great symbolic importance, and go some way to redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.

A new preamble to the *Constitution* may be used as a tool to aid judicial interpretation, or to resolve ambiguities in the text of the *Constitution* itself. However, a revised preamble recognising Indigenous peoples would not have direct legal effect or give rise to substantive rights or obligations.

For this reason, it is of the utmost importance that preambular recognition of Indigenous peoples in the *Constitution* is not pursued as an alternative to reforming substantive constitutional reform, including the insertion of an equality clause and a constitutional guarantee of non-discrimination.

At present, only the Victorian constitution positively recognises the unique position of Indigenous peoples:

### 1A. Recognition of Aboriginal people

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –

- (a) have a unique status as the descendants of Australia's first people; and
- (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section–

- (a) to create in any person any legal right or give rise to any civil cause of action; or
- (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

On 5 December 2008 the Queensland Government also announced its intention to amend its state constitution to provide similar recognition for its Indigenous peoples.<sup>155</sup>

While by no means exhaustive, the preambles to the following pieces of federal legislation also provide useful guidance on the matters that might be included in a new Australian constitutional preamble:

- *Aboriginal and Torres Strait Islander Act 2005* (Cth); and
- *Native Title Act 1993* (Cth).

Text Box 13 below sets out the preambles to these pieces of legislation.

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154 J Howard, *To Stabilise and Protect: Little Children are Sacred* (Speech delivered at the Sydney Institute, Sydney, 11 October 2007).

155 'Activists Welcome Indigenous preamble for QLD *Constitution*', ABC Online, 5 December 2008. At <http://www.abc.net.au/news/stories/2008/12/05/2438520.htm> (viewed 11 December 2008).

**Text Box 13: Recognition of Indigenous peoples in Commonwealth legislation preambles**

*Aboriginal and Torres Strait Islander Act 2006 (Cth)*

Preamble

WHEREAS the people of Australia voted overwhelmingly to amend the *Constitution* so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race;

AND WHEREAS the people whose descendants are now known as Aboriginal persons and Torres Strait Islanders were the inhabitants of Australia before European settlement;

AND WHEREAS they have been progressively dispossessed of their lands and this dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal persons and Torres Strait Islanders concerning the use of their lands;

AND WHEREAS it is the intention of the people of Australia to make provision for rectification, by such measures as are agreed by the Parliament from time to time, including the measures referred to in this Act, of the consequences of past injustices and to ensure that Aboriginal persons and Torres Strait Islanders receive that full recognition within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire;

AND WHEREAS it is also the wish of the people of Australia that there be reached with Aboriginal persons and Torres Strait Islanders a real and lasting reconciliation of these matters;

AND WHEREAS it is the firm objective of the people of Australia that policies be maintained and developed by the Australian Government that will overcome disadvantages of Aboriginal persons and Torres Strait Islanders to facilitate the enjoyment of their culture;

AND WHEREAS it is appropriate to further the aforementioned objective in a manner that is consistent with the aims of self-management and self-sufficiency for Aboriginal persons and Torres Strait Islanders;

AND WHEREAS it is also appropriate to establish structures to represent Aboriginal persons and Torres Strait Islanders to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of programs and to provide them with an effective voice within the Australian Government;

AND WHEREAS the Parliament seeks to enable Aboriginal persons and Torres Strait Islanders to increase their economic status, promote their social well-being and improve the provision of community services;

AND WHEREAS the Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms...

*Native Title Act (1993) (Cth)*

Preamble:

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the *Constitution* so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms...

The people of Australia intend:

- (a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.....

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

There has been one previous attempt to insert a new preamble into the *Constitution*. This was in 1999 and came at a difficult stage in the reconciliation process.

The Council for Aboriginal Reconciliation had released its draft Declaration towards Reconciliation, but the Prime Minister had publicly stated that he did not support the substance of its recommendations.<sup>156</sup> The proposed preamble reflected the Prime Minister's position, which was a much more limited form of recognition than the Council and others had proposed.

It is understood that many people who would generally have supported a new preamble being inserted into the *Constitution* did not support the proposed wording and so voted "no". Although the reasons for that result are difficult to determine, a number of constitutional theorists have suggested that a lack of public ownership and consultation over the terms of the preamble,<sup>157</sup> rather than questions over the recognition of Indigenous peoples, was a decisive factor in its demise.

Any future efforts to amend the *Constitution*, and to redraft a proposed preamble recognising the unique rights and status of Indigenous peoples, must therefore have significant public input and ownership in order to have the best chance of success at a referendum.

156 J Gardiner-Garden, *From Dispossession to Reconciliation*, Australian Parliament House Parliamentary Library Research Paper 27 (1998–1999). At <http://www.aph.gov.au/library/Pubs/RP/1998-99/99rp27.htm#late90s> (viewed January 14, 2009).

157 See, for example, M McKenna, A Simpson and G Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24(1) *University of New South Wales Law Journal* p 401–419; A Winkel, 'A 21st century constitutional preamble: an opportunity for unity rather than partisan politics' (2001) 24(3) *University of New South Wales Law Journal* p 636–652.



Arriving at such a proposal will require both extensive consultation with Aboriginal and Torres Strait Islander peoples, as well as an extensive process of engagement with the broader Australian community.

We will need an extensive discussion in Australian society about national identity, belonging, and the place of Indigenous peoples in our society to ensure the broadest possible consensus for any proposed constitutional amendment to the preamble.

While constitutional change may be difficult to achieve, it is worth recalling that the most successful referendum ever was in 1967, a referendum that was intended to improve the position of Aboriginal and Torres Strait Islander peoples under Australia's constitutional arrangements.

I believe that the climate of goodwill that has been evident since the National Apology demonstrates that with bipartisan commitment, constitutional change would have a strong chance of success.

In order to ensure more lasting change, the Commonwealth government should also ensure that constitutional recognition of the unique status of Indigenous peoples is not limited to a textual amendment in the *Constitution*. A crucial component for the legitimacy of any future constitutional change should be the active engagement of Indigenous peoples in the reform process – particularly, in the development of any new process towards the achievement of an Australian republic.

The legitimacy of the process by which Indigenous peoples participate in public law reform processes may be as important as the legal results themselves. If dealt with properly, I believe that these processes could play a significant part in engendering a lasting relationship of understanding and trust between Indigenous peoples and government.

## 2. Secure protection for Aboriginal and Torres Strait Islander human rights

### 2.1 The removal of existing discriminatory provisions in the *Constitution*

A major concern of Indigenous peoples, that is shared by many non Indigenous Australians, (which has similar force on all racial groups) is the ability of the Commonwealth Parliament to:

- validly enact racially discriminatory laws under the powers vested in it by the *Constitution*; and
- authorise the states and territories to enact racially discriminatory laws.

As I have outlined above, I firmly support an Australian Human Rights Act that would require the government to explicitly consider human rights issues when developing and applying Commonwealth laws and policies.

However, it is of great concern to me that even the strongest Commonwealth legislative protection for human rights already in existence in Australia, has not proven capable of providing secure protection for Aboriginal and Torres Strait Islander peoples' rights. The following steps explain how this can occur:

- 1) **States and territories are bound by the protections of the *Racial Discrimination Act 1975* ('RDA') by virtue of the *Constitution*.** Through the operation of section 109 of the *Constitution*, state and territory laws will be invalid to the extent that they are inconsistent with a validly enacted law of the Commonwealth Parliament – such as the RDA.

**2) The Commonwealth Parliament can, however, authorise state and territory governments to introduce discriminatory laws against Indigenous peoples.** For example, the Commonwealth's Northern Territory Emergency Response legislation exempts the Queensland government from the operation of the RDA in the operations of the Family Responsibilities Commission. The Native Title Amendment Act of 1998 also authorised the states and territories to replace the 'right to negotiate' with a lesser 'right to be consulted' in particular circumstances – the states would not have been able to do this without the authorisation provided by the Commonwealth Parliament.

**3) Notably, if the state or territory levels of government initiated such discriminatory provisions themselves then those laws would be open to constitutional challenge.** For example, the Queensland Government's attempt to prevent Eddie Mabo from pursuing his claim of native title, by legislatively acquiring all native title rights for the Crown, was found to be invalid by reason of the incompatibility of the QLD legislation with the RDA;<sup>158</sup> as was the Western Australian government's attempt to extinguish all native title rights across the state in favour of lesser rights.<sup>159</sup>

**4) The Commonwealth can also directly discriminate against Indigenous peoples.** Since the RDA is an ordinary enactment of the Commonwealth Parliament, the principle of parliamentary sovereignty applies. As such, laws that are made at a later time will typically override anti-discrimination legislation to the extent of any explicitly intended inconsistency with the RDA. The Commonwealth Parliament can therefore legally discriminate against Indigenous peoples if it so chooses – so long as it evinces a specific intention to override the RDA through the passage of a constitutionally competent law.

#### **Text Box 14: Suspension of the *Racial Discrimination Act 1975* (Cth)**

The RDA was originally enacted to codify Australia's international obligations in accordance with the *International Convention on the Elimination of all forms of Racial Discrimination* ('CERD'). Under CERD, State parties undertake to promote non-discrimination on the grounds of race as a non-derogable standard within their jurisdictions.

However, the failure of the Commonwealth government to encode entrenched protections for non-discrimination beyond the level of an ordinary statute has led to the RDA being suspended in order to allow government to passing racially discriminatory laws on two occasions:

- In 1998 the Government's legislative amendments to the *Native Title Act 1993* provided that the RDA did not prevent the validation of 'past acts' or 'intermediate period acts' that impaired the native title rights and interests of Aboriginal and Torres Strait Islander peoples; and
- In 2007 the Northern Territory Emergency Response legislation excluded any acts done under the auspices of the legislation from the operation of the RDA. Although the National Board set up to review the Intervention recommended the re-instatement of the RDA and other State and Territory anti-discrimination legislation in October 2008, the suspension of the RDA in the Northern Territory currently remains in place.

158 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

159 *Western Australia v Commonwealth* (1995) 183 CLR 373.

This discrimination has occurred through the making of discriminatory laws under the 51(xxvi) of the *Constitution* (the ‘Races Power’) and section 122 of the *Constitution* (the ‘Territories Power’).<sup>160</sup>

In *Social Justice Report 2007*, I outline how the measures introduced under the Northern Territory Emergency response could have been formulated in a non-discriminatory manner, consistent with the RDA, through providing for proper consultation and engagement with Indigenous peoples and allowing for proper review processes. I explain that measures introduced to address family violence and child abuse, can be done in way that is consistent with human rights protections.<sup>161</sup>

## 2.2 How the *Constitution* currently permits racial discrimination

Following the 1967 referendum, Section 51(xxvi) of the *Constitution* provides that the Commonwealth Parliament can legislate for the peace, order and good government of the Commonwealth with respect to:

[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

While the success of the 1967 referendum and deletion of the words ‘other than the aboriginal people of any state’ gave the Commonwealth the power to make laws for Aboriginal people, the referendum did not confer a constitutional responsibility upon the Commonwealth to ensure that any laws it passed under the section would either benefit Indigenous peoples, or recognise their right to equal protection under the law.

While the question of whether section 51(xxvi) gives the Commonwealth the power to enact ‘detrimental’ laws for Aboriginal and Torres Strait Islander people is not considered fully settled.<sup>162</sup> The Hindmarsh Island Bridge case made it clear that the Parliament has the power to repeal its own laws made under the power that were intended to provide a ‘benefit’ to Aboriginal people,<sup>163</sup> and that such an action may clearly have a detrimental effect in practice. As the Chief Justice of the High Court has recently noted, the 1967 referendum has left the Races Power in need of further reform:

The intention of the amendment was entirely beneficial. That however did not turn the power generally into a beneficial one. The weight of High Court authority supports the view that s 51(xxvi) authorises both beneficial and adverse laws. It can properly be described as a constitutional chimera.<sup>164</sup>

160 Section 122 provides that ‘The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit’.

161 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission 7 (2008), ch 3.

162 In *Kartinyeri v Commonwealth* (1998) 195 CLR 337, Gaudron, Gummow and Hayne JJ left open the possibility that a ‘manifest abuse’ of the federal legislature’s use of the ‘races power’ under s 51(xxvi) of the *Constitution* may generate a justiciable constitutional question for the High Court.

163 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (Per Gaudron J at 369; Gummow and Hayne JJ at 380).

164 R S French, *Dolores Umbridge and the Concept of Policy as Legal Magic* (Speech given at the Australian Law Teachers’ Association National Conference, Perth, 24 September 2007).

As the dissenting judge in the Hindmarsh Island Bridge case, Kirby J found that it was open to the court to characterise the races power as only permitting 'benign' discrimination for the benefit of Indigenous peoples.<sup>165</sup>

It has been suggested that section 51(xxvi) of the *Constitution* should be amended to ensure that the Commonwealth can only make racially specific laws 'for the benefit' of the people of a particular race.

However, while such an approach may have led to a more preferable outcome in the Hindmarsh Bridge case itself, the question of what actions constitute a 'benefit' may, in fact, be a subjective and controversial question. In attempting to give legal content to this term, it is conceivable that a court could look to a number of different sources:

- That which the Commonwealth Parliament termed 'beneficial'; or
- That which the court considered 'beneficial' in the ordinary sense of the term.

It is not clear that either of these options would give strong protection to human rights. It is also not difficult to imagine a future situation where a government might pass particular legislation proclaiming that it was intended to improve the welfare and wellbeing of Indigenous peoples, even though the legislation was contrary to the consent of the peoples that would be affected.

It has also been suggested that an alternative way of addressing this issue would be to replace the existing Races Power with an 'equality before the law' clause in section 51 of the *Constitution*. However, such a clause may also prove problematic, given that:

- it may not bind every section of the *Constitution* (this issue is discussed further below); and
- a number of existing laws and programs (such as those relating to multiculturalism, migrant support services and Indigenous specific services) depend upon section 51(xxvi) for their validity. It is unclear whether any revised provision would still support all of these laws.

Accordingly, a focus on clarifying the scope of the Races Power will not resolve the existing deficiencies in the *Constitution*.

This is demonstrated through the example of the *Northern Territory National Emergency Response Act 2007* (Cth) ('NTER Act'):

- The NTER Act and related legislation suspend the operation of the RDA and remove protection against discriminatory actions;
- The NTER Act and related legislation also contain racially discriminatory provisions;
- These laws can rely on section 122 (the 'territories' power) of the *Constitution* for their validity;
- As a result, even if the Races Power could only be exercised for 'beneficial' purposes (and even if the interpretation of a 'benefit' as decided upon by a court coincided with the protection of human rights) the discriminatory aspects of the NTER Act provisions would still be constitutionally competent.

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165 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 411 (Kirby J).

### Text Box 15: The ‘Territories Power’

Section 122 of the *Constitution* provides:

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

As I noted in the *Social Justice Report 2007*, the High Court has traditionally interpreted section 122 of the *Constitution* as providing the Commonwealth Government with unqualified scope to legislate in the Northern Territory, and in a manner that is unrestricted by other guarantees provided by section 51 of the *Constitution*.<sup>166</sup> The case of *Kruger v Commonwealth*<sup>167</sup> considered the constitutional validity of the policy of removing Indigenous children from their families in the Northern Territory. Brennan CJ and Dawson J explicitly found that:

- no constitutional requirement limited the power conferred on the federal government to legislate to remove Indigenous children from their families; and
- that neither express constitutional guarantees such as freedom of religion, nor implied terms such as freedom of movement and a general requirement of equality before the law, affected the unqualified scope of the Territories Power.<sup>168</sup>

Although the most recent case law suggests that the power of the Commonwealth government to legislate for the Northern Territory is unqualified, statements by the current government have exhibited an intention for governmental legislative power in the Northern Territory to be subject to other constitutional protections and limitations, such as the right to just terms compensation for the acquisition of property.<sup>169</sup>

In light of the land tenure reform measures adopted in the Northern Territory Intervention legislation, such a commitment is a welcome one. However, it is clear that Aboriginal and Torres Strait Islander people in the Northern Territory have an ongoing vulnerability to laws infringing upon their human rights, and that constitutional rights protection mechanisms should not be left to the benevolence of a particular government.

These provisions reveal the vulnerability of Indigenous peoples’ protection against discrimination in Australia. There are several examples of where racially discriminatory laws have been passed consistently with the *Constitution*. The prime issue, therefore, is how to ensure that the *Constitution* protects against racially discriminatory laws being enacted in the future.

The precedents set by the Commonwealth government’s suspension of the RDA demonstrates the inherent limitations of legislative protections for human rights in

166 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007) p 219. While it is true that recent cases heard by the High Court such as *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 do leave scope for future interpretation regarding a more ‘integrationist’ view of the Territories Power, the jurisprudence can hardly be said to provide a firm basis on which constitutional protections are currently guaranteed.

167 (1997) 190 CLR 1.

168 (1997) 190 CLR 1 (Per Brennan CJ at 46; Dawson J at 73).

169 Minister for Families, Housing, Community Services and Indigenous Affairs ‘Response to the NTER Review’ (Transcript of media conference, 23 October 2008).

highly politicised situations, and in situations where the views and voices of affected minority groups are not adequately represented at the Commonwealth and state/territory levels.

As I have noted above, a focus on amending section 51(xxvi) may provide protection against discrimination that is incomplete and in some circumstances, ineffective. Accordingly, there is a need to ensure that any mechanism to protect people against discrimination applies to the provisions of the entire *Constitution*.

To address the issues discussed here, I propose that a more broadly based protection against discrimination and guarantee of equality before the law should form the basis of any constitutional reform. This would be in place of a focus on reforming the racial power of the *Constitution*.

### 2.3 A constitutional guarantee of equality before the law and freedom from discrimination

A constitutional guarantee of equality before the law and freedom from discrimination that is intended to bind the exercise of all Australian legislative, administrative and judicial powers could be drafted in order to provide comprehensive protection against racial discrimination.

Since the applicability of human rights standards should in no way depend on the vicissitudes of party politics, I believe that the time has come for the Commonwealth government to respond to the concerns of the Committee on the Elimination of all forms of Racism to entrench a guarantee against racial discrimination in its domestic law:

The Committee, while noting the explanations provided by the delegation, reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth (Convention, art. 2).

The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.<sup>170</sup>

Nearly all Commonwealth countries have entrenched equality and non-discrimination clauses in their Constitutions, including Canada, Fiji, India, Malaysia, New Zealand, Republic of South Africa and the United Kingdom. Although Australia has no constitutional tradition of rights protection, a well-established line of jurisprudence exists on the operative components of discrimination law at the domestic level, with considerable judicial comment and interpretation having been made with regard to the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*, over the past 30 years.

A constitutional guarantee of equality before the law and freedom from discrimination, was positively canvassed by the Council for Aboriginal Reconciliation<sup>171</sup> and in the *Social Justice Report 2000*.<sup>172</sup> This is an option for Australian constitutional reform that I believe warrants further consideration.

In June 2008, the House of Representatives Standing Committee on Legal and Constitutional Affairs convened a roundtable discussion to discuss, *inter alia*, how such an amendment might be effected.<sup>173</sup> A number of committee members at the

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170 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/AUS/CO/14 (2005).

171 Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000) available online at <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/pg3.htm> (accessed 2 December 2008).

172 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission (2000) ch 4.

173 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming our Constitution: A roundtable discussion* (2008).

roundtable recommended that section 25 of the *Constitution* should be repealed and replaced with a non-discrimination clause.<sup>174</sup> In relation to voting procedures in the House of Representatives, section 25 of the *Constitution* currently provides that:

**25. Provision as to races disqualified from voting** For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

As the Council for Aboriginal Reconciliation have stated:

Section 25 of the *Constitution* is intended to discourage discrimination but recognises the possibility that a State might exclude people from voting on the grounds of race. Such a provision is inappropriate for any democratic nation, particularly one whose people come from many different backgrounds. As it stands, the Australian *Constitution* arguably contemplates that Australian citizens may be disenfranchised on racially discriminatory grounds. The Council strongly supports removing section 25 from the *Constitution* to ensure that no Australian can be denied the vote on the grounds of their race.<sup>175</sup>

Noting that section 25 contemplates the exclusion of voters on racial lines, the 1988 Constitutional Convention described section 25 as ‘odious’ and recommended that it be repealed.<sup>176</sup> The recommendation to repeal the section, which I support, was also favourably cited by the final report of the 2020 Summit, and by the Committee majority of the Standing Committee on Legal and Constitutional Affairs’ roundtable discussion.

In my view, the replacement of section 25 with guarantees of equality before the law and freedom from discrimination should be strongly considered as an option for constitutional reform in Australia.

This would be consistent with our international human rights obligations. The principle of non-discrimination on the grounds of race has attained the status of *jus cogens* under international customary law. In other words, non-discrimination is already a standard from which no deviation is permitted at either the national or international level. Constitutional entrenchment of equality and non-discrimination principles would be the most effective way of ensuring Australia meeting this obligation.

While the Australian *Constitution* is not generally viewed as a mechanism by which citizens can assert their rights against the Commonwealth government, the *Constitution* does operate in a number of areas as a restraint on the power of the government to legislate – such as the restraint on government legislation that would interfere with the express constitutional guarantees of freedom of religion and trial by jury for indictable offences.

It is also noteworthy that it is currently unclear to what extent implied guarantees of equality before the law,<sup>177</sup> or equal justice as a fundamental element of the judicial process,<sup>178</sup> are currently protected by the *Constitution*, with differing constitutional interpretations being preferred by various members of the High Court.

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174 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming our Constitution: A roundtable discussion* (2008) p 49.

175 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – National Strategy of the Council for Aboriginal Reconciliation* (2000). At: [www.austlii.edu.au/au/other/IndigLRes/car/2000/9/](http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/) (viewed 11 December 2008).

176 *Constitution* Commission, *Final Report of the Constitutional Commission* (1988) p 16.

177 A substantive constitutional doctrine of the ‘inherent equality of all people’ was posited by Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 455, 486, though such a doctrine should likely be regarded as having been rejected by the majority in *Kruger v Commonwealth* (1997) 190 CLR 1.

178 *Kruger v Commonwealth* (1997) 190 CLR 1, 68 (Gaudron J).



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A positive guarantee of equality before the law would clarify judicial disagreement in this area, and give strong protections to the rights that at least some High Court judges have stated should necessarily be regarded as impliedly protected by our *Constitution*.

Constitutional guarantees of equality before the law and freedom from discrimination would also prevent legislative protections against discrimination being overridden or suspended.

A national Human Rights Act may also provide the judiciary with an interpretive tool with which to support the application of the Races Power and the Territories Power in a manner consistent with human rights. However, in situations in which the Parliament has evinced an intention to override provisions of a Human Rights Act or discrimination laws more generally, entrenched constitutional guarantees of equality before the law and freedom from discrimination would provide more effective protection by preventing the operation of such legislation to the extent of its inconsistency with the amended *Constitution*.

In the past, legislative action has been justified by the principle of parliamentary supremacy, for which the rationale is ostensibly representative and responsible government. However, these examples demonstrated that in overriding rights on the basis of 'necessity', governments faced little political accountability – and in fact, in some cases, may have gained perceived political advantages – for their actions.

It is also my view that entrenching guarantees equality before the law and freedom from discrimination in the *Constitution* may also lead to outcomes that are more consistent with human rights in cases involving section 51(xxvi) of the *Constitution* (the 'Races Power') and section 122 of the *Constitution* (the 'Territories Power').

In my view, entrenched guarantees of equality before the law and freedom from discrimination would provide a far firmer legal basis for a human rights approach to constitutional interpretation in this area. Such a guarantee might also be expected to provide limitations on the 'Territories Power' in a manner that ensured that human rights were protected.

### 3. Recommendations

#### **Recommendation 6**

That the Commonwealth Government undertake national consultations and begin a constitutional process for the recognition of the special place of Aboriginal and Torres Strait Islander peoples in the preamble to the *Constitution*. Particular emphasis should be placed on the need for an inclusive, consultative process in drafting a revised preamble prior to a referendum.

#### **Recommendation 7**

That, in recognition that existing protections against racial discrimination have been overridden in relation to Indigenous peoples, the Commonwealth Government begin a constitutional process for the removal of section 25 of the *Constitution* and its replacement with a clause guaranteeing equality before the law and non-discrimination.

## Part 5: A National Indigenous Representative Body

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### 1. Background

Throughout my term as the Aboriginal and Torres Strait Islander Social Justice Commissioner, I have maintained that sustained progress in Indigenous policy making can only occur when there is a genuine partnership between government and Indigenous peoples and communities.

In my view, this partnership requires two elements. The first is the involvement of Indigenous peoples in the development of policies and programs that affect them. The second is a permanent mechanism to ensure that there is clear government accountability to Indigenous peoples for the progress that is being made.

Indigenous peoples and their representatives in Australia should be able to conduct open and transparent communications with all levels of government, in order to promote the protection of Indigenous human rights. Such a dialogue is essential in order for our democratic system to work effectively. The existence of representative mechanisms that can facilitate such dialogue and provide a voice to Indigenous peoples is also provided for in the *UN Declaration on the Rights of Indigenous Peoples*.<sup>179</sup>

The Objectives of the Second Decade of the World's Indigenous People also provide a template for governments' obligations in this regard. Specifically, states should

[p]romot[e] full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspects of their lives, considering the principle of free, prior and informed consent.

In the *Social Justice Report 2006* I argued that the Commonwealth government's 'new arrangements' in Indigenous affairs did not enable the effective participation of Indigenous peoples in decision making and in fact constitute the fundamental flaw of those arrangements. This is significant in terms of human rights compliance, but it is also a practical issue that goes to the workability and sustainability of service delivery and policy making processes. In the *Social Justice Report 2006* I recommended that:

the Ministerial Taskforce direct the Office of Indigenous Policy Coordination to address this deficiency [of engagement with Indigenous communities] as an urgent priority, including by:

- consulting with Indigenous communities and organisations as to suitable structures, including by considering those proposals submitted to the government for regional structures;
- utilising the Expert Panels and Multi-use List of community facilitators/ coordinators to prioritise consideration of this issue; and
- funding interim mechanisms to coordinate Indigenous input within regions and with a view to developing culturally appropriate models of engagement.<sup>180</sup>

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179 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007) articles 4, 19.

180 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2007) p 176.

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I also identified that in the period 2007–2008, I would follow up the issue by taking the following action:

The Social Justice Commissioner will work with Indigenous organisations and communities to identify sustainable options for establishing a national Indigenous representative body.<sup>181</sup>

## 2. New government, new approach?

Since the federal Labor government was elected in November 2007, the need for genuine partnership with Indigenous peoples has once again been spoken of as a priority. The government's commitment to partnership has also been matched with new policy approaches in a number of important areas.

As I detail in Chapter 5 of this *Social Justice Report*, one of the most notable advances has been the government's commitment to closing the gap in Indigenous health inequality. In line with the participatory goals of the Second Decade of the World's Indigenous Peoples, the Close the Gap Statement of Intent has committed the Commonwealth government to:

ensuring the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs.<sup>182</sup>

But in other areas the gap between political rhetoric and practical change has been more troubling. In particular, the processes surrounding the development and implementation of the Northern Territory Intervention measures have left much to be desired, even under the current Commonwealth government.

While the appointment of a Board of Review for the Intervention was a welcome step, the government's initial response to the Board's report has demonstrated that consultation, even when it occurs, does not always go on to shape policy development in the way that it should. For example, the government has so far delayed the immediate re-instatement of state and Commonwealth anti-discrimination legislation,<sup>183</sup> in spite of the Board's clear recommendations to that effect.<sup>184</sup>

The key question with regard to representative structures is not how policy outcomes such as this can immediately be changed. Rather, the question is what steps should be taken to entrench proper accountability to Indigenous peoples for decision making, and to ensure that consultation processes are undertaken in good faith.

I believe that the Commonwealth government shares these aspirations. That is why over the past year, a number of steps have been taken, both by both my office and the Commonwealth government, to progress the establishment of a new National Indigenous Representative Body.

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181 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2007) p v.

182 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008). At [www.humanrights.gov.au/social\\_justice/health/statement\\_intent.html](http://www.humanrights.gov.au/social_justice/health/statement_intent.html) (viewed 28 January 2009).

183 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Compulsory Income Management to continue as key NTER measure' (Media release, 23 October 2008). At [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter\\_measure\\_23oct08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm) (viewed 20 January 2009).

184 Northern Territory Emergency Response Board, *Report of the NTER Review Board* (2008) p 12. At [http://www.nterreview.gov.au/docs/report\\_nter\\_review/docs/Report\\_NTER\\_Review\\_October08.pdf](http://www.nterreview.gov.au/docs/report_nter_review/docs/Report_NTER_Review_October08.pdf) (viewed 30 January 2008).

### 3. Developing a representative body

In October 2007, my office sought expressions of interest for a research consultancy to research different mechanisms for representing Indigenous peoples in Australia and internationally. As the result of a competitive tender process, the National Centre for Indigenous Studies at the Australian National University was contracted to conduct the research.

The research informed a comprehensive issues paper released by my office in July 2008.<sup>185</sup> The issues paper examined three questions on Indigenous representation which were:

1. What lessons can be learned from mechanisms for representing Aboriginal and Torres Strait Islander peoples at the national, State/ territory or regional level that have previously existed or that are currently in place?
2. What lessons can be learned from mechanisms for representing Indigenous peoples that have been established in other countries?
3. What options are there for ensuring that a national Indigenous representative body is sustainable?

During this period, the Commonwealth government also began to take steps to advance the establishment of a representative body. In the budget portfolio statement for Indigenous Affairs released as part of the Commonwealth budget in May 2008, the Minister for Indigenous Affairs stated that:

The Government went to the election with a commitment to set up a national representative body to provide an Aboriginal and Torres Strait Islander voice within government. We will soon begin formal discussions with Indigenous people about the role, status and composition of this body.<sup>186</sup>

The government then announced consultations with Indigenous peoples on the key issues for a new national representative body. These consultations began in July 2008, and included 80 public meetings in each state and territory. The government also received over 100 public submissions to its consultations.

The consultations revealed that there was widespread consensus in the community about the need for a national representative body. However, it was also clear that there was considerable divergence on issues such as:

- what kind of body it should be;
- how it should be structured;
- what kind of membership it would have;
- what role should it have;
- how it would be funded ;
- what its relationship to government should be; and
- how it should be accountable to Indigenous peoples.

On 16 December 2008 the Minister for Indigenous Affairs, Jenny Macklin, announced that the second stage of consultations would be guided by Indigenous peoples. To further that process, the Minister invited me to convene an independent Indigenous Steering Committee to develop a model for a new national Indigenous representative body.

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185 Aboriginal and Torres Strait Islander Social Justice Commissioner, *A National Indigenous Representative Body*, Human Rights and Equal Opportunity Commission (2008). At [http://www.hreoc.gov.au/social\\_justice/repbody/index.html](http://www.hreoc.gov.au/social_justice/repbody/index.html) (viewed 30 January 2009).

186 Australian Government, *Budget 2008–2009* (2008). At [http://www.budget.gov.au/2008-09/content/ministerial\\_statements/html/indigenous-02.htm](http://www.budget.gov.au/2008-09/content/ministerial_statements/html/indigenous-02.htm) (viewed 30 January 2009).

**Text Box 16: The Steering Committee for a National Indigenous Representative Body**

In December 2008, I invited a number of individuals to participate on the Steering Committee:

- Mr Mark Bin Bakar (WA);
- Ms Tanya Hosch (SA);
- Mr Geoff Scott (NSW);
- Dr Jackie Huggins AM; (Qld)
- Mr Tim Goodwin (Victoria and youth representative);
- Ms Yananymul Mununggurr (NT Top End homelands communities);
- Mr Jason Glanville (ACT);
- Ms Rosalie Kunoth-Monks (NT, Central Australia);
- Mr John Toshi Kris (Torres Strait Islands); and
- Ms Nala Mansell-McKenna (Tasmania and youth representative).

Professor Mick Dodson also agreed to participate in the Steering Committee in an advisory capacity.

Each person selected will take their place on the Committee in their individual capacity. Those chosen were picked for their experience and knowledge of national representative body mechanisms, as well as being selected to represent a balance of geographic representation, gender, age and youth members. Steering committee members are not, however, intended to represent the state or territory where they reside.

The Minister has mandated the Steering Committee to engage with and consult Aboriginal and Torres Strait Islander peoples across the country, in order to gain feedback on the Indigenous community's preferred model for a national Indigenous representative body. In doing so, the Steering Committee will also consider the outcomes of consultations conducted by the government to date.

The Steering Committee is also required to:

- convene an Indigenous peoples Workshop in March 2009, with a possible second workshop in June 2009;
- develop a preferred model for a new national Indigenous representative body for presentation to the Australian Government in July 2009;
- make recommendations in regards to the establishment of an interim body from July 2009 which would operate until the finalised body takes effect; and
- ensure strong community support for such a representative model.

Without proper engagement with Aboriginal and Torres Strait Islander peoples, governments will struggle in their efforts to make lasting progress in improving the conditions of Indigenous people and in our communities.

A national Indigenous representative body is a fundamental component of any future action if we are to achieve positive change.

At present, there is not a transparent, rigorous process for engaging with Indigenous peoples in determining the policy settings and to hold governments accountable for their performance.

The new Australian Government has acknowledged the importance of addressing this and of establishing a new partnership with Indigenous peoples.

It is now time for us to flesh out these commitments to ensure the full participation and input of Indigenous peoples into government decision making at the national level. And this, ultimately, is what the discussion about a new national Indigenous representative body is about.

It is about our place at the table in making the decisions that impact on our communities, on our men, our women and our children.

It is about creating a genuine partnership with government and across society:

- **With shared ambition**, so we are all working towards the same goals and not at cross purposes.
- **With mutual respect**, so we are part of the solutions to the needs of our communities instead of being treated solely as the problem.
- **With joint responsibility**, so that we can proceed with an honesty and an integrity where both governments and Indigenous people accept that we each have a role to play, and where we each accept our responsibilities to achieve the change needed to ensure that our children have an equal life chance to those of other Australians.
- **With respect for human rights**, that affirms our basic dignity as human beings and provides objective, transparent standards against which to measure our joint efforts.

We should resist the temptation to slip back into old habits. This is not about reviving ATSIC. The ATSIC Review of 2003 did not recommend the abolition of ATSIC but instead proposed a restructure and close adherence to a series of key principles. I am confident that Indigenous people will draw on the lessons from the ATSIC Review while also looking beyond the ATSIC model when setting out their hopes and expectations for a new national Indigenous representative body.

I consider that perhaps the greatest problem that ATSIC faced was that it was 'blamed' for the lack of progress in addressing Indigenous disadvantage, despite the simple fact that it had few responsibilities for service delivery that could contribute to achieving this goal. This was a key finding of the ATSIC Review in 2003.

I see significant benefits for a new National Indigenous Representative Body to not exercise the service delivery responsibilities of government. As for all other Australians, let government be responsible for delivering services to Indigenous citizens. We don't want to take the blame for second class treatment by government anymore.

Let the new Representative Body set the vision for our people's future, provide the guidance to achieving this and advocate for understanding for the consequences that flow from our status as the First Peoples of this nation.

A new National Indigenous Representative Body will also have to operate in a vastly changed environment from when ATSIC existed. This is one with:

- concrete commitments from government to closing the gap, with a partnership approach at the centre of this process;
- a renewed focus on reconciliation, following from the National Apology to the stolen generations;
- a whole of government system for delivering services to Indigenous people where the primary responsibility resides with mainstream government departments; and
- significant environmental challenges facing all Australians, and where the traditional knowledge, practices and land use of Indigenous peoples will have a significant role to play in preserving the quality of life of all Australians.

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A new National Indigenous Representative Body will also be created within the context of rapid advances internationally in the recognition of the rights of Indigenous peoples – developments which the new Australian government has indicated it supports and respects.

It is essential that as Indigenous peoples we have a seat at the table and are involved in the big debates that affect our communities. It is not credible to suggest that we should not have such involvement.

My hope is that we can, in partnership with government, develop a new national Indigenous representative body that engages with different sections of the pan-Aboriginal and/ or Torres Strait Islander community – be it women, men, our youth and children, communities in different geographical locations, traditional owners or stolen generations members.

And I hope that a representative body will operate in such a way as to inspire and support our people, while also holding governments accountable for their efforts, so we may ultimately enjoy equal life chances to all other Australians.

The first step on this road is mutual respect and a partnership. A national Indigenous representative body is an essential component of achieving the long overdue commitments to closing the gap.

### 4. Follow-up action by the Social Justice Commissioner

<b>Follow-up Action by the Social Justice Commissioner</b>
The Social Justice Commissioner will provide to the Minister for Families, Housing, Community Services and Indigenous Affairs advice on the proposed model for a new National Indigenous Representative Body in July 2009.



## Part 6: Unfinished business: A framework for negotiation

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This chapter so far has outlined some of the key components that are required to establish a comprehensive framework for formal protection of human rights – such as through constitutional reform and a Human Rights Act. The elements discussed so far are forward looking and seek to ensure adequate protection of Indigenous peoples into the future.

Such a framework will go a long way to preventing ongoing violations of Indigenous peoples' human rights. But it will not address two other critical issues:

- a framework to guide the relationship between governments and Indigenous peoples to set a benchmark for ongoing dialogue and negotiations; and
- an address to the ongoing consequences of the historical violation of Indigenous peoples' human rights.

It is one thing to acknowledge the existence of human rights abuses – as the Apology did so movingly – it is another to deal with the consequences and the inter-generational effects of such abuses and to ensure that structures are in place to ensure that such violations do not occur again.

For this reason, we also need to provide a mechanism through which to settle the outstanding consequences of past injustices and settle a negotiation framework for the future.

The *UN Declaration on the Rights of Indigenous Peoples* particularly emphasises the importance of processes to adjudicate disputes and for negotiations to take place between governments and Indigenous peoples. Relevant provisions include:

### *Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

### *Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

### *Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

### *Article 37*

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

### *Article 40*

Indigenous peoples have the right to access and to prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

An important component of the human rights challenge for twenty first century Australia will be to establish a forum or framework through which genuine partnership can be negotiated between Indigenous peoples and the governments of Australia.

The need for a framework of negotiation stems back to the absence of a treaty between Indigenous peoples and the colonising governments. Other western democracies with Indigenous populations such as the United States of America, Canada and New Zealand, have all negotiated treaties with their indigenous peoples.

These treaty processes involve treaties struck at the time of colonisation but also modern, comprehensive settlement agreement processes that were begun in the past 30–40 years.

Comprehensive settlement processes provide the framework within which agreements between government and indigenous peoples are made in relation to land rights, governance, healing and other issues. The absence of a foundational framework for negotiation in Australia has impeded the development of similar agreements and institutions for the advancement of Indigenous peoples in Australia.

On 13 February 2008, in the National Apology to the Stolen Generations, the Prime Minister spoke of the need for a new partnership between Indigenous and non-Indigenous Australians based on respect. The Prime Minister spoke of successful government policies and of closing the gaps in inequality, as being the core planks of that partnership.

However, what was unspoken of was the absence of an agreed framework within which these policies can be negotiated and implemented. The unfinished business is the need to create this framework where Indigenous peoples and governments can sit at the table in good faith and with mutual respect to negotiate agreements.

Discussions for such a framework have been had before by both Indigenous peoples and governments.<sup>187</sup> Some of the more recent references to the need for a framework for negotiation have been made by the Council for Aboriginal Reconciliation. The Roadmap for Reconciliation includes the following recommendations:

#### **Constitutional and Legislative Implementation**

A. ATSIC and other Aboriginal and Torres Strait Islander representatives and representative organisations consult with communities to establish the basis for negotiation with governments and agree on representative structures through which they will undertake those negotiations. Provision of adequate resources is imperative to this process.

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<sup>187</sup> For an overview of discussions for a treaty from 1873 – 1998 see Council for Aboriginal Reconciliation, *Documents of Reconciliation Briefing Paper: Terra Nullius and Sovereignty*. At: <http://www.austlii.edu.au/orgs/car/docrec/policy/brief/terra.htm> (viewed 1 February 2009).

B. The Commonwealth government and Aboriginal and Torres Strait Islander representatives and representative organisations enter into discussions to establish a protocol for negotiation and the principles upon which the legislative framework will be based.

C. The Commonwealth government, in cooperation with Aboriginal and Torres Strait Islander representatives and representative organisations adopt the legislative framework proposed in this Document.

D. The Commonwealth Parliament legislate to establish a framework for negotiation and agreement on the unresolved issues of reconciliation.<sup>188</sup>

The Australian Labor Party, in its National Platform and Constitution (2007) has also committed to implementing these recommendations and implementing a social justice package. The platform states:

44. Promote the First Nations status of Indigenous Australians.  
Build national consensus around a long-term strategy to improve the social and economic well-being of Indigenous Australians.  
Enable the full exercise of Indigenous Australian's rights and responsibilities on both an individual and collective level.  
Advance reconciliation and social justice.
48. Implement the recommendations made in 2000 by the Council for Aboriginal Reconciliation and use the Council's Australian Declaration towards Reconciliation as a basis for action.
49. Work towards a lasting settlement with Indigenous Australians. Labor and build public support to meet the goal of providing constitutional recognition of the First Nations status of Indigenous Australians and their custodianship of land and waters.<sup>189</sup>

Perhaps most significantly, paragraph 97 of the ALP National Platform also states:

Labor recognises that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision. Labor will honour this commitment.

The Social Justice Package was the third prong of the response to the Mabo decision after the establishment of the *Native Title Act 1993* (Cth) and the establishment of the Indigenous Land Fund.

Indigenous representatives consented to the package of measures in the *Native Title Act 1993* (Cth) – which included discriminatory provisions which confirmed extinguishment of native title – on the basis of there being a broader response to Indigenous social justice issues.

As a result, consultations were conducted by the Council for Aboriginal Reconciliation, ATSIC and the Social Justice Commissioner on the core elements of a social justice package to accompany the *Native Title Act 1993*. Three reports were produced by CAR, ATSIC and the Social Justice Commissioner proposing a framework for settlement in 1995.

Due to the change of Commonwealth government, these were never implemented.

It is timely for the ALP to revisit this issue.

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188 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights: Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation* (2000). At: <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/pg7.htm> (viewed 1 February 2009).

189 Australian Labour Party, *National Platform and Constitution*, (2007), Ch 13. At: [http://www.alp.org.au/platform/chapter\\_13.php#13aboriginal\\_peoples\\_and\\_torres\\_strait\\_islanders](http://www.alp.org.au/platform/chapter_13.php#13aboriginal_peoples_and_torres_strait_islanders) (viewed 31 January 2009).

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The failure of government to deliver the social justice package is highly significant. It reflects a lack of good faith on the part of government to deliver on elements of reform that it promised, in return for discriminatory provisions in the original Native Title Act. It goes to the bona fides of a Labor government to stand by commitments it has made solemnly to Indigenous peoples in the past.

Notably, the social justice package proposal of ATSIIC recommended that the starting point of a social justice package negotiation should be for governments to 'agree to and legislate a broad set of *Principles for Indigenous Social Justice and the Development of Relations between the Commonwealth Government and Aboriginal and Torres Strait Islander peoples*'.<sup>190</sup>

I endorse this proposal as a way forward to establish a framework to address the unfinished business in Australia.

The experiences in Canada, New Zealand and the United States show the value of an agreement framework in providing formal recognition to the unique rights and status of Indigenous peoples. Renewal of a national dialogue on this issue would greatly enhance the process of reconciliation between Indigenous and non-Indigenous Australians, and indicate to Indigenous peoples that the Australian nation recognised them with both honour and respect.

Further, it is my view that the establishment of an ongoing legal framework for agreements between governments and Indigenous peoples based on mutual partnership will fundamentally bolster the level at which self-determination can be exercised, and that more 'practical benefits' such as those associated with overcoming disadvantage, will result as a corresponding outcome over time.

Without determining the content of what such a mechanism might look like, I believe that such an approach may provide a more principled and certain framework to resolve issues of service delivery between Commonwealth, State and Territory governments: a key policy objective of the current Commonwealth government.<sup>191</sup>

Over time, it may be appropriate to also provide constitutional protection to agreements that have been struck through such a framework. Section 35 of the Canadian Constitution is a potential source of guidance in this area. It provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.<sup>192</sup>

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190 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995). Reproduced in [1996] *Australian Indigenous Law Reporter* 27. At: <http://www.austlii.edu.au/au/journals/AILR/1996/27.html>.

191 Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13 (Respecting Human Rights and a Fair Go for All) pars 53–54. At [http://www.alp.org.au/platform/chapter\\_13.php](http://www.alp.org.au/platform/chapter_13.php) (viewed 4 August 2008).

192 *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) cl 11, s 35.

## 1. Recommendations

### ***Recommendations 8 and 9***

That the Commonwealth Government commence negotiations of a framework for the negotiation of a social justice package to address the unfinished business of reconciliation.

Further, the new National Indigenous Representative Body, once established, be funded and tasked with consulting with Indigenous peoples and representing their interests in the negotiations of a social justice package. The social justice package should be finalised within 3 years of the establishment of the National Indigenous Representative Body.

## Part 7: Building a culture of human rights

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In addition to the formal protection mechanisms outlined above, the final significant step that should be considered by both government and the community sector in developing an Indigenous human rights framework is to build a culture of respect for human rights in Australia. This can be achieved through a substantial focus on human rights education.

The creation of a human rights culture refers to the presence of a context in which formal protections can operate to ensure that there is adequate recognition, awareness and application of human rights standards within parliament, government, the courts and the community.

To mark the 60<sup>th</sup> anniversary of the *Universal Declaration of Human Rights*, the United Nations has proclaimed the year beginning 10 December 2008 as the International Year of Human Rights Learning.<sup>193</sup> The importance of complementing a legal human rights-based approach with intellectual and cultural strategies to engender respect for universal human rights is also one of the primary goals of the World Program for Human Rights Education,<sup>194</sup> and is also a substantive component of many of Australia's international human rights obligations as they have been discussed in this chapter.

The question of human rights education has also been given significant attention by a number of treaty bodies and other international mechanisms, with the Human Rights Council's Ad Hoc Committee on the Elaboration of Complementary Standards to CERD recently recommending the development of:

a comprehensive binding instrument establishing the duty to promote non-discrimination, tolerance and equality of rights irrespective of race, ethnicity and other related grounds through human rights education...<sup>195</sup>

Central to the goal of creating a human rights culture in Australia will be undertaking measures that promote community understanding and acceptance of human rights for the entire Australian nation, as well as their particular importance in Indigenous communities.

Throughout my tenure as the Aboriginal and Torres Strait Islander Social Justice Commissioner, I have consistently argued that more extensive human rights education programs are needed in order to raise awareness of the existence and effect of human rights standards in the general community.

In the context of formal mechanisms for human rights protection, human rights education is particularly necessary to:

- inform the effective development of formal mechanisms for rights protection; and
- guarantee the effectiveness of formal rights protection mechanisms once they are operative.

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193 *International Year of Human Rights Learning*, GA Resolution 62/171, UN Doc A/Res/62/171 (2008).

194 *Revised draft plan of action for the first phase (2005–2007) of the World Programme for Human Rights Education*, UN Doc A/59/525/Rev.1 (2005).

195 Human Rights Council, *Complementary international standards* UN Doc A/HRC/AC.1/1/CRP.4 (2008), art 32.

## 1. Informing the development of formal mechanisms

The relationship between formal mechanisms for rights protection and human rights education is one of mutual reinforcement. On the one hand, processes initiated by governments to develop formal human rights mechanisms are themselves a useful tool for raising awareness of human rights standards and complementary responsibilities in the general community.

For example, the current national consultation on human rights protections in Australia may be expected to raise awareness of the level at which rights are currently protected in Australia, and allow the community to contribute to the development of a human rights culture in Australia.

On the other hand, the ability of various sectors of the community to engage in such discussions will be considerably limited without considerable capacity building and awareness-raising regarding the importance and applicability of human rights.

Education about human rights may also be necessary to counter the perception amongst some sectors of the community that they do not have the understanding or experience to contribute to a human rights dialogue, or that reform in the area should primarily be the concern of lawyers and academics.

Further, the notion that formal legal recognition of Indigenous rights is an abstract and academic concern was encouraged by the previous government's postulated tension between symbolic and substantive or 'practical' reconciliation,<sup>196</sup> and must be countered if genuine community-generated progress is to be achieved.

It is therefore of the utmost importance that formal rights protection mechanisms and strategies to promote human rights education are pursued simultaneously.

## 2. Guaranteeing effectiveness

One of the central goals of human rights education for Indigenous peoples should be to empower individuals and communities to assert control of their own lives. Human rights provide communities an external frame of reference for the legitimate expectations that they may have of dealings with government, businesses, and other community groups.

However, in the *Social Justice Report 2006* I identified that an 'information gap' exists in Australia that inhibits the use of a human rights framework by many Indigenous peoples and other civil society groups.

In particular, my experience as the Aboriginal and Torres Strait Islander Social Justice Commissioner has reinforced my belief that many Indigenous peoples continue to be unaware of the ways in which human rights relate to their lives.

Even where that understanding is present, many more lack the capacity and resources to usefully apply those standards to their advocacy and negotiations with government.<sup>197</sup> This belief has been confirmed in other reports including, the *Little Children are Sacred* report which found that 'many Aboriginal people remain powerless because they do not have access to information' and recommended that a range of community education projects be undertaken.<sup>198</sup>

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196 ANU National Centre for Indigenous Studies, *Building Sustainable Policy for Indigenous Affairs in Australia* (Executive summary report of the ANU Centre for Dialogue's Inaugural Event, Canberra, Saturday June 21 2008) p 7.

197 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006) p 253.

198 P Anderson and R Wild, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), p 157 and 160.



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Similar findings also came out of the NSW report – *Breaking the Silence*<sup>199</sup>, and from the research the Australian Human Rights Commission undertook from 2001–2006 which recommended:

4. Human rights education in indigenous communities. There is a need for broad-based education and awareness-raising among Indigenous communities to progress these issues. Working with communities to send strong messages that violence won't be tolerated, that there are legal obligations and protections, and that individuals have rights, are critical if we are to stamp out family violence.<sup>200</sup>

In this context, human rights education is necessary in order to operationalise formal human rights protections once they are enacted, and equip Indigenous peoples with the knowledge and skills to be able to advocate for improved standards of rights protection 'on the ground' in our communities.

A number of models already exist which may provide useful templates for human rights education programs across a range of different policy areas. The *Social Justice Report 2007* examined some of the positive Indigenous community education and community development initiatives undertaken in response to family violence and child abuse.

These examples demonstrated that community education and community development approaches, with a focus on human rights education, can play an important role in preventing violence. However, these examples also illustrated that their success was reliant on good partnerships between governments and communities, and ensuring that the education was community driven: recognising and responding to the Indigenous community's diverse needs and building on the community's knowledge and strengths.<sup>201</sup>

Throughout 2007–2008, my office and the Commonwealth Attorney-General's Department jointly co-ordinated a Community Legal Education module designed to train educators attached to Indigenous Family Violence Prevention Units around Australia. In my view, the model is an excellent example of the practice of human rights 'in action', as legal educators work with communities to send strong messages that violence won't be tolerated, that there are legal obligations and protections, and that individuals have legal and enforceable human rights.

### Text Box 17: Community Legal Education Training Program

The Community Legal Education Training Program is funded by the Commonwealth Attorney-General's Department to deliver an education module for Community Legal Education workers (CLEs) employed in Family Violence Prevention Legal Services. This initiative was intended to meet one of the aims of the *Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities* and the *COAG Communiqué of July 2006*.

The role of the CLE workers is to raise awareness amongst Indigenous peoples about the standards of Australian law that are relevant to family violence, and to clarify the relationship between Australian law and customary law.

199 NSW Aboriginal Child Sexual Assault Taskforce, *Breaking the silence: Creating the future*, Attorney General's Department NSW (2006).

200 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities – Key issues* (2006). At: [http://humanrights.gov.au/social\\_justice/familyviolence/family\\_violence2006.html](http://humanrights.gov.au/social_justice/familyviolence/family_violence2006.html) (viewed 31 January 2009).

201 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007) p 23–26.

The aim of the training program was to provide CLE workers with appropriate skills and knowledge to fulfil their role. The training program was underpinned by community development theory and practice and the content of the training focused on Australian law and customary law as they are relevant to preventing violence in Indigenous communities.

13 CLE workers were trained in 2007, followed by an advanced training for some of these in 2008 and a second training in 2008 for new CLE workers engaged in 2008.

The evaluation of the program found the community education approach was very effective:

- The CLE workers reported a very high degree of satisfaction with the quality of the materials and the relevance of the content of the training program. In their evaluations, all CLE workers reported an increase in relevant knowledge and skills as a result of the training.
- The Secretariat of National Aboriginal and Islander Child Care (SNAICC) described the training program as a useful and necessary resource for workers engaged in the prevention of both child abuse and family violence.
- CLE workers strongly supported the need for follow-up training and development. They argued that they need opportunities to come together to problem solve, to share ideas and resources and to refresh and debrief from the arduous aspects of the role.

In partnership with the Diplomacy Training Program and Oxfam, my office will also jointly co-ordinate the development of an Indigenous Human Rights Network over the coming three years. Through the progressive development of web-based resources and regional workshops, the network will facilitate information-sharing between Indigenous human rights advocates across Australia about developments in Indigenous rights at the national and international level. Through education and collaboration, it is my hope that over time human rights education will be disseminated to Indigenous communities across through the leadership of their own advocates.

There remains a pressing need for broader based education and awareness-raising in both Indigenous and non-Indigenous communities across Australia to ensure that Indigenous interests and rights are protected.

In my view, this could be achieved through a combination of a number of different measures. Governments, the private sector, civil society and international organizations and aid agencies need to support Indigenous organisations to undertake their own capacity building around rights advocacy in the light of the particular circumstances of individual communities that they service.

As I noted in the *Social Justice Report 2006*, there is also still much to be gained through partnerships between organisations that deal with questions of human rights as part of their daily business, whether those be Indigenous organisations, research institutes and universities, Indigenous legal and medical services and the broader non-government sector.<sup>202</sup>

Finally, there is a need to build the capacity of politicians, government officials, the private sector and other non-governmental actors to understand and apply human rights standards to ensure the practical realisation of human rights.

Importantly, this includes increasing their knowledge of Indigenous human rights in order that that can effectively engage with Indigenous communities. Intensive training

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202 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006) p 254.

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and awareness raising on the rights of Indigenous peoples should be provided throughout Australia, and concerted efforts should be made to recruit and then support Indigenous people working in human rights positions in government, private and non-government sector employment.

### 3. Recommendations

***Recommendation 10***

That the Commonwealth Government resource the Australian Human Rights Commission to develop and implement a comprehensive community development and community education programs on human rights for Aboriginal and Torres Strait Islander peoples.

## Part 8: Conclusions and recommendations

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This chapter has set out an agenda for the protection of the rights of Indigenous peoples in Australia for the 21<sup>st</sup> century. It contains a mix of mechanisms to ensure sufficient legal safeguards (including at the constitutional level); recognition of the place of Indigenous peoples in the Australian story; participatory processes and frameworks to negotiate unfinished business; and a substantial focus on human rights education to ensure that human rights are fully understood among our communities.

This is an ambitious set of proposals that are complementary and address different elements of the existing deficiencies in our legal and cultural system.

Ultimately my goal is to ensure that human rights are for everyone, everywhere, everyday.

### Summary of Recommendations

#### **Recommendation 1**

That the Commonwealth Government make a statement of support in the UN General Assembly and UN Human Rights Council for the *UN Declaration on the Rights of Indigenous Peoples* as a matter of priority.

#### **Recommendation 2**

That the Commonwealth Attorney General schedule the *UN Declaration on the Rights of Indigenous Peoples* to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

#### **Recommendation 3**

That the Joint Standing Committee on Treaties conduct consultations, including with Indigenous peoples, on the desirability of ratifying *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*.

#### **Recommendation 4**

That the Commonwealth Government commits to comprehensive support for engagement with Indigenous peoples in the consultation process for a National Human Rights Act.

#### **Recommendation 5**

That the Commonwealth Government adopt a Human Rights Act that is comprehensive in its scope and includes:

- recognition of Aboriginal and Torres Strait Islander peoples in the preamble;
- the right to self-determination;
- economic, social and cultural rights and civil and political rights;

- specific protections for Indigenous peoples where required; and
- the *UN Declaration on the Rights of Indigenous Peoples* scheduled as a relevant international instrument

**Recommendation 6**

That the Commonwealth Government undertake national consultations and begin a constitutional process for the recognition of the special place of Aboriginal and Torres Strait Islander peoples in the preamble to the *Constitution*. Particular emphasis should be placed on the need for an inclusive, consultative process in drafting a revised preamble prior to a referendum.

**Recommendation 7**

That, in recognition that existing protections against racial discrimination have been overridden in relation to Indigenous peoples, the Commonwealth Government begin a constitutional process for the removal of section 25 of the *Constitution* and its replacement with a clause guaranteeing equality before the law and non-discrimination.

**Recommendations 8 and 9**

That the Commonwealth Government commence negotiations of a framework for the negotiation of a social justice package to address the unfinished business of reconciliation.

Further, the new National Indigenous Representative Body, once established, be funded and tasked with consulting with Indigenous peoples and representing their interests in the negotiations of a social justice package. The social justice package should be finalised within 3 years of the establishment of the National Indigenous Representative Body.

**Recommendation 10**

That the Commonwealth Government resource the Australian Human Rights Commission to develop and implement a comprehensive community development and community education programs on human rights for Aboriginal and Torres Strait Islander peoples.

**Follow-up Action by the Social Justice Commissioner**

The Social Justice Commissioner will provide to the Minister for Families, Housing, Community Services and Indigenous Affairs advice on the proposed model for a new National Indigenous Representative Body in July 2009.