

**United Nations Permanent Forum on Indigenous Issues
Eleventh Session – New York
7-18 May 2012**

Agenda Item 3: Study on national constitutions and the United Nations Declaration on the Rights of Indigenous Peoples with a view to assessing the nature and extent of the inclusion of indigenous peoples' human rights in national constitutions, with reference to the rights affirmed in the Declaration

Joint Intervention Delivered by Dea Delaney on behalf of the Indigenous People's Organisation's (IPO) Network of Australia:

National Aboriginal and Torres Strait Islander Legal Services (NATSILS);
New South Wales Aboriginal Land Council (NSWALC);
Turkindi - Indigenous Information Network of South Australia;
Aboriginal Legal Service of WA (Inc.);
Marninwarntikura Women's Resource Centre Aboriginal Corporation;
Foundation for Indigenous Recovery and Development Australia (FIRDA);
Gugu Badhun Limited;
Aboriginal Legal Rights Movement (ALRM);
Queensland Culture Heritage and Native Title Management Services;
Secretariat of National Aboriginal and Torres Strait Islander Child Care (SNAICC);
Koort Marr Kaart – Aboriginal and Torres Strait Islander Social Workers of Western Australia;
Victorian Aboriginal Legal Service (VALS);
National Aboriginal Community Controlled Health Organisation (NACCHO);
Wollotuka, School of Aboriginal Studies; &
Aboriginal Medical Service Western Sydney.

Thank you Madame/Mister Chairperson

The Indigenous Peoples Organisations Network of Australia is encouraged by the United Nations Permanent Forum's efforts to engage Nation States on a dialogue to recognise Indigenous Peoples in their national constitutions. In Australia, Indigenous Peoples have been calling for constitutional recognition since it was first drafted.

The Indigenous Peoples Organisations Network of Australia also acknowledge those States whose national constitutions include safeguards ensuring that human rights apply uniformly to all citizens, and particularly those whose constitution's guarantee the specific rights of Indigenous Peoples.

Indigenous Peoples in Australia are currently engaged in a process to recognise Aboriginal Peoples and Torres Strait Islanders in our national Constitution. However, there are a number of critical factors that must be considered.

In drafting the Australian Constitution the framers concluded that decision-making about rights protections, including which rights are recognised and the extent to which they are protected, is the responsibility of Parliament.¹ Unfortunately the Australian Constitution remains silent on human rights, and Australia does not have a Bill of Rights.

Further when the colonisers were progressing the creation of a new nation on our ancestral lands and territories, the drafters of the nation's Constitution did not seek input from Indigenous Peoples ~~or women~~, it does not recognise Indigenous Peoples as first peoples, nor does it offer any acknowledgement or protection of the inherent rights of Indigenous Peoples.

In effect, the Australian Constitution expressly discriminated against Indigenous Peoples – preventing us from being counted as among the numbers of the new nation, preventing the new Australian Government from making laws that were specifically directed towards us, and allowing state provinces to discriminate in their elections on the basis of race.

In 1967, a referendum was held that removed the first two exclusions. However, the provision allowing state provinces to discriminate in their elections remains. This referendum was the most successful in Australian history² with an overwhelming 90.77% vote to support the referendum.

While this was a momentous occasion in our nation's history, being counted in the Census and allowing the Australian Government legislative powers did not result in recognition as first peoples. Despite these amendments, the Constitution as it currently stands is ineffective in protecting Indigenous Peoples from one of the most fundamental of all freedoms, the freedom from discrimination.

Although discrimination based on race is prohibited domestically via the Racial Discrimination Act, because this is not constitutionally entrenched, it can be amended, suspended and even repealed through the passage of further federal legislation.

The Australian Parliament has suspended the Racial Discrimination Act on three occasions: each time negatively affecting the rights and fundamental freedoms of Indigenous Peoples' including legislation affecting our rights to our lands, territories and resources.

In 2007, this approach enabled the Northern Territory Emergency Response, also known as 'the NT Intervention'. Under this legislative framework, the Australian Government prescribed 73 remote Northern Territory Aboriginal communities and sent in the Army to stabilise them and medical teams to conduct sexual health checks on all Aboriginal children which was strongly opposed by key Indigenous

¹ L Behrendt, T Lindbert, R J Miller, J Ruru, *Discovering Indigenous Lands The Doctrine of Discovery in the English Colonies*, Oxford University Press, 2001, Ch 7, p 186.

² The Australian Electoral Commission, *Referendum Dates and Results 1906 – Present*, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (viewed 1 November 2010).

NGO's and mainstream medical professionals in Australia. The Government also introduced 11 broad measures, including compulsory income management, special 'star chamber' powers for the Australian Crime Commission, increased police, alcohol and pornography bans, the abolition of permit system administered by *Indigenous communities and the compulsory acquisition of township leases* by Government over Indigenous communities. These measures were rushed through Parliament in 10 days, without the participation or free, prior and informed consent of those Indigenous people who were to be directly affected by the measures. Further insufficient evidence was found to substantiate such an approach.

Finally, Mister Chairperson, the Australian Government has not supported the introduction of a National Bill of Rights opting instead for a National Human Rights Framework that includes an action plan for all levels of government to promote and protect. While this is a step forward, unfortunately this does not amount to substantive equality or the protection of human rights and fundamental freedoms for any Australian citizen. Without constitutional entrenchment of such protections they can not be guaranteed and as demonstrated above are subject to the whim of the government of the day.

In order to address these issues substantive constitutional change is necessary. Unfortunately, while some states can change their national Constitutions through legislative processes, Australia's Constitution is extremely difficult to change and can only occur through a national referendum. Of the 44 referendums held in Australia since federation in 1901, only eight have been successful. Aboriginal and Torres Strait Islander peoples have been the subject of three referendums in 1944, 1967, and 1999, and only one in 1967 was successful. Recognition of Aboriginal and Torres Strait Islander peoples was the subject of the 1999 referendum but was unsuccessful.

Mr Chairperson

A dialogue is currently underway in Australia that has multi-party support to recognise Aboriginal and Torres Strait Islander peoples in our Constitution.

In November 2010, the Australian Government established an Expert Panel comprised of Aboriginal and Torres Strait Islander community members, members of Parliament and members of the non-Indigenous community to consult Australian's on the best possible options for a constitutional amendment. The Expert Panel reported to the Australian Government in December 2011.³ A copy of the Report has been provided for your information. The Indigenous Peoples Organisations Network urge the Australian Government to continue to work with Indigenous peoples and the broader Australian community to ensure a positive outcome.

The progress made by the Australian Government in this regard responds to the Programmes of Action for the First and Second Decades of the World's Indigenous People that both called upon states to review their constitutions and laws to ensure the identity and rights of Indigenous peoples are recognised. As a reflection of the global support for the Declaration, nation-states can progress the recognition of

³ Expert Panel on Constitutional Reform, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, Report of the Expert Panel*, 16 January 2012, Commonwealth of Australia 2012. Available at: <http://www.youmeunity.org.au/final-report> (viewed 17 April 2012).

Indigenous peoples in national constitutions as one step in the overall global programme of action to implement the Declaration on the Rights of Indigenous Peoples.

However in order for constitutional recognition of Indigenous Peoples to be meaningful it must be underpinned by a real commitment to:

- improve the lives of Indigenous peoples
- ensure adequate protection of the human rights of all citizens
- ensure a solid foundation upon which to build reconciled nations.⁴

Constitutional recognition of Indigenous Peoples must be in accordance with the principles of the Declaration on the Rights of Indigenous peoples and the core international human rights treaties, those being justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. Constitutional recognition must respect the inherent rights of Indigenous Peoples, including respect for and recognition of self-determination and the ongoing sovereignty of Indigenous nations to our lands, territories, resources, cultures and identities. Constitutional recognition should not be pursued with the intent to negatively impact the rights and fundamental freedoms of Indigenous Peoples but rather to benefit and nurture the lives and futures of Indigenous Peoples. This is particularly important in countries such as Australia where treaties have not been negotiated with Indigenous Peoples.

Mister Chairperson, the constitutional recognition of Indigenous Peoples is not only beneficial to our futures, it is part of the healing process between Indigenous Peoples, non-Indigenous Peoples and nation-states globally and as such must have the support of the Indigenous Peoples, and must contribute to unity and reconciliation within nation states.

Recommendations

Mister Chairperson, we recommend that:

1. The Permanent Forum commends the constitutional revision processes occurring in those member states who seek to recognise Indigenous Peoples in their Constitutions.
2. That the Permanent Forum in conjunction with the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples undertake a study on national constitutions and the United Nations Declaration on the Rights of Indigenous Peoples with a view to assessing the nature and extent of the inclusion of indigenous peoples' human rights in national constitutions, with reference to the rights affirmed in the Declaration.
3. The Permanent Forum strongly reiterate its previous recommendations on the recognition of Indigenous Peoples in national constitutions, and recommend

⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional Reform: Creating a Nation for all of us*, Australian Human Rights Commission, 2011, p 13. Available at: <http://www.hreoc.gov.au/constitution/reform/index.html> (viewed 17 April 2012).

that member states respond to the First and Second Decades on the Worlds Indigenous People Programmes of Action by reviewing their constitutions and laws to ensure the identity and rights of Indigenous Peoples are recognised and protected in accordance with the Declaration the Rights of Indigenous Peoples and core human rights treaties and conventions.