



**Australian  
Human Rights  
Commission**

**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**

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**Joint Intervention delivered by:**

**Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, on behalf of the Australian Human Rights Commission**

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Thank you Madam/Mister Chairperson

The Australian Human Rights Commission welcomes the opportunity afforded by the Permanent Forum to engage in dialogue with Member States on the recognition of Indigenous peoples in our national constitutions. This dialogue comes at an important time in Australia's constitutional history when a process is underway which we hope will finally achieve constitutional recognition of Aboriginal and Torres Strait Islander people.

The Australian Human Rights Commission notes that many States' constitutions include human rights protections and several guarantee the specific rights of Indigenous peoples. This is not the case in the Australian Constitution.

The Australian Constitution, adopted in 1901, was drafted under the prevailing myth of *terra nullius*. Aboriginal and Torres Strait Islander people were not included in the drafting process, and were expressly discriminated against in the final text: the Australian Constitution originally prevented us from being counted as Australians, and it prevented the Australian Government from making laws specifically directed towards us (leaving that power to the state governments). To this day, the Australian Constitution allows for voting restrictions based on race. It goes without saying, then, that the Australian Constitution does not recognise the specific rights that Aboriginal and Torres Strait Islander peoples have by virtue of being the Indigenous peoples of Australia.

Compounding the effect of the discriminatory provisions within the Constitution, Aboriginal and Torres Strait Islander people have not been able to rely on any generic constitutional human rights protections. The Australian Constitution contains

few fundamental rights protections. It was designed to be a document governing the relationship between the provincial states and the new federal government. The protection of rights was a task left to Parliament.<sup>1</sup>

Parliament has passed several anti-discrimination laws but without constitutional backing these protections can be amended, suspended, repealed or simply overruled by subsequent contradictory legislation. Indeed, the Racial Discrimination Act has proven to be inadequate protection against the will of parliament, having been suspended on three occasions, all to the detriment of the rights of Aboriginal and Torres Strait Islander people. The first was in 1998; the Native Title Amendment Act allowed states to 'wind back' the protections previously afforded to Indigenous peoples by passing laws which adversely impacted their native title. The second case, also in the 1990s, involved the government suspending the application of the Racial Discrimination Act over the Hindmarsh Island area to enable a bridge to be built interfering with sacred sites. The third suspension, in 2007, enabled an 'emergency intervention' in 73 remote communities in the Northern Territory. We have previously reported on the negative effects of the Northern Territory Intervention on the lives of Aboriginal and Torres Strait Islander people affected, none of whom were consulted on, or gave their consent for, the measures imposed. The Intervention included, among other measures, legislation to enable the federal Government to control Aboriginal land and governance bodies and to quarantine welfare payments.

The Racial Discrimination Act was reinstated in 2010 and the current Government is engaged in the process to renew the relevant legislation to continue some of the Intervention measures. The Government has stressed its commitment to involving Aboriginal and Torres Strait Islander people in decisions affecting them and has conducted a consultation process regarding the continuing measures in the 'Stronger Futures in the Northern Territory' package. There has certainly been some positive movement since 2007. However, the Australian Human Rights Commission continues to have concerns about the consultation process, based on what we have been told by individuals and organisations in the Northern Territory. It is not clear that the measures proposed by the Government have community support and without that support they will not achieve their aim of creating stronger futures for Aboriginal and Torres Strait Islander people in the Northern Territory. Without free, prior and informed consent, these measures will continue to foster resentment and distrust between Aboriginal and Torres Strait Islander people and the Government. We urge the Australian Government to reassess their procedures for consultation with Aboriginal and Torres Strait Islander people to ensure they are compliant with their obligations under international human rights law, particularly the requirement of non-discrimination. We especially highlight the positive obligation on those seeking 'consent' to ensure that those giving it are fully informed.

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<sup>1</sup> 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.

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Very recent experience makes it clear – and we again reiterate – that Australia needs to entrench the principle of non-discrimination in its national Constitution.

Over the last few years, the Australian Government has noted the human rights gulf in Australian law. In 2009, it established an independent National Human Rights Consultation Committee to consider the case for a bill of rights, but ultimately rejected the Committee's recommendation for a statutory bill of rights. Instead the Government opted for a National Human Rights Framework which encourages all levels of government to protect and promote human rights.

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is also now being discussed at the highest levels.

Since the Australian Constitution was drafted, Aboriginal and Torres Strait Islander people have been asking for recognition in it. In 1967, a rare successful referendum ensured that we were counted in the census and gave the Commonwealth law-making power regarding Aboriginal and Torres Strait Islander people.

Now we are on the cusp of even greater – long overdue – constitutional reform, which has the potential to bring Indigenous and non-Indigenous Australians together as a more unified nation. We attach the Australian Human Rights Commission's publication "Constitutional reform: Creating a nation for all of us" for the Permanent Forum's reference. It addresses the need for constitutional reform in Australia, what that reform might look like and what the steps might be to get there.<sup>2</sup>

In 2010, an Expert Panel was appointed by the Australian Government to consider options for constitutional recognition of Aboriginal and Torres Strait Islander people. The Australian Human Rights Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner was a member of that Expert Panel and we encourage the Permanent Forum to read the Report and its recommendations.<sup>3</sup> The recommendations addressed both the substance of constitutional recognition and how it can be achieved.

The Australian Human Rights Commission supports the recommendations contained in the Expert Panel Report and urges the Australian Government to continue to work with Aboriginal and Torres Strait Islander peoples and the broader Australian community to ensure a positive outcome is achieved when Australians are asked to vote. This will be hard. Constitutional change is difficult in Australia: legislation must pass both houses of Parliament; it must achieve a majority of votes overall (with compulsory voting, that means a majority of all Australians over 18 years must vote for change); and it must pass in a majority of states. Only 8 of 44 referenda have passed.

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<sup>2</sup> Australian Human Rights Commission, *Constitutional Reform: Creating a nation for all of us*, 2011. Available at <http://www.hreoc.gov.au/constitution/reform/index.html> (viewed 18 April 2012).

<sup>3</sup> 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 18 April 2012).

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The Australian Human Rights Commission recognises that it is within the framework of the Declaration on the Rights of Indigenous Peoples (and all the core rights that it entails) that national constitutional recognition processes should be viewed. In that broader context we encourage governments to keep the following points at the forefront of their work towards constitutional recognition of Indigenous peoples.

Firstly, the substance of and processes surrounding constitutional recognition of Indigenous peoples must be in accordance with the principles of the Declaration: 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 self-determination and rights of Indigenous peoples to our lands, territories, and resources, and to our cultures and identities.

Secondly, the intent of constitutional recognition must be borne in mind throughout any national process – it is to benefit Indigenous peoples directly and to benefit the nation as a whole in reconciling with its past. This is particularly important in countries, such as Australia, where treaties were never negotiated with Indigenous peoples. To be successful in these aims, the form of recognition must be supported, in Australia, by Aboriginal and Torres Strait Islander people and non-Indigenous Australians. There is no point in securing constitutional change to supposedly benefit Indigenous people when that change is not what is wanted or needed from the Indigenous people's perspective. It would also be potentially damaging to the journey of nationhood for a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples to fail.

Thirdly, the Programmes of Action for the First and Second Decades of the World's Indigenous People called upon states to review their constitutions and laws to ensure the identity and rights of Indigenous peoples are recognised. The constitutional recognition process in Australia responds to this call. The Australian Human Rights Commission encourages governments to take further steps to implement the Declaration on the Rights of Indigenous Peoples. In particular, we ask the Permanent Forum to recommend that States conduct an analysis of how their national legislative frameworks meet the responsibilities laid out in the Declaration, those responsibilities being derived from existing obligations in the core human rights treaties. Where the law is found lacking, remedial action must be taken in partnership with Indigenous peoples. We ask that the Permanent Forum draw States' attention to the fact that the Declaration provides clear guidelines as to how these core human rights relate to Indigenous peoples and the requirements on states to implement those rights.

## **Recommendations**

The Australian Human Rights Commission recommend that:

1. The Permanent Forum urge States to respond to the First and Second Decades on the World's 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 on the Rights of Indigenous Peoples.

2. The Permanent Forum commend those states currently engaged in processes to recognise Indigenous peoples in their constitutions and encourages them to ensure that the form and process of recognition adheres to the principles of the Declaration on the Rights of Indigenous Peoples.
3. The Permanent Forum urge each State to engage with its Indigenous peoples regarding what is necessary to bring the laws of the state into compliance with the Declaration and the core treaty rights which the Declaration incorporates; this includes resourcing Indigenous peoples to contribute on an equal footing to negotiations on constitutional recognition and legislative analysis.