

EMC David 11/4

INTERVENTIONS PRESENTED BY NSWALC DELEGATION AT THE SECOND SESSION OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLE – GENEVA, SWITZERLAND

17.4  
12/09/08

**Item 4: United Nations Declaration on the Rights of Indigenous Peoples: Implementation of the Declaration at the regional and national levels.**

**Presenter: David Lee – Statement on behalf of the New South Wales Aboriginal Land Council (NSWALC)**

Madam Chair, the following comments are provided to offer constructive and practical contribution to the work of the expert mechanism in developing the way forward for the implementation of the Declaration of the Rights of Indigenous People at the National and Regional levels and measures to provide for adjudication, remedies, repatriation, redress and compensation. My colleagues have articulated the complex issues which confront the Indigenous people of Australia in gaining recognition and effective redress within the Australian constitution or legal framework.

**1. Creating National laws and policies**

In order to operationalise the Declaration, the relevant State (in this case Australia) would need to implement the Declaration into domestic law. In the context of Australia, we have not implemented all of our human rights obligations. Those that have been include:

- The *Racial Discrimination Act 1975* (Cth) which occurred in response to Australia's ratification of the International Convention on the elimination of all forms of racial discrimination,
- The *Sex Discrimination Act 1984* (Cth) which gives effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women and certain aspects of the International Labour Organisation (ILO) Convention 156,
- The *Disability Discrimination Act 1992* (Cth) which implements the Declaration on Rights of Disable Persons and the Convention on the Rights of Person with Disabilities which was recently scheduled to the Act, and
- The *Crimes Act* which incorporates aspects of the Convention Against Torture.

Once the Commonwealth Government enacted these laws, it has been adopted by the States and Territories in various forms so that domestic laws all across Australia are uniform in their compliance with Australia's international obligations.

We do not underestimate the challenges that are before us.

In respect of the Declaration on the Rights of Indigenous peoples, however, Australia has at this stage only recently endorsed the Declaration, which we are all aware is **not** legally binding. It has not given legal effect to it. We believe it should.

We note that in contrast, international laws (created through treaties or conventions) are binding on the signatory counties.

**2. Some considerations on possible avenues for adjudication, remedies, repatriation, redress and compensation for Indigenous peoples arising from the Declaration**

There are some existing mechanisms in our region which (with would require significant adjustment) could provide a basis and be used to create ways for adjudication, remedies,

repatriation, redress and compensation of matters of concern under the Declaration. Three mechanisms come to mind being;

- ***Native Title Act 1993 (Cth)*** – whilst this Act is controversial for ‘failing to deliver’ in relation to the expectations of Indigenous peoples, and it has been criticized for being slow, ineffective, resource intensive and litigation-focused, it has been one mechanism that has enabled Indigenous peoples to gain some recognition of their traditional laws and customs and to gain land and rights over land which can then be used for economic advancement and for the protection and maintenance of culture and heritage.
- ***Aboriginal Land Rights (Northern Territory) Act 1976 (NT)*** – this Act was the first attempt by an Australian government to legally recognise the Aboriginal system of land ownership and put into law the concept of inalienable freehold title. However, recent amendments to this Act by the Commonwealth government have sought to curtail Aboriginal control, and ownership of these lands by requiring leases to government of the land in return for the delivery of essential services, on the grounds that this will facilitate home ownership.
- ***Aboriginal Land Rights Act 1983 (NSW)*** – this Act is New South Wales based only and creates and defines the core business of the New South Wales Aboriginal Land Council, and created 121 Local Aboriginal Land Councils. It permits Aboriginal land claims to be made over claimable Crown lands, irrespective of prior association or traditional laws and customs, and provided that the Crown lands are claimable then they must be granted by the NSW Minister for Lands. The preamble to the Act clearly recognizes that land has importance to Aborigines and that as a result of past Government decisions the land set aside for Aborigines has been progressively reduced. Therefore, the Act establishes a compensatory regime for past dispossession.

The central premises of the importance of land to Aboriginal people in both this Act and the *Aboriginal Land Rights (Northern Territory) Act 1976 (NT)* is fundamentally important to the Declaration.

- ***Some mechanism which have been proven to be a useful and practical process employed in other States include Truth and reconciliation tribunals*** – The momentum behind this type of tribunal is to provide acknowledgement, justice and accountability for human rights abuses, noting that any findings do not necessarily eventuate into criminal or other sanctions. They can be viewed as a less exhaustive and intensive process than a traditional legal court process to deal with such abuses however the ‘looser’ format of the tribunal does not necessarily guarantee that the process will be any quicker. It is difficult to say whether a tribunal such as this would be the appropriate mechanism to foster reconciliation and resolution within Australia. It is also unknown to what extent the Government would support any such tribunal, given the potential for damages to flow from any adverse findings.
- ***Reparations tribunal*** – another possible consideration in considering how to redress past injustices and provide compensation for Indigenous peoples could be a reparations tribunal. The “Green Party” put forward a Bill in 2008 which advocated the establishment of such a tribunal to provide a process for members of the Stolen Generations to receive reparation and/or an ex gratia payment by way of redressing the historical injustice of the forcible removal of Indigenous people from their families. This Bill did not succeed. In some states within Australia there are existing Reparations processes for citizens who had suffered abuse or damage as a consequence of actions of the State. The principle could



be adopted for a wider or narrower reparations tribunal for specific matters. Needless to say, it would require significant political will for this type of Bill to become law.

It is important to note that Australia has not entered treaties or settlements with Indigenous peoples. Issues of redress and compensation will remain until a settlement is entered into.

### **3. Challenges to any implementation measures**

Any implementation process of the Declaration, should include delivery of services, financial and infrastructure support, legislative amendment, education programs and reparatory measures. It should address the following issues:

- a) Ensuring direct, meaningful, respectful, effective, grass roots and culturally appropriate Indigenous peoples control and involvement consultation;
- b) consideration and recognition of the fundamental importance of self-determination, the impact of historic injustices and dispossession, reparations, compensation and the right to autonomy and self-government;
- c) recognition and respect of culture and heritage and the right to non-assimilation;
- d) freedom from discrimination and respect for legal and other protections that enshrine this right (noting at present that the Commonwealth Government continues to suspend the *Racial Discrimination Act 1975*, an Act that came into being as a result of Australia's international obligations, on the basis that Government has decided that the services and activities being carried out whilst the suspension is in place provide justification for the suspension – this view is highly controversial and contested by many key Indigenous groups and people); and
- e) adequate financial input and political will to carry out the above and develop suitable education, training and other opportunities for economic advancement that enhance the fundamental rights promulgated in the Declaration.

### **4. Rights-based checklist for benchmarking and/or monitoring policies, programs and services for Indigenous Australians.**

Madam Chair, the development of a rights-based checklist for benchmarking and/or monitoring policies, programs and services for Indigenous Australians informed by the conviction that enduring improvement in the disadvantage and welfare-dependence of Indigenous Australians will be achievable only where there is broader recognition of the special rights and aspirations of Indigenous Australians arising out of their prior ownership and continuing dispossession, which would necessary be determined by reference to the Declaration of the Rights of Indigenous peoples would we suggest be a practical and constructive way forward.

The checklist was developed by the former Aboriginal and Torres Strait Islander Commission in 2004, but this was unable to be promulgated due to the abrupt and untimely termination of the Aboriginal and Torres Strait Islander Commission.

The checklist attempts provide a framework against laws, policies, programs, and services can be assessed. The framework includes three general categories and five particular categories.

These are:

1. General: Self-determination, effective participation and informed consent
2. General: Equality Rights
3. General: Distinct Indigenous Rights
4. Particular: Housing related policies, programs or services
5. Particular: Food and nutrition related programs or services
6. Particular: Education related policies, programs or services
7. Particular: Health related policies, programs or services
8. Particular: Employment related policies, programs or services

The check-list would be premised upon recognition of the equality (or citizenship) rights of Indigenous Australians, as well as distinct Indigenous rights (as articulated in the Declaration on the Rights of Indigenous Peoples):

**(a) Equality Rights**

The same rights as other Australians, that is to a basic standard of services, as well as comparable outcomes in areas of health, housing, education, labour force participation, and law and justice, and grounded in international human rights law, especially the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights;

**(b) Distinct Indigenous Rights**

Particular rights by virtue of our prior occupation and status as the first peoples of Australia, in relation to matters such as self-determination and autonomy, cultural, linguistic and spiritual identity, land and resources, cultural heritage, the environment and development, and Indigenous knowledge, and grounded also in existing and emerging international standards, as well as international jurisprudence.

We welcome the endorsement of the Declaration on the Rights of Indigenous People by the Australian Government and look forward to negotiating with the government of Australia the domestic implementation of the Declaration.

This must be underpinned by the active adherence to the principle of free, prior and informed consent.

We look forward to the creation of a relationship founded on trust, respect and honesty with the Australian Government and all citizens of Australia.

Given the time constraints I have attached a copy of the aforementioned checklist to this tabled paper as it may be of interest to delegates of the forum.

**Thank You Madam Chair**