



Human Rights
Law Centre

**Towards Constitutional Recognition for
Aboriginal and Torres Strait Islander Peoples**

Submission to the Expert Panel

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Introduction

1. The Human Rights Law Centre (**HRLC**) welcomes the Australian Government's commitment to consider the question of constitutional recognition of Aboriginal and Torres Strait Islander Peoples and is pleased to provide this submission to the Expert Panel. The HRLC considers the question of constitutional recognition presents an opportunity to further the recognition, protection and promotion of the human rights of Aboriginal and Torres Strait Islander peoples.
2. The purpose of this submission by the HRLC is to inform the discussion about possible constitutional reform by reference to Australia's international human rights obligations. The submission does not seek to canvass all possible options for constitutional amendments to recognise Aboriginal and Torres Strait Islander peoples, nor present a position on what particular constitutional amendments should be made.
3. Parts 2 and 3 of this submission address Australia's international human rights obligations and highlight relevant recommendations that have been made by United Nations human rights bodies regarding the need for constitutional reform.
4. Part 4 of this submission provides an overview of relevant human rights obligations and principles that should guide the meaningful participation of, and consultation with, Aboriginal and Torres Strait Islander peoples in the process of considering constitutional recognition.

2. Australia's Human Rights Obligations

5. Australia is a party to a number of key international human rights treaties. Australia's ratification of these instruments obliges it to adopt such legislative or other measures as may be necessary to give effect to the rights contained in the various treaties.¹ Many of the legal obligations contained in these treaties relate specifically to the rights of Aboriginal and Torres Strait Islander peoples.
6. In recent years, a number of highly respected, independent international human rights bodies and experts have made specific recommendations in relation to areas where Australia is failing to meet its human rights obligations. A large number of these recommendations relate to protection and promotion of the rights of Aboriginal and Torres Strait Islander peoples.

¹ See, eg, article 2 of the ICCPR and article 2 of the ICESCR.

7. In particular, the following United Nations bodies have recently made recommendations to Australia:
- (a) in August 2010, the Committee on the Elimination of Racial Discrimination (**CERD Committee**);²
 - (b) in March 2009, the Human Rights Committee on Australia's compliance with the *International Covenant on Civil and Political Rights*;³
 - (c) in May 2009, the Committee on Economic, Social and Cultural Rights on Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*;⁴
 - (d) in May 2008, the Committee against Torture;⁵
 - (e) the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, following his country visit to Australia in August 2009;⁶
 - (f) the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, following his country visit to Australia in November/December 2009;⁷ and
 - (g) the UN Human Rights Council during Australia's Universal Periodic Review (**UPR**) appearance in January 2011.⁸
8. In addition to the human treaties to which Australia is a party, Australia has also indicated its formal support for the UN Declaration on the Rights of Indigenous Peoples (**Declaration**).⁹ The Declaration was adopted by the United Nations General Assembly in 2007 and is a landmark document that recognises the fundamental human rights of Indigenous peoples around the world on a wide range of issues.

² UN Committee on the Elimination of All Forms of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia* (August 2010) UN Doc CERD/C/AUS/CO/15-17.

³ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009) UN Doc CCPR/C/AUS/CO/5.

⁴ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (May 2009) UN Doc E/C.12/AUS/CO/4.

⁵ UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia* (May 2008), UN Doc CAT/C/AUS/CO/1 (2008).

⁶ James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Situation of indigenous peoples in Australia* (June 2010), UN Doc A/HRC/15/37/Add.4.

⁷ Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Mission to Australia* (June 2010), UN Doc A/HRC/14/20/Add.4.

⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review* (24 March 2011), UN Doc A/HRC/17/10.

⁹ UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

9. While the Declaration is not, strictly, legally binding, it is a significant instrument that establishes a framework for the human rights that already exist in international law and their specific application to Indigenous peoples. In this respect, the Declaration has “significant moral force”¹⁰ and represents an important standard for the treatment of Indigenous peoples.
10. Australia’s endorsement of the Declaration represents an important acknowledgement of the fundamental human rights of Aboriginal and Torres Strait Islander peoples in Australia and the need for recognition of specific collective rights. Compliance with international human rights obligations is crucial in order to address the serious disadvantage and discrimination that is experienced by many Aboriginal and Torres Strait Islander peoples.

3. Recommendations to Australia by International Human Rights Bodies

3.1 Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

11. A number of UN treaty bodies and independent experts have specifically recommended that Australia pursue effective constitutional recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples.¹¹ In 2010, the CERD Committee expressed its regret at “the limited progress towards Constitutional acknowledgement of Australia’s indigenous peoples” and recommended that “any measures to amend the Australian Constitution include the recognition of Aboriginal and Torres Strait Islanders as First Nations Peoples.”¹²
12. Most recently, during Australia’s UPR appearance in January 2011, recommendations were made to Australia by a number of countries, including France, Colombia, Bolivia and Guatemala, relating to the recognition of Aboriginal people in the Constitution.¹³ In addition, while they didn’t make specific recommendations on the subject, a number of other countries raised the issue of constitutional recognition of Aboriginal people in their statements, including Sweden, Turkey and Timor-Leste.
13. Following his country visit to Australia in 2010, the Special Rapporteur on Indigenous Peoples, James Anaya, reported that:

Indigenous peoples have called for reforms to deliver constitutional recognition of Aboriginal and Torres Strait Islander peoples, provide guarantees of non-discrimination and protect their rights in a charter of rights to be included in the Constitution or other legislation.¹⁴

¹⁰ M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

¹¹ See eg, Report of the Special Rapporteur on Indigenous Rights, above n 6, [75]; UPR Working Group Report, above n 8, Recommendation 105 (Colombia).

¹² CERD Concluding Observations, above n 2, [15].

¹³ UPR Working Group Report, above n 8.

¹⁴ Report of the Special Rapporteur on Indigenous Rights, above n 6, [14].

14. The Special Rapporteur recommended that “the Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner providing long-term security for these rights”.¹⁵

3.2 Constitutional Protection of Human Rights

15. In addition to recommendations about the recognition of Aboriginal and Torres Strait Islander peoples, a number of recommendations have also been made about the need for comprehensive constitutional protection of human rights. In its Concluding Observations in 2000, the Human Rights Committee expressed particular concern about Australia’s lack of constitutional protection of human rights, or a constitutional provision giving effect to the *International Covenant on Civil and Political Rights*.¹⁶ Similar concerns about Australia’s lack of entrenched institutional protection for human rights have been expressed by the Committee on Economic, Social and Cultural Rights,¹⁷ the Committee against Torture¹⁸ and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.¹⁹
16. In his country report following his visit to Australia in 2009, the Special Rapporteur on the Right to Health also expressed his concern at the lack of protection of human rights in the Australian Constitution.²⁰ The Special Rapporteur specifically cited the Northern Territory Emergency Response, stating that it:
- exposed a clear lack of constitutional protection of the rights of Australian citizens, irrespective of any perceived or actual benefit flowing from the intervention. The ability of the Government to suspend the application of the *Racial Discrimination Act* (Cth) and subsequently implement policies that were clearly discriminatory vis-à-vis Aboriginal and Torres Strait Islander people, was of great concern to the Special Rapporteur.²¹
17. The Special Rapporteur on the Right to Health specifically recommended that Australia takes steps to enshrine human rights within the Constitution, including constitutional protection of the rights of Indigenous peoples.²² As referred to above, this recommendation was also made by

¹⁵ Ibid [75].

¹⁶ See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55th sess, 1967th mtg, [514], UN Doc A/55/40 (2000): “there remain lacunae in the protection of Covenant rights in the Australian legal system”.

¹⁷ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [14], [36], UN Doc E/C.12/1/Add.50 (2000).

¹⁸ CAT Concluding Observations, above n 5, [9]–[10].

¹⁹ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism* (2006) UN Doc A/HRC/4/26/Add.3, [10].

²⁰ Report of the Special Rapporteur on the Right to Health, above n 7, [14], [15].

²¹ Ibid [64].

²² Ibid [100].

the Special Rapporteur on Indigenous Rights, who called on Australia to “pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner providing long-term security for these rights”.²³

3.3 The Right to Equality and Non-Discrimination

18. In successive reviews of Australia, the CERD Committee has expressed its serious concern about the absence of any entrenched protection against racial discrimination in the Constitution.²⁴ In its most recent Concluding Observations, the Committee made repeated references to this concern. The Committee also specifically expressed concern about sections 25 and 51(xxvi) of the Constitution, which it said “in themselves raise issues of racial discrimination”.²⁵
19. During Australia’s UPR appearance, a number of countries also noted that the Australian Constitution does not provide safeguards against discrimination and that current laws discriminated against Aboriginal and Torres Strait Islander peoples because of their race.²⁶ Australia accepted a number of recommendations to take more effective steps to recognise and protect the rights of Aboriginal and Torres Strait Islander Peoples, including the right to be free from racial discrimination.²⁷
20. The lack of comprehensive protection of the rights to equality and non-discrimination in Australia’s domestic law has also been recognised by a number of other treaty bodies, including the Human Rights Committee and Committee on Economic, Social and Cultural Rights.²⁸

²³ Report of the Special Rapporteur on Indigenous Rights, above n 6, [75].

²⁴ CERD Concluding Observations, above n 2, [10]; Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc CERD/C/AUS/CO/1 (14 April 2005) [9]; Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc CERD/C/304/Add.101 (19 April 2000) [6].

²⁵ CERD Concluding Observations, above n 2, [10].

²⁶ UPR Working Group Report, above n 8, [18].

²⁷ *Ibid*, Recommendations 104 (France), 107 (Guatemala), 60 (Sweden) and 114 (France).

²⁸ Human Rights Committee Concluding Observations, above n 3, [12]; CESCR Concluding Observations, above n 4, [14].

3.4 Political Representation

21. A number of international human rights bodies have also made recommendations to Australia to ensure that there is adequate and appropriate political representation of Aboriginal and Torres Strait Islander peoples. In its most recent Concluding Observations, the CERD Committee expressed concern that the National Congress of Australia's First Peoples is "only an advisory body representing member organisations and individuals and may not be fully representative of Australia's First Peoples."²⁹ The Committee expressed regret at "the limited progress towards Constitutional acknowledgement of Australia's Indigenous peoples, and slow implementation of the principle of Indigenous peoples' exercising meaningful control over their affairs".³⁰ The Committee specifically recommended that Australia "consider the negotiation of a treaty agreement to build a constructive and sustained relationship with Indigenous peoples".³¹
22. The Special Rapporteur on Indigenous Peoples recommended that Australia increase Aboriginal and Torres Strait Islander Peoples' representatives in legislative, executive, and judicial institutions at all levels.³²
23. Finally, Australia accepted UPR recommendations to ensure Aboriginal and Torres Strait Islander Peoples can participate in decision-making which affects their interests, including decision-making bodies and processes at all levels.³³ In particular, Australia agreed to increase the representation of Aboriginal and Torres Strait Islander women in decision-making posts.³⁴

Recommendation 1:

Any proposals for reform of the Australian Constitution should be guided by reference to and in accordance with Australia's international human rights obligations, including particularly:

- the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples;
- the right to equality and non-discrimination; and
- the right to participate fully and without discrimination in public and political affairs.

²⁹ CERD Concluding Observations, above n 2, [15].

³⁰ Ibid.

³¹ Ibid

³² Report of the Special Rapporteur on Indigenous Rights, above n 6, [79].

³³ UPR Working Group Report, above n 8, Recommendations 109 (Bolivia) and 110 (Bosnia and Herzegovina).

³⁴ Ibid, Recommendation 120 (Morocco).

4. Consultation with Aboriginal and Torres Strait Islander Peoples

24. This section of the submissions addresses Australia's international human rights obligations regarding ensuring meaningful engagement with and involvement of Aboriginal and Torres Strait Islander peoples in the process of constitutional reform.
25. Indigenous peoples all around the world have long suffered from historic injustices, principally as a result of colonisation and the dispossession of their traditional lands. This has prevented many Indigenous peoples from exercising, in particular, their right to development in accordance with their own needs and interests.³⁵ Specifically in relation to Aboriginal and Torres Strait Islander peoples in Australia, the UN Special Rapporteur on Indigenous Rights has recognised that:
- Since British occupation, indigenous peoples have suffered oppressive treatment, including acts of genocide, dispossession of lands and social and cultural disintegration, and a history animated by racism that is well-documented in numerous sources.³⁶
26. As a result of their particular vulnerability and the disadvantaged state in which they often find themselves, rights of self-determination and participation in decision-making processes about matters which affect them have a particular significance and meaning for Indigenous peoples and are vital to ensure the protection and promotion of Indigenous culture and identity. Indeed, the preamble to the Declaration states that:
- control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.
27. The HRLC highlights the imperative for states to engage in effective and meaningful consultation and partnership with Indigenous peoples as a fundamental element to empowering vulnerable and disadvantaged communities in a way which establishes long-term mutually respectful relationships.

³⁵ See, generally, Department of Economic and Social Affairs Division for Social Policy Development Secretariat of the Permanent Forum on Indigenous Issues, *UN Report on the State of the World's Indigenous Peoples (2009)*, UN Doc ST/ESA/328, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf.

³⁶ Report of the Special Rapporteur on Indigenous Rights, above n 6, [4].

4.1 Right of Self-Determination

28. The right of self-determination has particular significance for Indigenous peoples and is enshrined throughout the Declaration.³⁷ The importance of the right of self-determination is evident in its prominence as Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.
29. The Special Rapporteur on Indigenous Rights has commented that the inclusion of the right to self-determination in the Declaration “responds to the aspirations of Indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them.”³⁸ The Special Rapporteur also states that the right of self-determination “is a foundational right, without which Indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”³⁹
30. In relation to Australia, the CERD Committee has expressed concern about the slow implementation of Aboriginal and Torres Strait Islander peoples exercising meaningful control over their own affairs.⁴⁰ Respecting the right of self-determination must be at the forefront of any engagement with Aboriginal peoples on the issue of constitutional reform. Consultation and participation is particularly important for Aboriginal and Torres Strait Islander communities in remote, rural and regional areas.⁴¹

4.2 The Duty to Consult and Free, Prior and Informed Consent

31. The duty to consult with Indigenous peoples for decisions and matters affecting them is a fundamental obligation firmly entrenched in international human rights law.⁴² The duty is recognised is affirmed as an overarching principle in article 19 of the Declaration:

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.

32. Article 6(2) of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries similarly provides:

The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

³⁷ United Nations Declaration on the Rights of Indigenous Peoples, articles 3, 4, 18, 19, 23 and 32.

³⁸ Report of the Special Rapporteur on Indigenous Rights, above n 6, [41].

³⁹ *Ibid.*

⁴⁰ CERD Concluding Observations, above n 2, [15].

⁴¹ Megan Davis and Dylan Lino, ‘Constitutional Reform and Indigenous Peoples’ (2010) 3(7) *Indigenous Law Bulletin* 5.

⁴² Report of the Special Rapporteur on Indigenous Rights, above n 6, [38].

33. The right of Indigenous peoples to free, prior and informed consent underpins the right to self-determination and the duty to consult. As referred to above, article 19 of Declaration explicitly requires states to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect Indigenous peoples.

Recommendation 2:

The participation of and engagement with Aboriginal and Torres Strait Islander peoples in relation to constitutional recognition must be in accordance with the rights contained in the UN Declaration on the Rights of Indigenous Peoples and in particular the rights to self-determination and free, prior and informed consent.