

The ANTaR Qld

Submission

to the

National Human Rights

Consultation Process

15th June 2009

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Australians for Native Title and Reconciliation (ANTaR) aims to promote the human rights of Aboriginal and Torres Strait Islander people by working in conjunction with Indigenous organisations. It was established in response to the Federal Government's attack on the native title rights of Indigenous Australians. ANTaR Queensland Association Inc is a member of a federation of organisations making up the national ANTaR movement.

We are pleased to have the opportunity to make this submission to the National Human Rights Consultation. Our responses to the key consultation questions follow.

Which human rights (including corresponding responsibilities) should be protected and promoted?

ANTaR Qld's primary concern is with protecting the human rights of Aboriginal and Torres Strait Islander people. Indigenous Australians experience breaches of a wide range of human rights, including, among others, the right to equality before the law, the right to an adequate standard of living, freedom to manifest their religion or beliefs, and the right to the highest attainable standard of health. ANTaR Qld considers that protecting and promoting all the rights set out in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights is essential to protecting the rights of Indigenous Australians.

ANTaR Qld also believes that specific recognition of the rights of Aboriginal and Torres Strait Islander people is necessary if Indigenous Australians are to achieve the same level of enjoyment of human rights as other Australians. These include the right to self-determination, the right to land, and the right to maintain and enjoy their identity and culture. Requiring Aboriginal and Torres Strait Islander people to submit to the demands of the dominant culture in order to enjoy the same rights and freedoms as non-Indigenous Australians is fundamentally incompatible with human rights.

Are these human rights currently sufficiently protected and promoted?

The mechanisms that protect the human rights of the majority of Australians, at least to a limited degree, fail completely at protecting and promoting the human rights of Aboriginal and Torres Strait Islander people. Consequently Australia has an extensive history of human rights abuses against its Indigenous population.

Human rights abuses began with the occupation of the Australian continent by the British. One-sided teaching of history and the use of terms such as "settlement" have left many Australians with the false perception that colonisation occurred relatively peacefully. In fact it was characterised by intense conflict, resulting in the violent deaths of an estimated 20,000 Aboriginal people over more than 100 years¹, and the internal displacement of many more. The fact that neither the British nor

subsequent Australian governments have ever seen reason to negotiate a treaty with the people displaced by colonisation is an indication of the degree to which Aboriginal and Torres Strait Islander people were brutally subjugated.

Once the colonial governments of Australia had assumed authority over Aboriginal and Torres Strait Islander people, successive Aboriginal affairs policies resulted in gross violations of the rights of Aboriginal and Torres Strait Islander people. The forced removal of Aboriginal children from their families and communities, and withholding of wages and savings of Indigenous workers, are two examples. The report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families found estimates of the numbers of children separated from their families either by force, under duress, or as a result of undue influence ranging from 10% to around one-third². The devastating impact of these practices continues to affect those who were removed, with members of the stolen generations more likely to have been imprisoned, to use illicit substances, to lack stable, supportive relationships, and to have a lower self-assessed health status³.

The misappropriation of the earnings and other income of Indigenous Queenslanders by the State Government is one of the issues which ANTaR Qld has worked with the Indigenous community to address. This practice occurred over several decades until the 1970s, with the wages of Aboriginal workers being divided into compulsory savings and statutory deductions, both of which were diverted into government controlled accounts and misused, and "pocket money", which due to a lack of accountability was also subject to fraud. The amount of money stolen from Indigenous people in Queensland has been conservatively estimated at around \$500 million⁴. There can be no doubt that these practices are a major contributing factor to the poverty and disadvantage experienced by many Aboriginal and Torres Strait Islander people today.

Failure to respect the human rights of Aboriginal and Torres Strait Islander people is not, however, confined to history. There is extensive evidence that Indigenous Australians still do not enjoy the human rights taken for granted by non-Indigenous Australians. For example:

- Aboriginal and Torres Strait Islander people make up more than one-quarter of people in prison in Queensland⁵. The proportion of Indigenous young people under juvenile justice supervision is even higher, comprising 46.6% of all young people under supervision in 2006-07⁶. The causes of overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system are complex, involving a range of factors including poverty, social exclusion, and antagonistic relationships between Indigenous Australians and legal authorities. The statistics do, however, suggest also that the safeguards protecting most Australians from arbitrary detention are not adequately protecting the human rights of Aboriginal and Torres Strait Islander people.
- A range of gaps in socioeconomic outcomes culminate in Aboriginal and Torres Strait Islander people having a life expectancy 17 years less than that of the general population. Thus the mechanisms that allow the majority of Australians to enjoy the right to life and the right to the highest attainable standard of health, as well as other economic, social and cultural rights, are not sufficient to protect the human rights of Aboriginal and Torres Strait Islander people.

- The continued willingness of Australian governments, with public support, to implement policies that breach the human rights of Aboriginal and Torres Strait Islander people was starkly illustrated in 2007 with the suspension of the Racial Discrimination Act in order to facilitate the Northern Territory Intervention.

There are a number of barriers that prevent the existing framework for protecting human rights in Australia from operating effectively in the case of Aboriginal and Torres Strait Islander people. These include the legacy of past policies and practices, racism, failure to recognise the culture and identity of Indigenous Australians, and weak human rights protections generally.

The historical examples of human rights abuses previously discussed give an indication of the effect these actions have had on the current position of Aboriginal and Torres Strait Islander people. Violent dispossession, forcible removal from families and communities, and withholding income have resulted in ongoing trauma, social breakdown, disruption of economic activities, and entrenched poverty and disadvantage. Protecting and promoting the human rights of Indigenous Australians will require this legacy to be addressed.

The mindset surrounding historical human rights abuses has also had an impact of the attitudes of non-Indigenous Australians towards Aboriginal and Torres Strait Islander people. Racism is entrenched in Australian society, with various studies of self-reported racism finding up to 79% of Indigenous participants had been treated badly because of their race⁷. Other surveys have also found that a significant proportion of Australians believe too much government assistance is provided to Aboriginal and Torres Strait Islander people, do not believe Indigenous Australians are disadvantaged, blame them for their poor socioeconomic position, believe that Aboriginal and Torres Strait Islander people should conform to the norms of the dominant population, and question the legitimacy of Indigenous identities⁸. Such attitudes are not conducive to forming the necessary political will to effectively address current human rights issues and ensure the future protection of Aboriginal and Torres Strait Islander people's human rights.

Institutional racism in the operation of laws and public services in a variety of sectors, including employment, health, housing and law enforcement also creates a barrier to the protection and promotion of Aboriginal and Torres Strait Islander people's human rights. Examples include the failure of the legal system to recognise the existence of customary law in a number of areas⁹, and funding arrangements for health care organisations which do not take into account the greater need of Indigenous Australians¹⁰.

Although for many Australians human rights are adequately protected by democratic institutions, including the rule of law and independent courts, the examples discussed above have shown that these mechanisms fail to protect the rights of marginalised sections of the population. The weakness of the current human rights framework in Australia is illustrated by the case of *Kruger v The Commonwealth*, in which members of the stolen generations unsuccessfully sought compensation for the breach of explicit and implied rights under the Constitution¹¹, and the Federal Government's argument in *Kartinyeri v Commonwealth* that the Constitution gave it the power to pass laws that disadvantaged Aboriginal and Torres Strait Islander people¹².

The absence of specific recognition of the status and rights of Indigenous Australians presents a further barrier to protecting the human rights of Aboriginal and Torres Strait Islander people. Larissa Behrendt has argued that in other jurisdictions where treaties have been made with indigenous populations, they have provided a basis for legal claims, and have had some benefit in protecting rights to land and self-determination within a broader framework of human rights protections¹³. Since there has been no formal legal recognition of the rights of Indigenous Australians as first nations peoples, this avenue is not available Aboriginal and Torres Strait Islander people to advocate for their human rights. The broader potential benefits, such as the development of a more inclusive political culture and greater public awareness of Indigenous rights, are also lost as a result of the non-recognition of Indigenous Australians.

All of these factors contribute to a lack of political will to address the human rights issues Indigenous Australians face on terms that respect the culture and identity of Aboriginal and Torres Strait Islander people. While the federal and state governments are making attempts to address entrenched disadvantage, they have often failed to engage Indigenous perspectives in doing so, and have even made assistance conditional on conforming with dominant cultural values. A case in point is the dispute between the Tangyentere Council and the Federal Government over funding for improvements to housing in the town camps around Alice Springs. Funding for desperately needed housing was made conditional on changes to land tenure desired by the government, contrary to the wishes of the community¹⁴. Not only is the provision of services and programs developed without the involvement of Aboriginal and Torres Strait Islander stakeholders unlikely to improve the level of enjoyment of human rights by Indigenous Australians, doing so on the condition of conformity with the dominant culture is itself a breach of human rights.

How could Australia better protect and promote human rights?

In order to better protect and promote the human rights of Aboriginal and Torres Strait Islander people, ANTaR Qld recommends the following:

- That the Federal Government enacts a human rights act which protects the rights articulated in the International Covenant of Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights, and also includes specific recognition of the rights of Indigenous Australians. In particular, the human rights act should explicitly recognise the rights of Aboriginal and Torres Strait Islander people to maintain their culture and identity, their right to self-determination, and their right to land;
- That the Australian Constitution be amended to guarantee the right of all people to equality under the law and freedom from all forms of discrimination;
- That the status of Aboriginal and Torres Strait Islander people as the original owners of the Australian territory be recognised in the preamble to the Constitution;
- That the Federal Government explore the level of support amongst Aboriginal and Torres Strait Islander people for negotiating a treaty or treaties between Indigenous and non-Indigenous Australians, using the

United Nations Declaration on the Rights of Indigenous Peoples as a starting point;

- That the Federal Government takes further measures to eliminate racial discrimination, including education of public officials and a public anti-racism campaign; and
- That the Federal Government invests the necessary amount of resources in culturally appropriate programs and services to address the disadvantage and social exclusion experienced by Aboriginal and Torres Strait Islander people, which are developed with the input of Aboriginal and Torres Strait Islander peoples and operate with an appropriate level of Indigenous community control.

¹ Reynolds, H. 1999. *Why Weren't We Told*. Penguin Books, Ringwood, Victoria.

² Human Rights and Equal Opportunity Commission (HREOC). 1997. *Bringing Them Home: the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*. HREOC, Sydney.

³ HREOC, 1997.

⁴ Kidd, R. 2006. *Trustees on Trial: Recovering the Stolen Wages*. Aboriginal Studies Press, Canberra.

⁵ Steering Committee for the Review of Government Service Provision. 2009. *Report on Government Services 2009*. Productivity Commission, Canberra.

⁶ Australian Institute of Health and Welfare (AIHW). 2008. *Juvenile Justice in Australia 2006-07*. Juvenile Justice Series No. 4. Cat No. JUV 4. AIHW, Canberra.

⁷ Paradies, Y., Harris, R., and I. Anderson. 2008. *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Discussion Paper No. 4. Cooperative Research Centre for Aboriginal Health, Darwin.

⁸ Behrendt, L. 2003. *Achieving Social Justice: Indigenous Rights and Australia's Future*. The Federation Press, Leichhardt.

⁹ Davis, M. 2006. 'Treaty, Yeah? The utility of a treaty to advancing reconciliation in Australia'. *Alternative Law Journal* 31(3): 127-131, 136.

¹⁰ Mooney, G. 2003. 'Institutionalised Racism in Australian Public Services'. *Indigenous Law Bulletin* 5(26): 10-12.

¹¹ Behrendt, L. 2003b. 'It's broke so fix it: arguments for a Bill of Rights'. *Australian Journal of Human Rights* vol. 12. Available from: [<http://www.austlii.edu.au/au/journals/AJHR/2003/12.html>]. Accessed 17 November 2008.

¹² Williams, G. 2000. 'Legislating for a Bill of Rights'. *Alternative Law Journal* 25(2): 62-64, 74.

¹³ Behrendt, L. 2002. 'The Link Between Rights and a Treaty: "Practical Reconciliation"'. *Balayi* 4: 21-27.

¹⁴ Tilmouth, W. 2007. 'Saying No to \$60 Million'. In Altman, J. and M. Hinkson (eds). *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia*, pp 231-238. Arena Publications Association, North Carlton.