

**Aboriginal and Torres Strait Islander Peoples
and Australia's Obligations under the
United Nations
International Covenant on Civil and Political Rights**

**A report submitted by the Aboriginal and Torres Strait Islander Commission
to the United Nations Human Rights Committee**

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1. Introduction

The Aboriginal and Torres Strait Islander Commission (“ATSIC”) takes the opportunity of the forthcoming consideration of Australia’s Third and Fourth Country Reports at the 69th Meeting of Human Rights Committee, 10 – 28 July 2000, to present a report dealing with the present situation of the human rights of the Aboriginal and Torres Strait Islander peoples.

ATSIC is an independent authority established by Commonwealth statute and is Australia’s principal democratically elected Indigenous organisation. ATSIC advises governments at Commonwealth, State/Territory, and local levels on Indigenous issues. It administers a number of major programs in areas such as housing, employment, culture, legal aid, land rights and native title, sometimes in partnership with other agencies. ATSIC monitors the performance of other government agencies in providing services to Indigenous citizens. ATSIC acts as an advocate for Australia’s Indigenous peoples within Australia and also internationally.

ATSIC was established as a vehicle for self-determination. Despite some difficulties from time to time in the relationship with the current Commonwealth Government, ATSIC continues to fulfill these roles and is recognised as the principal voice for the Aboriginal and Torres Strait Islander peoples on a national basis.

A submission was previously provided to the Committee’s Working Group in March of this year. The present submission encompasses and adds to the information provided in March. In particular, ATSIC wishes to draw to the Committee’s attention its serious concerns that Australia may be out of compliance with its human rights obligations under the Covenant in respect of Indigenous peoples. ATSIC believes that the rights and welfare of Indigenous peoples in Australia are being seriously affected as a result.

2. The Relevance of the ICCPR to the Legal and Social Status of Indigenous Peoples within Australian Society.

The ICCPR was ratified by Australia in 1980 and Australia acceded to the Optional Protocol in 1991. The significance of these actions for Australian law is reflected in the comments by Justice Brennan in his judgement in *Mabo v Queensland* (1992)¹. This case finally disposed of the convenient fiction that Australia had been settled on the basis of *terra nullius*, that is to say that the Indigenous peoples were not the proprietors of their own lands. *Mabo* established that the Indigenous peoples do in fact hold native title to their lands according to their own customs and practices, and that this ownership continues where the title has not otherwise been extinguished and where those people have maintained their connection to their land. The *Mabo* decision represents a watershed in Australian law, and in the relationship between the Indigenous peoples and the wider Australian society. Justice Brennan stated that:

¹ *Mabo v The State of Queensland* (1992) 175 CLR 1

The opening up of international remedies to individuals pursuant to Australia's accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.²

As well, the ICCPR, along with other human rights instruments, is annexed to the *Human Rights and Equal Opportunity Act 1986* (Cth). It is also incorporated by reference in the legislation establishing the Australian Law Reform Commission. Whilst such scheduling of the Covenant does not make it a part of the law of Australia, the "quasi-incorporation" of the Covenant gives it a visibility not accorded to other non-incorporated instruments. It would seem that the Australian Parliament intended the Covenant to have a special status so far as executive and judicial organs are concerned. Further, in *Teoh's Case*³ the High Court has established that the ratification of a Convention by Australia raised a legitimate expectation that decision-makers would take account of the Convention.

ATSIC is strongly of the view that the ICCPR is an important part of the legal framework that encompasses and determines the outcomes of the Australian legal system and its consequences for the rights of Indigenous Australians. Whilst ratification itself is sufficient to establish legal obligations on Australia, the history of the interaction of the ICCPR and the Australian legal system means that the Covenant, whilst not applying automatically in Australian law, is embedded in the legal and political life of the nation. The human rights norms contained in the ICCPR are both binding on Australia and are consistent with the development of law in Australia. A number of those norms reflect customary international law. However, recent experience has shown that the human rights of Indigenous Peoples in Australia remain vulnerable.

The year 2000 is important in the relations between Indigenous and other Australians. The Reconciliation process, with its massive show of public support at the recent Corroborree 2000 activities in cities and towns around Australia, has highlighted the "unfinished business" of Australian society, including an apology to Indigenous Australians for taking away Aboriginal children over many years ("The Stolen Generations") and, more broadly, acknowledging the dispossession, destruction and disruption of Indigenous land, life and culture. The Reconciliation process entails not only restitution for past wrongs, but also the ongoing recognition and protection of Indigenous rights to land and culture.

² 175 CLR 1, at 42

³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

In these circumstances, ATSIC believes the Human Rights Committee can play a significant role. Discrimination on the grounds of race remains a major concern for Indigenous peoples in Australia. The present Government has shown an unwillingness to accept and implement a rights-based approach to Indigenous affairs, but has instead wound back rights that had been recognised in areas such as native title, and has emphasised a welfare approach towards Indigenous peoples. As fundamental as welfare matters are, without a rights framework it appears that we are seeing a return to the discredited and unacceptable assimilationist policies which characterised the 1950s and 1960s.

The conclusions of the Human Rights Committee at its forthcoming 69th meeting in July in respect of Australia can provide direction and guidance. The Committee best knows the current international principles and standards in respect of the human rights of Indigenous peoples, and what can properly be expected of a modern democratic nation such as Australia in terms of respecting and implementing these standards. ATSIC believes that the concluding Comment of the Committee on Australia can serve as a benchmark for Indigenous human rights and be the basis for constructive dialogue with the Australian Government in respect of any shortfalls that are identified in its compliance with its international obligations.

There may be some difficulty in establishing the sort of dialogue that could lead to positive outcomes. Certainly the Australian Government has been somewhat recalcitrant in responding to concerns expressed by the Committee on the Elimination of Racial Discrimination (CERD) over the past two years. However, ATSIC notes that the debate has moved on to some extent. The groundswell of support for the Reconciliation process, the refusal of the Senate to date to reduce native title negotiating rights on pastoral leases, the increased use of agreements to settle native title claims, and the intense controversy over mandatory sentencing, (which in its effect is compulsory gaoling by the courts) all point to a climate where Indigenous rights have shown resilience. In these circumstances it may be possible for dialogue to occur. Indeed, the Chairman of ATSIC, Mr Geoff Clark, wrote to the Prime Minister earlier this year suggesting such a dialogue in the aftermath of the CERD decision in March 2000.

It is ATSIC's expectation that the Human Rights Committee will be able to confirm that discriminatory law and practice has no place under international law, that it can identify areas or situations where in the Committee's view Australia has failed to ensure to Indigenous peoples the rights enshrined in the Covenant, and that it can propose possible solutions to address problems identified, in order to ensure compliance. ATSIC believes the Committee should indicate its willingness to enter into a constructive dialogue with the Australian Government, and that it should keep the situation in Australia under ongoing review.

3. Self-determination

The first matter ATSIC wishes to bring to the attention of the Committee is the application of the principle of self-determination in respect of Australia's Indigenous peoples. The principle of self-determination is the basis upon which other rights are built. The loss of autonomy and the inability to control our lives is the root cause of Indigenous disadvantage in Australia. ATSIC believes that the applicability of the principle of self-determination to Indigenous peoples is now an established principle of international law. Without self-determination it is not possible to right the injustices of colonial dispossession, and overcome the legacy of the arbitrary exercise of power over Indigenous societies with its consequent marginalisation of Indigenous societies within the life of the nation.

It is therefore of the utmost concern to ATSIC that the Australian Government has abandoned self-determination as the basis of its domestic policy in respect of Indigenous peoples, and that it has also sought in international fora to persuade other countries to oppose the application of self-determination to Indigenous peoples. It is the contention of ATSIC that the negative view of self-determination taken by the Government encompasses and explains the winding back of, and failure to promote the realisation of, Indigenous rights in a number of key areas, including native title, mandatory sentencing, socio-economic disadvantage and the response to the Stolen Generations.

In November 1996 the Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, announced that the Government's Indigenous affairs policy would no longer be based on the principle of self-determination. Instead, Government policy would now be based on the concept of "empowerment". ATSIC considers the term "empowerment" is vague, has no meaning in international law, and does not provide a coherent basis for Indigenous policy. It is a matter of some embarrassment that Australia has pushed the line in international fora that the possible linkage in international law between self-determination and external independence means the term "self-determination" should be avoided in respect of Indigenous peoples. For example, the Australian representative at a recent meeting of the Commission on Human Rights Working Group on elaborating a UN Draft Declaration on the Rights of Indigenous Peoples, speaking in respect of Draft Article 3 providing for self-determination,

affirmed his delegation's position that it was unable to accept the inclusion of the term 'self-determination' in the draft declaration because for many people it implied the establishment of separate nations and laws.⁴

⁴ UN Doc. E/CN.4/2000/84 (6 December 1999) at para 62

ATSIC contends, however, that the jurisprudence of international bodies, including the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, clearly establishes that the principle of self-determination has an internal application, and that this is particularly the case in respect of Indigenous peoples⁵. The relevant articles in the ICCPR are Article 1 (and the identical Article 1 in the International Covenant on Economic Social and Cultural Rights) and Article 27. In the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Articles 2.2 and 5(c) apply. Such a right of self-determination does not establish either a right of, nor an expectation about, secession, partition or other changes to the boundaries or sovereignty of existing states. What it does is to establish limits, under international law, against unreasonable intrusion by the State into the lives of Indigenous peoples and the expropriation of, or interference with, their lands and territories. Indigenous peoples have a legitimate expectation of autonomy.

It is also clear that a strong link is established between the right of self-determination for Indigenous peoples and control over their lands and resources.⁶ This linkage is seen in ILO Convention 169 Concerning Tribal and Indigenous Peoples. Article 14 of that Convention provides a strong statement of Indigenous rights “of ownership and possession over the lands which they traditionally occupy” and States parties must “take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession”. Similarly, Article 16 provides strong safeguards in respect of natural resources pertaining to their lands. It would seem that ILO Convention 169 reflects an emergent minimum body of customary international law on Indigenous rights to self-determination, and provides a guide to international standards in respect of Indigenous rights.

The right of self-determination encompasses political participation rights, including the right to be consulted and to give or withhold consent on an informed basis in respect of decisions that will directly affect Indigenous peoples. Such negotiation rights relate to both procedural issues (such as the negotiation in Australia in 1997-8 of amendments to the *Native Title Act* 1993 as a result of the Wik decision – see below), and substantive negotiating rights in respect of proposals to use Indigenous land and resources (such as the Right to Negotiate provisions of the *Native Title Act* 1993). Whilst the exact content of the right of self-determination may not yet have been fully defined, Dr Lowitja O’Donoghue, former Chair of ATSIC, has described it thus:

⁵ See, *inter alia*, the HRC Concluding Comments on the initial report of Azerbaijan, UN Doc A/47/40 (1992) para 296; HRC Concluding Comments on Canada’s fourth periodic report concerning Article 1 and the right to self-determination, UN Doc. CCPR/C/79/Add.105(7 April 1999), at para 7; HRC General Comment 12 on Article 1 and General Comment 23 on Article 27 of the ICCPR, UN Doc. HRI/Gen/1/Rev 3 (1997); and HRC Concluding Comments re Article 27 for Norway and Mexico UN Doc, A/49/40 (1994) and the United States UN Doc. A/50/40/ (1995); ICERD Article 2 (2) and CERD General Recommendation XX and Article 5(c) and General Recommendation XXIII UN Doc. CERD/C/365 (11 February 1999).

⁶ See for example the 1990 case of *Chief Ominayak v Canada* UN Doc. A/47/40 (1992) brought under the Optional Protocol

self-determination is a ‘dynamic right’ under the umbrella of which Aboriginal and Torres Strait Islander peoples will continue to seek increasing autonomy in decision making.⁷

Despite the overwhelming evidence that Indigenous peoples have a right to self-determination, and that their informed consent is required in respect of decisions and activities impacting on their rights and resources, the Australian Government has, both at the level of policy and in specific instances, refused to recognise such rights, nor negotiate with Indigenous Peoples over matters of great import to them. The most that the Government has been prepared to accede to is consultation with Indigenous peoples as one stakeholder, with no more and no less rights than any other stakeholder, even in respect of central issues such as native title rights where the rights at question are the rights of Indigenous peoples, pre-dating colonisation and arising from time immemorial. This approach is consistent with the Government’s abandonment of self-determination as the basis of Indigenous affairs policy. It is reflected in a recent submission by the Attorney General’s Department to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Inquiry into Australia’s compliance with the CERD. In response to the CERD Decision of March 1999, the submission argued that “[T]here is no international obligation on Australia under Article 5(c) (of ICERD) that would make any decision relating to the rights of particular racial groups without their informed consent inconsistent with the Convention.”⁸ This reflects the general view that the Government is not obliged to obtain the informed consent of Indigenous Peoples on matters which directly affect them.

Throughout the development of the Government’s amendments to the *Native Title Act* 1993, which came to be known as the “Wik amendments” or “The 10 Point Plan” and which resulted in the *Native Title Amendment Act* 1998 (NTAA), the Government consistently refused to enter into negotiations with Indigenous representatives as had characterised the development of the original legislation by the previous Government. It is these 1998 Wik amendments’ which came to the attention of the CERD. They significantly diminished the rights of native title holders (see below) and were found by the CERD to be racially discriminatory. In developing these amendments the Government was only prepared to consult with Indigenous representatives on the same basis as it did with other stakeholders, such as industry bodies. In effect, native title holders were seen as having, at the end of the day, no special rights or interests in respect of their own title which the courts had found survives colonial settlement. They had no effective means to protect their common law rights as recognised in the Native Title Act, other than to rely on the goodwill of Government. In the context of the consultations leading up to the passage of the Wik amendments, the disparity in resources and influence between the Indigenous parties and industry bodies representing mining and pastoralism and the various State and Territory Governments needs hardly to be stated.

⁷ ATSIIC, *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 2nd edition, March 1999

⁸ PJC *Inquiry into the Consistency of the Native Title Act 1993, as amended, with the ICERD*. Submission 24 Mr Richard Moss Attorney General's Department para 90 and following.

The experience of the Wik amendments process was demeaning and saddening to the Indigenous representatives, who felt that the concerns of industry and the States and Territories were of higher priority to the Government than their own property and cultural rights.

In respect of the failure of the Government to seek the informed consent of the Aboriginal and Torres Strait Islander peoples to the Wik amendments, ATSIC concurs with the CERD Decision of 18 March 1999 (paragraph 9), viz:

The lack of effective participation by Indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. Calling upon State Parties to "recognise and protect the rights of Indigenous peoples to own, develop, control and use their common lands, territories and resources", the Committee, in its General Recommendation XXIII, stressed the importance of ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent"

ATSIC believes that the Decision of CERD in respect of informed consent on such a vital matter as Native Title is consistent with the jurisprudence of the Human Rights Committee. Articles 1 and 27 of the ICCPR would indicate that Australia has seriously breached its obligations in respect of the self-determination rights of the Aboriginal and Torres Strait Islander peoples. This breach is at the level of general policy, and is reflected in the significant winding back of Native Title rights effected by the 1998 amendments.

Self-determination was also central to the conclusions of the Royal Commission into Aboriginal Deaths in Custody. It stated: "The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands".⁹ Similarly, the *Bringing them Home* Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families recommended self-determination be implemented in relation to the well-being of Indigenous children and young people. The Government has failed to implement these recommendations regarding self-determination, in matters which directly affect the lives and welfare of Indigenous people. This reflects the abandonment of self-determination by the present Government.

Outcome:

The Australian Government should acknowledge the right to self-determination of the Indigenous peoples of this country, confirm that its policy will take cognisance of this right, and, in policy implementation seek the informed consent of Indigenous Peoples on all matters relating directly to them.

⁹ Royal Commission into Aboriginal Deaths in Custody, Volume 1, para 1.7.6

4. Native Title and Land Rights

Native title is the term used to describe the recognition in Australian law of the rights of Aboriginal peoples and Torres Strait Islanders to land and waters under the laws and customs of those peoples. Unlike other British colonies, in Australia the colonial authorities refused to acknowledge that the Indigenous peoples had any legal rights in land. Consequently, the Australian legal system, including property law, was built on the assumption that the land was *terra nullius*, belonging to no one at the time of acquisition of sovereignty by Britain. This convenient legal fiction was finally put to rest by the High Court of Australia in *Mabo v Queensland (No 2)* in 1992. The Court declared that Australian law recognised the title of Indigenous Australians to their traditional lands and waters. However, the common law title of native title was vulnerable to extinguishment either by loss of connection based on customary law and traditions, or by government acting in a way clearly inconsistent with the survival of native title. However, the ability of governments to extinguish native title is constrained by the *Racial Discrimination Act 1975* (RDA).

The *Native Title Act 1993* (NTA) was enacted at the end of 1993, after a year of intense public debate, and, importantly, direct negotiations between Indigenous representatives, the Prime Minister and other senior members of the Government and other parties. The NTA was intended as beneficial legislation to recognise and protect native title. The main objects of the NTA were to:

- provide for the recognition and protection of native title
- validate ‘past acts’ acts affecting native title which might otherwise have been invalid
- establish means to determine native title claims
- provide for ‘future acts’ which might affect native title.

It is very important to note that the 1993 NTA represented a negotiated agreement. Indigenous representatives accepted validation of past acts that may have affected native title rights, but in return obtained the Right to Negotiate in respect of mining and other proposed developments on native title land. Although falling clearly short of an absolute veto, the Right to Negotiate provides strong negotiating powers and a system of arbitration where agreement cannot be reached. The Right to Negotiate (RTN) provisions were a key reason for the Indigenous representatives agreeing to the NTA package, as the RTN provided a degree of control, participation and consent in respect of proposals for development on native title land. The negotiations leading to the NTA can be seen as an exercise of informed consent and of effective participation.

Following its election in March 1996, the new Government began consideration of amendments to the NTA which, among other things, proposed to narrow the scope of the application of the Right to Negotiate and truncate the procedures and time limits available for negotiations. In December 1996, the High Court made a further ruling on native title (the Wik Decision¹⁰) which confirmed that native title could co-exist with pastoral leases. In response, the Government legislated to limit the effect of the Wik decision, in particular to provide for the removal of the Right to Negotiate from pastoral lands and similar titles (Note: pastoral leases account for approximately 40% of the Australian land mass, so such changes have far-reaching consequences for native title holders).

It should be noted that the significant reductions in the Right to Negotiate effected by the 1998 (“Wik”) amendments (detailed below) are seen by Aboriginal and Torres Strait Islander people as the Government reneging on the agreement negotiated in 1993 – where the Right to Negotiate was the cornerstone of the agreement. Consequently to wind back the Right to Negotiate was seen as an act of bad faith by the Government, which Indigenous people thought was bound to honour the agreement of 1993.

ATSIC, along with the National Indigenous Working Group (NIWG) – a coalition of the major land councils and Native Title Representative Bodies from around Australia, did not consent to the 1998 amendments to the NTA that significantly reduced the rights of Indigenous people. ATSIC, along with the NIWG, was willing at the time to negotiate amendments to improve the workability of the NTA. ATSIC remains prepared to enter into discussions with the Government on these matters. However, it is essential that the discriminatory provisions of the 1998 amendments, including those identified by the CERD (see below), be reversed as a matter of priority.

In particular, ATSIC is opposed to provisions in the 1998 amendments relating to:

1. validation of “intermediate period” acts;
2. erosion of the Right to Negotiate;
3. expansion of the rights of pastoralists at the expense of native title parties (primary production upgrade provisions); and
4. statutory ‘confirmation’ of extinguishment of native title;

1. “Intermediate period” acts

After the commencement of the NTA on 1 January 1994 some State and Territory Governments granted interests in certain land without following the procedures set out in the NTA to protect possible native title interests. The Wik decision showed what Indigenous representatives had claimed all along – that is, that grants eg mining interests, on pastoral leases and similar tenures, could be invalid because of the failure to follow the NTA processes.

¹⁰ *Wik Peoples v The State of Queensland* (1996) 187 CLR 1

The 1998 amendments allow for the retrospective validation of those potentially invalid acts of governments in the “intermediate period’ ie between 1 January 1994 and the Wik decision of 23 December 1996. The effect of such validation on native title can vary from extinguishment to impairment and suppression of native title. It also means that the opportunity to exercise the Right to Negotiate has been lost.

The validation provisions clearly breach the non-discrimination principle in that they validate acts and provide for extinguishment or impairment only in relation to native title. This favours Crown-granted titles over native title and does not provide native title with equal protection. Rather than protect native title, the validation provisions operate to subordinate and in some cases extinguish native title in favour of the subsequently granted Crown titles. The validation provisions also absolve governments from their failure to comply with the explicit statutory provisions of the NTA. The excuse offered by some State and Territory Government that they believed native title did not exist in respect of pastoral leases is not credible – governments, both Commonwealth and State and Territory, were very much alive to the fact that the continuation of native title on pastoral leases was an unresolved matter¹¹. The compensation provisions do not remedy the clear preference conferred on non-Indigenous titles granted during the validation period.

ATSIC believes that international human rights law requires respect for native title, not obliteration followed by compensation. The validation provisions of the amended NTA appear to breach Australia’s obligations under Articles 1, 26, and 27.

2. The Right to Negotiate

The winding back of the Right to Negotiate as a result of the 1998 amendments is considerable. These provisions attack the core of self-determination – the ability of native title holders to exercise a degree of control in respect of activities on land where native title applies. Each reduction of the Right to Negotiate moves native title holders away from being active participants and decision-makers in respect of their land and resources. It signals a return to the disempowerment, marginalisation and alienation that has characterised much of the history of relations between Indigenous and non-Indigenous Australians.

The changes to the Right to Negotiate include (references are to the NTA 1993 as amended in 1998):

- widening of the scope of the exception from the Right to Negotiate for low impact exploration (s.26A);
- the new exception from the Right to Negotiate for alluvial tin/gold mining (s.26B) and opal or gem mining (s. 26C);

¹¹ See transcript of evidence 13 March 2000 by Mr Ernst Wilhelm, former senior counsel with the Attorney General’s Department, before the Joint Parliamentary Committee Inquiry into Consistency of the NTA, as amended, with the ICERD.

- the removal of the Right to Negotiate from an infrastructure facility associated with mining (s.26 (1) (c));
- the removal of the Right to Negotiate from compulsory acquisition of native title in respect of private infrastructure projects (broadly defined) (s.26(1)(c)(iii) and s.253);

Note: The loss of the Right to Negotiate in respect of infrastructure projects and mining related infrastructure (including roads, pipelines etc) fundamentally alters the application of the Right to Negotiate and represents a major winding back of negotiation rights.

- the removal of the Right to Negotiate from a wider range of renewals, re-grants and extensions of a right to mine (ss.26 and 26D);
- the removal of the Right to Negotiate from compulsory acquisition of native title rights within a town or city (s.26(2)(f));
- defining the inter-tidal zone so as to remove the possible application of the Right to Negotiate from it – potentially at significant cost to coastal Indigenous peoples (26(3));
- allowing the replacement by States and Territories of the Right to Negotiate on pastoral leases and reserves (including national parks) by minimum standard procedural rights (s.43A);

Note: These “43A schemes” mean the potential loss of the Right to Negotiate over approximately 40% of the land mass of Australia, and its replacement by substantially weaker rights of notification and consultation.

- reducing the area available for the Right to Negotiate to apply as the result of statutory extinguishment of native title through the validation and “confirmation of extinguishment” provisions.

3. Primary production upgrade provisions

As well as the provisions listed above which narrow and reduce the Right to Negotiate, the ability of native title holders to exercise the Right to Negotiate about other activities on non-exclusive pastoral and agricultural leases has been curtailed by the “primary production upgrade” and related provisions, which provide minimal procedural rights for native title parties instead of negotiating rights in response to proposed changes to the use of pastoral leases. The new provisions include diversification of primary production activities by the leaseholder beyond the terms of a lease (ss 24GA and 24GB(1)). Diversification can include forest operations, cultivating land, horticulture, taking or catching fish or shellfish, aquaculture and farm tourism – clearly potentially impacting on native title rights.

These provisions also allow for grazing animals and taking water in an area of native title *adjoining or near* a freehold farm or a pastoral or agricultural lease (s.24GD), and they allow for the grant of a right to a third party to cut and remove timber or to extract obtain or remove sand, gravel, rocks, soil or other resources (short of mining) (24GE) from a pastoral or agricultural lease.

Such activities, with potentially significant effects on the ability of native title holders to protect, enjoy and utilise their native title rights and interests, can, as a result of these amendments, validly take place without negotiation with, or the consent of, the native title holders. Minimal procedural rights are provided and there is a right to compensation. Whilst the non-extinguishment principle applies, the activities listed under these provisions can clearly result in the native title interests being degraded or destroyed. Accordingly, it is anticipated that these provisions will result in *de facto* extinguishment of native title property rights.

These primary production upgrade amendments were always an over-reaction. Indigenous interests made clear their willingness to negotiate solutions to these matters, and, in particular, to use agreements to provide the certainty sought by pastoralists. In effect, the Government responded to what it saw as a workability problem arising from the Wik decision in a way that was at the expense of the native title interests. This was a discriminatory response.

The result is to turn native title holders into bystanders as their assets are used and exploited, with no real say in what happens, and the only recourse being compensation. In effect, these provisions, along with the s.43A loss of the Right to Negotiate in respect of mining, nullify much of the benefits for the holders of native title on pastoral leases that should have flowed from the Wik decision.

The opportunity provided by The Wik decision for native title holders to be active partners in the management of their country and the use of their resources on a co-existence basis has been foregone.

4. “Confirmation” of extinguishment

The greatest negative impacts on native title arise not from the automatic operation of the amended Native Title Act itself, but rather from the exercise by the States and Territories of the newly-gained discretionary powers conferred by the 1998 amendments which provide for them to interfere with native title by way of State and Territory legislation.

Some aspects of these State and Territory schemes are subject to approval by the Commonwealth Attorney-General and disallowance by either House of the Commonwealth Parliament. Excluded from these safeguards, however, are those relating to validation and to “confirmation” of extinguishment. These are not subject to scrutiny by the Attorney General nor disallowance by the Commonwealth Parliament.

The “confirmation” of extinguishment provisions in the 1998 amendments fly in the face of international standards. It is quite contrary to the most basic standards of self-determination to have a situation where native title can be lost by legislative fiat. Yet this is the case in Australia as a result of the 1998 amendments. The common law of Australia requires a “clear and plain” intention on the part of government before native title will be held to be extinguished by the grant of an inconsistent interest. Generally, the 1993 NTA left the principles of extinguishment of native title to be decided by the courts, whilst protecting native title against discriminatory extinguishment. In contrast, the 1998 amendments preempt the development of the common law by the courts by providing that particular classes of titles and grants can be permanently extinguished by legislation. There is no chance for the native title holders of such titles to “have their day in court”, except to claim compensation for the title that has been extinguished. The term “confirmation of extinguishment” is a euphemism for legislative extinguishment of title.

It should be noted in this context that the common law, whilst recognising native title, is itself racially discriminatory in that the form of title recognised by the courts is weaker than later titles granted by Governments as part of the system of land administration. Thus, at common law confiscation of property is presumed to require payment of compensation. Native title is not protected by such a presumption. Native title is subject to extinguishment at common law without the consent of the Aboriginal people or the payment of compensation. The protection of native title in Australia today arises from the Racial Discrimination Act 1975 and the Native Title Act 1993. The discrimination in favour of other titles, even pastoral leases, was shown in the Wik decision where it was found that in the event of conflict between the rights of the pastoralists and those of the native title holders, the native title rights must ‘yield’ to the pastoralist’s rights.

In these circumstances, the 1998 amendments that provide a legislative regime in respect of extinguishment that is even less protective of native title, in a wide range of situations, than is the common law, are particularly heinous. ATSIC believes it is the responsibility of the legislature to ensure that native title holders should be given the opportunity to assert their claims to native title, and where that title is recognised, to protect it from the arbitrary extinguishment allowed by the common law. To “confirm” extinguishment by the Native Title Act, as per the 1998 amendments, prevents even the bringing of claims by Indigenous title holders before the courts of the land and leaves as the only redress for the dispossessed native title holders the unsatisfactory and difficult avenue of compensation.

ATSIC believes these provisions seriously breach the rights protected by Articles 1, 26 and 27 of the ICCPR.

Effective Suspension of the Racial Discrimination Act 1975 (RDA)

ATSIC draws to the attention of the Committee the effective suspension of the RDA resulting from the 1998 amendments. This is significant in terms of the prohibition on racial discrimination in international law, as it is through the RDA that most of the ICERD has been incorporated into Australian law. Section 7 of the NTA deals with the relationship between the RDA and the NTA, as amended. Section 7 limits the application of the RDA to the performance of functions and exercise of powers under the NTA, and acts as an interpretive aid in cases of ambiguity in the NTA. However, *NTA provisions cannot be challenged on the basis that they conflict with the RDA*, ie are racially discriminatory. The general provisions of the RDA must yield to the specific provisions of the NTA, and the RDA cannot be invoked to override racially discriminatory provisions.

ATSIC is deeply concerned with this override of laws prohibiting racial discrimination. This has occurred in a context where there are no entrenched constitutional guarantees against racist legislation. In effect, native title holders are left with no recourse if they believe that provisions of the NTA discriminate against them on the grounds of race. They have been denied any effective remedy in the courts.

ATSIC believes that, as well as breaching Articles 1, 26 and 27, this provision also raises the issue of whether Australia is in breach Article 2(3) concerning the availability of effective remedies.

The CERD Decision

The Committee will be aware that in March 1999 the CERD made a decision under its early warning and urgent action procedures in respect of Australia's compliance with its obligations under the ICERD, concentrating particularly on the 1998 NTA amendments. Despite considerable argument and pressure from Australia, CERD has maintained its decision throughout 1999 and 2000.

ATSIC agrees with the concerns expressed by CERD in March 1999 that the 1998 amendments may put Australia in breach of the ICERD, that specific provisions are discriminatory, and that the Government should suspend the implementation of the discriminatory 1998 amendments and open negotiations with Indigenous leaders.

The CERD noted in particular four specific provisions that discriminate against Indigenous title holders. These were the "validation" provisions, the "confirmation of extinguishment" provisions, the primary production upgrade provisions, and restrictions concerning the Right to Negotiate. It also noted the "lack of effective participation by indigenous communities in the formulation of the amendments" and it stressed the need to suspend the implementation of the discriminatory amendments and to re-open negotiations with Indigenous representatives with a view to finding solutions acceptable to Indigenous Peoples and consistent with Australia's obligations under ICERD.

Inquiry of the Parliamentary Joint Committee on Native Title

On 9 December 1999 the Australian Senate referred to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) the issue of the compliance of the 1998 amendments with the Native Title Act with the ICERD Convention.

The terms of reference are:

- (a) whether the finding of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* is inconsistent with Australia's international legal obligations, in particular, the Convention on the Elimination of All Forms of Racial Discrimination, is sustainable on the weight of informed opinion;
- (b) what amendments are required to the Act, and what processes of consultation must be followed in effecting those amendments, to ensure that Australia's international obligations are complied with; and
- (c) whether dialogue with the CERD on the Act would assist in establishing a better informed basis for Amendment to the Act.

The Committee will report by end June 2000.

This Inquiry is significant. It reflects the increasing importance in Australia of international standards in consideration of the human rights of Indigenous peoples. It shows the interplay between the CERD monitoring of Australia's performance and Parliamentary consideration of Australian legislation. It demonstrates that Australia can no longer consider the treatment of its indigenous peoples as only a matter of domestic jurisdiction. It indicates that increasingly there is a dimension of international responsibility attaching to Australian law and policy in respect of the rights of Indigenous peoples.

Summary

ATSIC believes that, in respect of native title and the NTA, the Human Rights Committee is well placed to provide authoritative guidance to the Australian Government in respect of any breaches, or potential breaches, of the standards contained in the ICCPR as a consequence of the NTA 1998 amendments and their ongoing implementation. ATSIC believes that negotiation is the only way to overcome such problems and reach viable long term solutions. It has made clear its willingness to contribute to constructive dialogue with the Government. Guidance from the Committee could complement and strengthen the concerns raised by CERD. In turn, this would assist the consideration within Australia of the application of international human rights norms to the rights of Indigenous peoples, in this instance native title rights.

Outcome:

ATSIC seeks repeal of the discriminatory 1998 amendments and the re-opening of negotiation with representatives of the Aboriginal and Torres Strait Islander peoples as a matter of the highest priority.

5. Protection of Indigenous Heritage

Until 1984 the protection of areas and objects of particular significance to Indigenous Australians was dependent on the laws of the several States and Territories which varied considerably.

In 1984 the Commonwealth Parliament enacted what was seen then as interim legislation to provide protection in the event of failure at State or Territory level. With the removal in 1986 of the “sunset clause” the Act became permanent as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

It was, and remains, a “last resort” protection to operate only in the event of failure of protection at State/Territory level. Its purpose is defined in section 4:

The preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects of particular significance to Aborigines in accordance with Aboriginal tradition.

Since enactment, some 200 applications have been lodged. Of these, emergency declarations have protected five sites of significance on a short-term basis; five long-term declarations have been made, two of which remain in force.

Certain problems with the 1984 Act became apparent over the years, particularly in connection with a long running dispute concerning the proposed construction of a bridge near the mouth of the Murray River in South Australia to connect the town of Goolwa with Hindmarsh Island (Kumarangk). Two orders for long term protection were invalidated by the courts on the basis of problems in the process. Eventually in 1997 the Commonwealth Parliament enacted a special Act which removed the Hindmarsh Island bridge area from the protection of the 1984 Act. A Constitutional challenge to the Act in the High Court of Australia was unsuccessful.¹²

In the meantime the Act was reviewed by the Hon Elizabeth Evatt AC who reported in 1996 with a range of recommendations. These are referred to in ATSIC’s February 1999 report to the CERD: *Aboriginal and Torres Strait Islander Peoples and Australia’s Obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination* at pages 67-74.

¹² *Kartinyeri v Commonwealth* (1998) 195 CLR 337

That report also discusses the failure of the Commonwealth Government adequately to implement the Evatt recommendations in drafting the Aboriginal and Torres Strait Islander Heritage Protection Bill.

The Bill was passed by the lower House of Parliament, the House of Representatives, on 4 June 1998. The Government subsequently amended the Bill in some particulars to take account of recommendations from the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Twelfth Report.

In November 1999 the upper house of the parliament, the Senate, passed the Bill subject to amendments. In December 1999 the House of Representatives indicated that a number of the Senate amendments – which were based on key Evatt recommendations – were not accepted. The Bill is currently in limbo.

The difference between the two Houses represents a perception by non-Government Senators – a perception shared by ATSIC – that the Bill represents a diminution of Commonwealth protection of Indigenous heritage in favour of an expanded role for State and Territory governments.

Outcome:

Article 27 of the ICCPR, as interpreted by the Human Rights Committee in General Comment 23 imposes positive obligations on States parties. Australia should be urged to accept the Senate amendments and the Evatt recommendations in order to maintain the integrity of national protection of the cultural heritage of Indigenous Australians

6. Aboriginal Deaths in Custody

The situation in respect of Aboriginal deaths in custody continues to be a matter of shame to the Australian nation and grief and distress to the Aboriginal community. Little if any progress has been made over the last 10 years in reducing the appalling statistics on Aboriginal deaths in custody. The high rate of Aboriginal deaths in custody is explained essentially by the high incarceration rates for Aboriginal people.

Whilst the Aboriginal proportion of the total population over the past 20 years has been in the order of one to two per cent, it became clear during the 1980s that the proportion of Aboriginal deaths in police custody and prison far exceeded one or two percent of such deaths. In fact, between 1980 and 1987 the proportion of Aboriginal deaths to total deaths in custody ranged from 11% to 26%¹³. Consequently, a Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established by the Commonwealth Government in 1987.

¹³ V Dalton *Australian Deaths in Custody and Custody-related Police Operations 1995-96* Australian Institute of Criminology 1996 Table 3

The Royal Commission inquired into the specific circumstances surrounding each of the 99 deaths that had occurred between 1980 and 1989. It also inquired into the social, cultural and legal issues underlying those deaths. In 1991 it issued a 5 volume national report containing 339 recommendations.

The recommendations of the RCIADIC were based on two main findings. Firstly, many, if not all, of the deaths were avoidable. Recommendations to minimise the risk of deaths of Aboriginal persons in custody addressed issues such as custodial health and safety, post-death investigations, and compliance with international obligations in respect of custodial conditions.¹⁴

Secondly, and of considerable significance, the RCIADIC found that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. The reason for so many Aboriginal deaths is the far greater proportion of the Aboriginal population in custody. The Aboriginal population is grossly over-represented in custody: “Too many Aboriginal people are in custody too often”.¹⁵

The recommendations of the RCIADIC sought to address this problem of over-representation at two levels. Firstly, at the level of the underlying issues such as poverty, alcoholism, poor health, lack of education, inadequate housing and high unemployment. Here the RCIADIC emphasised the importance of self-determination:

The thrust of this report is that elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.¹⁶

At a second level, a significant number of recommendations concerned the operation of the criminal justice system itself. These were directed to ending discrimination against Aboriginal defendants, who were found to be more likely to be sought by police, more likely to be charged with an offence rather than cautioned, more likely to be arrested rather than charged by summons, less likely to be granted bail, and when convicted to have fewer appropriate sentencing options.

Despite the findings and recommendations of the RCIADIC, the rates at which Aboriginal people come into contact with the criminal justice system have not improved in the past decade. Aboriginal people remain over-represented at each stage of the criminal justice system which results in their being **12 times** more likely to be incarcerated than non-Indigenous Australians. Further, the Indigenous population is a developing population as opposed to the ‘ageing’ non-Indigenous population.

¹⁴ Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS 1991, Volume 5, Recommendations 328-333

¹⁵ Volume 1, para 1.3.1 - 1.3.3

¹⁶ Volume 1, para 1.7.6

It is estimated (if nothing is done to stem the present high and unacceptable rates of incarceration) that by 2011 there will be a 44% increase in the number of Indigenous juveniles in detention.¹⁷

From 1988 to 1998 the Indigenous prisoner population (across all age groups) has more than doubled. It has grown faster than non-Indigenous prisoner rates in all jurisdictions. To illustrate the extent of the problem, figures for the June 1999 quarter indicate that **76% of all prisoners in the Northern Territory, and 34% of all prisoners in Western Australia were Indigenous.** The rate of imprisonment of Indigenous Peoples in Western Australia was 21.7 times higher than that of the non-Indigenous population, and unacceptably high in other States.

A significant part of the reason for the increasing Indigenous prison population is the failure of States and Territories to commit to the genuine implementation of key recommendations of the RCIADIC. An independent study prepared in 1997 for ATSIC concluded that claims by State and Territory governments to have implemented recommendations cannot be sustained.¹⁸

Further, State and Territory Governments have taken legislative actions, not envisaged by the RCIADIC, that have actually exacerbated the situation and led to an increase in Aboriginal imprisonment. This has been part of a wider socio-political context and a “law and order” punitive atmosphere in many Australian jurisdictions which has worked against the interests of Aboriginal people receiving fair and just treatment from the legal system. In this context, mandatory sentencing (see below) and Zero Tolerance Policing (ZTP) also contribute to increased criminalisation of Aboriginal and Torres Strait Islander people. The mandatory sentencing regimes that have been legislated in the Northern Territory and Western Australia run counter to recommendations of the Royal Commission, and result in increased incarceration of Indigenous Peoples in particular. Jurisdictions such as the Northern Territory have been promoting the idea of ‘Zero Tolerance Policing’, pioneered in areas of the USA. ATSIC commissioned Chris Cunneen of the Institute of Criminology at Sydney University Law School to study the implications ZTP would have for Indigenous people. His report,¹⁹ published in February 1999, concluded that ZTP would lead to a further rapid increase in the jailing of Aboriginal people for trivial offences and would be in breach of 19 recommendations of the Royal Commission into Aboriginal Deaths in Custody. The failure to improve the situation in respect of deaths in custody also relates at a fundamental level to the failure to acknowledge the right of self-determination for Indigenous peoples. This relates to both the inadequate regard given to the need for negotiation and self-determination in relation to the design and delivery of services, and, more broadly, to the failure to deal effectively with the underlying problems identified by the RCIADIC.

¹⁷ Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report*, AGPS 1995 pp 34 and 15

¹⁸ C. Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People out of Custody*, ATSIC 1997

¹⁹ C. Cunneen, *Zero Tolerance Policing: Implications for Indigenous People*, ATSIC 1999

The continuing over-representation of Indigenous prisoners in Australian gaols and the continuing high level of Indigenous deaths in custody indicate that the underlying causes of Indigenous disadvantage have not been adequately addressed since the publication of the Report in 1991. The Government's abandonment of the policy of self-determination (see above) would appear to directly oppose the central thrust of the recommendations of the Royal Commission.

The fact that criminal justice is mainly a matter within the jurisdiction of the States and Territories does not absolve the Australian Government of responsibility in terms of its international legal obligations (Article 27 of the Vienna Convention on the Law of Treaties) including its obligations under the ICCPR (Article 50). Nor domestically are these matters seen as exclusively the domain of the States and Territories – there is clearly a public perception, reflected in debates in the Australian Parliament, that the Australian Government must show leadership on these fundamental human rights and justice issues and where necessary use its available Constitutional powers to address Aboriginal incarceration rates, mandatory sentencing and Aboriginal Deaths in Custody.

ATSIC believes that the present situation in respect of these matters represents a serious derogation by Australia of its obligations under international human rights law. In March of this year the CERD Committee's Concluding Observations on Australia expressed its concerns:

The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared to the general population. Concern is also expressed that the provisions of appropriate interpretation services is not always guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increases its efforts to seek effective measures to address the socio-economic marginalisation, the discriminatory approach to law enforcement, and the lack of diversionary programs²⁰

ATSIC supports this conclusion by CERD.

ATSIC believes that the continuing level of over-representation of Aboriginal and Torres Strait Islander people in police custody and prisons, the lack of concrete action by Australian governments in implementing the recommendations of the Royal Commission, and the implementation of arbitrary, inappropriate and negative policing and sentencing regimes, in particular mandatory sentencing in Western Australia and the Northern Territory, are in significant conflict with Australia's fundamental human rights obligations towards the Indigenous peoples of Australia under a number of provisions of the ICCPR.

²⁰ CERD *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 24/03/2000 CERD/C/56/Misc.42/rev.3, para 15*

Outcome:

ATSIC seeks that all Australian governments at Federal, State and Territory level move to immediate implementation of the recommendations of the Royal Commission and that sentencing and policing regimes be consistent with the findings and recommendations of the Royal Commission.

7. Mandatory Sentencing

Two jurisdictions, Western Australia and the Northern Territory, have introduced mandatory imprisonment for juveniles convicted of certain offences. In relation to adult offenders, Western Australia and the Northern Territory also remain the only jurisdictions with mandatory sentencing regimes which impose imprisonment for a broad range of offences. Whilst there has been a trend for harsher sentencing regimes in all jurisdictions, and “truth in sentencing” legislation and sentencing guidelines, it is Western Australia and the Northern Territory that have remained outside of the general trend of avoiding mandatory sentences of imprisonment.

ATSIC believes that the mandatory sentencing regimes are unjust, harsh and discriminatory in their application. There has been intense controversy within Australia about the impact of mandatory sentencing on Aboriginal and Torres Strait Islander peoples, especially juveniles. These matters were highlighted by the suicide in custody in Darwin in February of this year of a 15 year old Aboriginal boy. The boy concerned was serving a 28 day sentence for an offence concerning petty theft (pens, textas and pencils) and minor damage in his community in a very remote part of the Northern Territory. It is most unlikely that he would have been in detention, several hundred kilometres from his home community, other than for the operation of the Northern Territory mandatory sentencing laws. This case highlighted the tragic futility of these laws, and their particularly harsh impact on the Aboriginal community.

Subsequently, consultations between the Northern Territory Chief Minister and the Prime Minister have led to a number of changes to be introduced in the Northern Territory. The age of juvenile offenders will be raised from 17 to 18. For minor offences police will divert juvenile offenders to special programs. As well, police officers will have a discretion whether to divert juvenile offenders who have committed more serious offences to special programs and need take no further action if the program is successful. The Northern Territory is to receive additional funding for these ‘diversionary programs’.

Whilst such changes represent some modest improvement, they do not address the real problems posed by mandatory sentencing. They do not address mandatory sentencing for adults at all (except to raise the year for being termed an adult by one). They do not affect the Western Australian laws at all. The new regime does not confer any greater discretion on the courts. Rather, vast discretion is vested in police officers.

The Chairman of ATSIC, Mr Geoff Clark, noted in response to the announcement of these changes²¹:

The amendments to the mandatory sentencing legislation in the Northern Territory are minor and do not take account of 18 and 19 year olds who might be caught up in trivial sentences. It is ATSIC's view that there can be no substitute for allowing the judicial system the freedom to ensure that the punishment fits the crime. This means there should always be discretion in sentencing.

We need a thorough review of the system of crime and punishment in the Northern Territory which sees an over-representation of our people in the system while little or no account is taken of customary law.

Research conducted by ATSIC on the impact of mandatory sentencing²² leads to the conclusion that these legislative regimes are unjust, discriminatory and undermine Aboriginal and Torres Strait Islander people's development of localised and effective community-based justice mechanisms. Indigenous juvenile detention has increased in both Western Australia and the Northern Territory (contrary to the national trend for other jurisdictions). Adult imprisonment rates have also increased in Western Australia and the Northern Territory. The highest rate of Indigenous over-representation in Australia for both juveniles and adults is in Western Australia.

There is no doubt that, even though the legislation is on its face non-discriminatory, mandatory sentencing is significantly racially discriminatory in fact. Northern Territory data shows clearly that mandatory sentencing has an overwhelming impact on Aboriginal people rather than non-Aboriginal people. This relates in part to the types of offence included and excluded from the mandatory regimes. For example, the types of property offences, such as fraud, excluded from the mandatory sentencing regimes are precisely the offences where the majority of offenders are non-Indigenous.

Of particular significance is that mandatory sentencing undermines the Royal Commission into Aboriginal Deaths in Custody. It contradicts key findings and recommendations of the Royal Commission. Its impact is negative. It offers no solutions to the problems facing Aboriginal communities in terms of their inter-action with the criminal justice sentence.

In ATSIC's view, mandatory sentencing is directly contrary to Australia's international human rights obligations, including a number of specific articles of the Convention on the Rights of the Child (CROC), the ICCPR and ICERD. Mandatory sentencing contravenes international standards at least in respect of:

²¹ ATSIC media release *PM's Announcement on Mandatory Sentencing* 10 April 2000

²² see ATSIC submission to the Senate Legal and Constitutional References Committee, *Senate Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (supplied to the HRC as Attachment B in March 2000).

- arbitrary detention (ICCPR 9(1); CROC 37(b))
- the best interests of the child shall be a primary consideration (ICCPR 14.4;CROC 3(1))
- detention for children should be a measure of last resort, and proportionate punishment (CROC 37 (b); 40(4))
- discretion in the administration of juvenile justice (*United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”))
- cruel, inhuman or degrading punishment (ICCPR Art 7 and the HRC General Comment on Art 7; CROC 37(a))
- Equality (ICCPR Art 26; CERD 5(a))
- right to enjoyment of a culture (ICCPR Art 27; CROC 30)
- rehabilitative purpose for detention (ICCPR 10.3)

Outcome:

ATSIC seeks the repeal of the mandatory sentencing legislation of Western Australia and the Northern Territory. ATSIC believes this is necessary for Australia to meet its international human rights obligations.

8. Removal of Indigenous Children from Their Families

In its February 1999 report to the CERD Committee, pages 105-107, ATSIC discussed the 1997 report of the Human Rights and Equal Opportunity Commission *Bringing them Home*, and its principal recommendations. ATSIC expressed the view that “[v]arious aspects of the Federal Government’s response to the Report of the “Stolen Generations Inquiry” have been a major disappointment to Indigenous Australians”.

ATSIC regrets to report that that assessment still stands in terms of the component elements of the concept of reparation.

1. Acknowledgement and Apology

The Commonwealth Government continues to withhold any form of apology on behalf of the nation (as distinct from expressions of “regret”). Apologies have been proffered by all State Governments, some local governments, major church groups and other bodies. The Prime Minister’s refusal to say “sorry” attracted national publicity at the recent “Corroboree 2000” Reconciliation event held in Sydney on the third anniversary of the tabling of the *Bringing them Home* report, 27 May.

Indeed, the Minister for Aboriginal and Torres Strait Islander Affairs, in his submission to a current inquiry by a Senate Committee in March 2000, continued the Government's attempts to throw the Report's statistics and other findings into doubt.

2. Guarantees against Repetition

The Genocide Convention has not been incorporated in Australian law.

Indigenous children continue to be removed from their families at disproportionate rates, compared to non-Indigenous children, through the juvenile justice system and the child welfare system. In 1997/98 the percentage of Indigenous children under "care and protection" orders was 15.15% (compared with 3% for non-Indigenous children). In the same period Indigenous children comprised 22% of all juvenile arrests – a 51% increase over the previous year.²³ Indigenous Peoples constitute approximately 2% of Australia's population). The impact of mandatory sentencing legislation will exacerbate the problem.

3. Measures of Restitution and 4. Measures of Rehabilitation

The Commonwealth Government committed itself in 1997 to spending \$63 million over four years to help facilitate family reunion, to assist Indigenous Peoples to cope with the trauma of family separation, and to help build cultural ties. As at 30 June 1999, only about one quarter of the \$63 million had been spent.²⁴

5. Monetary Compensation

No National Compensation Fund has been established, as recommended. Affected Indigenous Australians have to argue their cases through standard court processes against vigorous opposition from the Government. The Government strongly denies any liability for compensation.

By contrast, Canada has expended some \$350 million to date on reparations for Indigenous Peoples affected by removal to residential schools, and many have received lump sum payments

The healing, envisaged by the *Bringing them Home* report, has scarcely begun.

²³ Canberra Journey of Healing Network Submission to the Senate Legal and Constitutional References Committee March 2000, p.9 and Appendix 1.

²⁴ Progress Report on Implementation of Commonwealth Government Response, 31 December 1999.

9. Social and Economic Status

ATSIC set out statistics on key indicators in its February 1999 report to the CERD Committee, pages 107-114. These statistics indicate clearly that, overall, Indigenous Australians are markedly worse off than other Australians on a range of socio-economic indicators. The Royal Commission into Aboriginal Deaths in Custody found clear links between these indicators and the over-representation of Indigenous Australians in the criminal justice system.

A recent report, *Health is Life. Report on the Inquiry into Indigenous Health* by a Parliamentary Committee²⁵ has concluded:

As well as a population which is younger, and growing at a much faster rate than the general population, the data also shows that Indigenous Peoples are the most disadvantaged in the country no matter where they live, particularly with regard to health and well-being.

The report notes that Indigenous Peoples are more likely to be:

- Unemployed or receiving lower incomes
- Less educated
- Imprisoned or in care
- Homeless or living in overcrowded conditions
- Unwell or dying early²⁶

These differences are often marked. For example, Indigenous people die almost 20 years younger than other Australians.

The Committee makes this salient observation:

While it seems reasonable, in terms of equity, to suggest that government support should be available at the same level for all Australians this is a difficult proposition to maintain in the face of this level of disadvantage compared to non-Indigenous Australians.²⁷

²⁵ House of Representatives Standing Committee on Family and Community Affairs, *Health is Life. Report on the Inquiry into Indigenous Health*, Canberra May 2000 p157.

²⁶ At p 159

²⁷ p 159

In other words, special programs and affirmative action are justified to redress the present levels of disparity. The Commonwealth Government has expressed its commitment to addressing needs in these areas as constituting “practical Reconciliation”, and has, for example, launched an Indigenous Employment program as well as a range of other programs and strategies.

The issue is, however, whether, given the major and entrenched inequalities existing in Australia between Indigenous and non-Indigenous people, such programs are adequate in terms of resources, scope, Indigenous participation and self-determination, and commitment and co-ordination on a sustained and long-term basis by all levels of government in Australia, for real and meaningful improvement to be achieved – and at a rate that will benefit present as well as future generations.

ATSIC believes that the level of disadvantage reflects the dispossession and dispersion of Aboriginal communities, the disruption to Indigenous social and economic systems, and a history of discrimination in the provision of public services such as health and housing. The fact that such inequalities continue to exist at alarming levels raises significant concerns about Australia’s international responsibility in responding to the needs of the Indigenous peoples within Australia. ATSIC notes the relevance of ICCPR Articles 2(1), 24 and 26. ATSIC considers that it is appropriate for the Human Rights Committee to take note of the economic and social situation of Indigenous peoples in Australia today.

Outcome:

ATSIC seeks a level of commitment of resources on a national scale, and the development of forward strategies, which are sufficient to provide for the real possibility of substantial progress in addressing the social and economic disparity present in Australia today between Indigenous and non-Indigenous people.

10. Impact of Changes to National Human Rights Institutions

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Human Rights and Equal Opportunity Commission in 1993 to carry out a number of functions with respect to Indigenous people. These functions included reporting annually on the exercise and enjoyment of human rights by Indigenous peoples, and recommending action that should be taken to ensure these rights are observed.

ATSIC’s 1999 report to CERD described a number of changes that the Government was proposing to make to the Commission, pages 127 – 129 including the abolition of the distinct portfolio of Aboriginal and Torres Strait Islander Social Justice Commissioner. This proposal was of major concern as it would mean that there would be no adequately resourced agency specifically responsible for monitoring the human rights of Indigenous peoples.

ATSIC understands that certain changes to HREOC have now been legislated, but that the proposed changes to the structure and roles of the Commissioners, whilst they have passed the lower house, have not yet been introduced into the Senate. Accordingly, this proposal remains a matter of serious concern. ATSIC understands that the Committee will be briefed in more detail on developments in respect of this matter in the submission of HREOC.

11. Conclusions

ATSIC, as the major representative Indigenous organisation in Australia, seeks to bring before the Human Rights Committee its concerns about the situation of Indigenous human rights in Australia.

ATSIC is concerned at the trend in Australia away from the recognition of the rights of Indigenous peoples, and the winding back of rights achieved after many years of struggle, such as native title rights. ATSIC is dismayed that self-determination is no longer recognised by the Australian Government as appropriate in respect of the Aboriginal and Torres Strait Islander peoples of Australia.

ATSIC believes that the discriminatory provisions of the 1998 amendments to the Native Title Act should be repealed forthwith in order to minimise the ongoing loss of rights, and that negotiations be re-opened with Indigenous representatives to find solutions acceptable to the Indigenous peoples and consistent with Australia's international obligations.

ATSIC brings to the attention of the Committee the continuing problems that Indigenous Peoples have in respect of the criminal justice system, in particular mandatory sentencing and the failure to implement the recommendations of the Royal Commission into Deaths in Custody. ATSIC is of the view that in these matters, and particularly in respect of mandatory sentencing in the Northern Territory and Western Australia, Australia is in significant breach of its international obligations under the Covenant and other international instruments.

ATSIC notes the continuing large discrepancies between the welfare and life chances of Indigenous Peoples compared to other Australians. The appalling health and other indicators show a continuing level of poverty and social distress which burdens the lives of Indigenous people. ATSIC believes that this is an unacceptable situation and that much more needs to be done by Australian governments if the disadvantage of Indigenous Peoples is to be adequately addressed and real improvements achieved.

ATSIC requests that the Human Rights Committee:

- identify those areas where it appears, in the Committee's view, that Australia is not meeting its international obligations under the Covenant;
- establish human rights benchmarks for the Australian Government in respect of the Indigenous peoples of Australia;
- provide positive suggestions in order to provide guidance to Australian authorities as to how they might move towards compliance, possibly as part of the Government's National Action Plan for Human Rights; and
- indicate its willingness to enter into constructive dialogue with the Government on such matters.

26 June 2000

Report Authors

This report was prepared by the Indigenous Law Centre (ILC) at the University of New South Wales in consultation with The Aboriginal and Torres Strait Islander Commission.

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