RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER RIGHTS

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In recent years advocacy for the recognition of Aboriginal and Torres Strait Islander rights has been abandoned politically. Nevertheless, the recognition of rights remains a fundamental objective for many Aboriginal and Torres Strait Islanders. Such recognition is integral to the achievement of reconciliation in Australia, as evidenced by its inclusion in the National Strategy in the Roadmap for Reconciliation that was presented to Corroboree 2000:

The full exercise and enjoyment of the human rights of the Aboriginal and Torres Strait Islander peoples is an essential foundation for reconciliation.

This paper draws upon the objectives of one of the four National Strategies in the Roadmap for Reconciliation, 'Recognising Aboriginal and Torres Strait Islander Rights'. It provides an overview of the framework of human rights, relevant to Aboriginal and Torres Strait Islanders rights, that exist internationally and domestically: universal human rights, Indigenous specific rights and domestic legal protections.

INTERNATIONAL HUMAN RIGHTS LAW

Universal rights

Indigenous peoples are the beneficiaries of all human rights listed in international human rights instruments. These rights are known as 'universal rights' because they are the rights that all human beings enjoy by virtue of their humanity and inherent dignity. These universal rights are detailed in the following international human rights instruments:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Rights of the Child (CROC)
- The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

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The right to self-determination

Indigenous peoples assert the fundamental right to self-determination. The right to self-determination is described in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the United Nations Charter:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The United Nations Draft Declaration on the Rights of Indigenous peoples, currently negotiated annually by a Commission on Human Rights inter-sessional Working Group, recognises the Indigenous right to self-determination. Article 3 of the Draft Declaration states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

There are some member states of the United Nations that object to the Indigenous right to self-determination on the basis of territorial integrity and secession. Indigenous peoples repudiate member state concerns about secession, arguing that it wrongly implies that Indigenous peoples relinquished their sovereignty and submitted to colonisation. Indigenous peoples argue that the right to self-determination is a democratic entitlement at international law, and that the denial of self-determination is essentially incompatible with true democracy.

1. **Formal recognition of the right of Aboriginal and Torres Strait Islander peoples to self- determination within the life of the nation.**
2. **Improved political participation of Aboriginal and Torres Strait Islander peoples.**

Objectives: 'Self-determination and political participation', Recognising Aboriginal and Torres Strait Islander Rights—National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights—Roadmap for Reconciliation—Council for Aboriginal Reconciliation (2000) p. 14.

Indigenous collective rights

Indigenous peoples have an inherently communitarian culture that lends itself to collective ownership of the land. Indigenous ownership of the land is not centred on the individual but on the collective.

Collective rights are currently recognised in numerous international human rights law instruments, including:

- The International Covenant on the Elimination of All Forms of Racial Discrimination;

- The International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples, 1989;
- The African Charter on Human and Peoples Rights, 1986;
- The UNESCO Declaration on Race and Racial Prejudice, 1978;
- The UNESCO Declaration on Cultural Diversity, 2001; and
- The Convention on Biological Diversity.

Collective rights of Indigenous peoples were also recognised by the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v Nicaragua.*

Collective rights are recognised in Australian law and other jurisdictions. *The Native Title Act 1993 (Cth)* creates collective rights in the Australian legal system. Section 223(1) defines the expressions 'native title' and 'native title rights and interests' as 'the communal, group or individual rights of Aboriginal peoples and Torres Strait Islanders in relation to lands or waters.'

Of particular interest to Indigenous peoples is Article 27 of the International Covenant on Civil and Political Rights, which states:

> In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee has held that Article 27 of the International Covenant on Civil and Political Rights provides a positive obligation on states to protect Indigenous cultures:

> .... the Committee observes that culture manifests itself in many forms including a particular way of life associated with the use of land resources especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.[1]

In *Lovelace v Canada* the Human Rights Committee found that Sandra Lovelace was denied her right of access with other members of her group to her Indigenous culture and language. Section 12(1)(b) of the Canadian Indian Act empowered the negation of her membership upon marriage to a non-Indian. The Act provided no such negation for an Indian man who married a non-Indian. The Committee found that the Act violated the International Covenant on Civil and Political Rights as it excluded a certain class of Indian women from government controlled recognition of Indian bands. The Committee found that no legal impediments should prevent a member of a minority from

[1] United Nations Human Rights Commission, The Rights of Minorities, 50th session (1994) CCPR General Comment No 23.

associating with any other group. Any legal impediment must have a 'reasonable and objective justification'.

Alternatively, in *Kitok v Sweden* the Human Rights Committee deemed interference with a person's membership as legitimate if it is justified and necessary. In Kitok the Committee held that a restriction placed upon the right of any member of a group must be shown to have a reasonable and objective justification, and be considered necessary for the continued viability and welfare of the group as a whole. The Committee found that in restricting Kitok's rights to reindeer herd, the Act did not violate Article 27 as protected by the ICCPR, as it was a means to ensure the continuation, viability and welfare of the Saami people as a whole.

Non-discrimination and equality before the law

Non-discrimination is a fundamental principle of international law. The principle of non-discrimination is enshrined in the purposes and principles of the United Nations Charter, encouraging states to respect human rights and fundamental freedoms for all 'without distinction as to race, sex, language or religion'.

The principle of non-discrimination underpins the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women, and is also set out in the International Covenant on Economic, Social Cultural Rights. Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as constituting:

> .... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The ICERD in particular is the primary tool for combating racial discrimination in international law. The Committee on the Elimination of Racial Discrimination (CERD) is the supervisory mechanism under which State parties must submit periodic reports on the measures that are taken by them to implement the provisions of the Convention. In the absence of domestic human rights protections it is an important mechanism for the international community to monitor State parties' commitment to obligations arising under the Convention. ICERD provides Indigenous peoples with a benchmark by which they can engage the State and measure their conduct according to internationally agreed minimum standards. This was illustrated in 1998 by Australian Indigenous peoples' submission to CERD alleging, among other complaints, a lack of meaningful consultation by the Australian Government on

amendments to the *Native Title Act 1993 (Cth).* This led to the condemnation by CERD of Australia's amendment to the Act and the suspension of aspects of the *Racial Discrimination Act (RDA).* Importantly, CERD noted the disturbing lack of domestic rights protections in Australia.

Equality before the law is detailed in Article 7 of the *Universal Declaration on Human Rights* and in Article 26 of the *International Covenant on Civil and Political Rights.* The ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides for equality before the law and equal protection of the law to all citizens, as well as prohibiting discrimination under the law.

Resolving non-discrimination and equality before the law

International law moves beyond a conclusion that non-discrimination and equality before the law require the same treatment for all people in all circumstances. It is accepted in international law that the principle of equality:

> .... does not require absolute equality or identity of treatment but recognises relative equality ie different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifiable is on those who make them.[2]

In the International Court of Justice decision in South West Africa Case (Second Phase) Judge Tanaka held that:

> The principle of equality before the law does not mean absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required.

This raises the dichotomy of formal equality and substantive equality. Formal equality is the principle that all people should be treated identically in all circumstances. Substantive equality begins with the premise that all people are not equal, and moves to the conclusion that it is permitted to treat unequally that which is unequal. International law advocates and permits the substantive equality approach because it acknowledges that there are situations where concrete circumstances may necessitate unequal treatment for unequal matters.

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[2] W McKean, Equality and Discrimination under International Law (Oxford: Clarendon Press, 1983), 82.

These circumstances permit distinctions to be made if those distinctions are reasonable and proportionate.

Special measures

The concept that states may take temporary action to correct discrimination can be found in the ICERD which has been incorporated into the Australian legal system through the *Race Discrimination Act 1975 (Cth)*. The underlying principle of special measures is that it is permissible to treat unequally that which is unequal. Therefore special measures permit Aboriginal and Torres Strait Islanders to be treated differently to non-Indigenous Australians on the basis that there is pre-existing inequality between these two groups that requires differentiation of treatment. The argument is that to attain equality in a society, legitimate differentiation of treatment may be warranted.

Recognition of legitimate cultural difference

The preferred option for the recognition of Aboriginal law are measures or actions that legitimately recognise cultural difference, as recognised by Article 1(4) of the ICERD and set out in the RDA (sections 9 and 10). This involves the recognition of Indigenous peoples as distinct peoples entitled to differential treatment by virtue of their cultural difference. This is more substantive than temporary special measures. The distinction is not only significant in law but symbolically would be an enormous step forward in Australian law. In the native title decision of *Western Australia v Commonwealth*, the High Court indicated a favourable approach to substantive equality, though held that there is no ' clear precedent' in Australian law.

1. **Social Justice and equality for Aboriginal and Torres Strait Islander peoples ensuring free and full participation in society.**
2. **Effective implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody and Bringing Them Home reports.**
3. **Increased public understanding of equality and awareness of the meaning and workings of special measures programs.**

Objectives: 'Social Justice and Equity', Recognising Aboriginal and Torres Strait Islander Rights—
National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights—
Roadmap for Reconciliation—Council for Aboriginal Reconciliation. (2000) p.4

Indigenous Peoples and the United Nations

In addition to the supervisory mechanisms of the United Nations human rights treaties, Indigenous peoples may utilise the Indigenous specific

mechanisms at the United Nations: the Working Group on Indigenous Populations (WGIP), a Commission on Human Rights open ended, inter-sessional working group (CHR working group) elaborating a Draft Declaration on the rights of indigenous peoples (Draft Declaration), the Permanent Forum on Indigenous Issues and a Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples.

The Working Group on Indigenous Populations

The WGIP is authorised to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of Indigenous populations, and to give special attention to the evolution of standards concerning the rights of such populations. It is from within the WGIP that the UN Draft Declaration was conceived and drafted.

The Working Group elaborating a United Nations Declaration on the Rights of Indigenous Peoples

The working group has been elaborating a Draft Declaration since 1995. The Draft Declaration identifies a number of Indigenous rights: self-determination, equality and freedom from adverse discrimination (Articles 1–5); life, integrity and security (Articles 6–11); culture, spirituality and linguistic identity (Articles 12–14); education, information and labour rights (Articles 15–18); development and other economic and social rights (Articles 19–24); land and resources (Articles 25–30); and the exercise of self-determination (Articles 31–36). Only two Articles have been provisionally adopted. The working group has been hampered by State objections to the right to self-determination, collective rights, and rights to land and resources.

The United Nations Permanent Forum on Indigenous Issues

The Permanent Forum is an advisory body to the United Nations Economic and Social Council (ECOSOC). The membership of the Forum includes sixteen independent experts, eight of whom are nominated by governments and eight of whom are appointed by the President of the ECOSOC. Members serve the Permanent Form for three years and there is an option for renewal of membership for an additional year. Its primary mandate is to discuss Indigenous peoples' issues and provide expert advice to the United Nations in the area of economic and social development, culture, the environment, education, health and human rights.

The Special Rapporteur for Indigenous issues

The mandate of the Special Rapporteur for Indigenous issues is to collate and exchange information with relevant sources such as governments, Indigenous communities and non-governmental organisations. The Special

Rapporteur formulates proposals and recommendations to the Commission on Human Rights for appropriate measures to take in remedying and improving the status of Indigenous peoples, their freedoms and human rights.

The importance of international human rights law

While the recommendations, decisions and comments of United Nations treaty bodies cannot force states to change domestic law or policy, the provision of international human rights standards by which Indigenous peoples can benchmark their treatment has great value. Equally important is confirmation of the paucity of rights protections in the Australian legal system. As Professor Larissa Behrendt observes of the international human rights system:

> In the absence of rights protection in the constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia.[3]

It is equally important not to forget that international human rights law has been significant to the successful advocacy for Indigenous rights in Australia. Professor Mick Dodson has remarked that:

> .... the Racial Discrimination Act 1975 (Cth), the Land Rights (Northern Territory) Act 1976 (Cth), the High Court's 1992 decision on native title—all of them were firmly grounded in, if not derived from, international law.[4]

The importance of international human rights law in the absence of domestic human rights protections is relevant to reconciliation in Australia. In the National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights, the Council for Aboriginal Reconciliation highlighted that:

> Australia has been an active member of the international community regarding human rights, although it does not have a strong record in the recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples. Those international standards provide a guide in reaching goals of social justice, particularly while Australia does not have a comprehensive human rights framework.

DOMESTIC HUMAN RIGHTS PROTECTIONS

Australia is a party to hundreds of international agreements including international human rights agreements. However, there are relatively few international human rights implemented into domestic law. The International Covenant on the Elimination of All Forms of Racial Discrimination is

[3] Larissa Behrendt, Achieving Social Justice, (1st ed, 2003).

[4] Mick Dodson, 'Linking international standards with contemporary concerns of Aboriginal and Torres Strait Islander peoples' in Sarah Pritchard, *Indigenous Peoples, the United Nations and Human Rights (*1st ed, 1998) 19.

implemented in the *Racial Discrimination Act 1975 (Cth).* The *Sex Discrimination Act 1984 (Cth)* incorporates some of the treaty provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women 1979 into Australian law. The *Disability Discrimination Act 1992 (Cth)* incorporates some provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child into Australian law. The International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is not scheduled to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth);* therefore there is no domestic or international complaints mechanism. The *Crimes (Torture) Act 1988 (Cth)* does, however, incorporate aspects of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are both scheduled to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth).* The Human Rights and Equal Opportunity Commission (HREOC) was established in 1986 consistent with Australia's ratification of the International Covenant on Civil and Political Rights. HREOC has a complaints mechanism that Australian citizens can use to complain, to a limited extent, about violations under the *Racial Discrimination Act 1975 (Cth)*, the *Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth)* and the *Age Discrimination Act 2004 (Cth),* and the two scheduled Acts.

HREOC is empowered to inquire into 'any act or practice that may be inconsistent with or contrary to any human rights'. However, HREOC's processes provide for a remedy that is unenforceable and this has been rightly criticized, for example, as 'an inadequate implementation of the obligations under International Covenant on Civil and Political Rights and Convention on the Rights of the Child'. Nevertheless its role is to investigate and attempt to conciliate on complaints. If HREOC is unable to resolve the complaint then proceedings can be instituted in the Federal Magistrates Court or the Federal Court of Australia.

International complaints mechanisms

In the absence of effective rights implementation, the international individual complaints mechanism is an important avenue for Australian citizens. Australia has ratified the First Optional Protocol to the International Covenant on Civil and Political Rights and it came into force on 25 December 1991. This gives Australian citizens the right to make complaints of violations under the ICCPR to the United Nations Human Rights Committee (HRC). The HRC's role is to investigate and publish their view on individual complaints. For the HRC to consider individual complaints against a State it is necessary

for the complainant to have exhausted all remedies within the domestic legal system.

Article 14 of the *Racial Discrimination Act 1975 (Cth)* allows for individual complaints to the Committee on the Elimination of Racial Discrimination. This came into force in Australia in January 1993. Australian citizens also have access to an individual complaint mechanism under the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment under Article 22 of the Convention. This came into force in January 1993.

Treaty	**Name of Treaty body**	**Entry into force of Treaty**	**Complaint Mechanism**	**Entry into force of complaint mechanism**
International Convention on The Elimination of All Forms of Racial Discrimination	The Committee on the Elimination of All Forms of Racial Discrimination	October 1975	Yes	28 January 1993
International Covenant on Civil and Political Rights	Human Rights Committee	November 1980	Yes	25 December 1991
International Covenant on Economic, Social and Cultural Rights	The Committee on Economic, Social and Cultural rights	March 1976	No	
International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	The Committee against Torture	September 1989	Yes	28 January 1993
Convention on the Rights of the Child	The Committee on the Rights of the Child	January 1991	No	
Convention on the Elimination of All Forms of Discrimination against Women	The Committee on the Elimination of Discrimination against Women	August 1983	Yes	Not in force

Constitutional rights

This section contains the rights of all Australians, protected under the Constitution. Constitutional rights are rights that are fundamental to the Australian constitutional system, and are stronger than legislative rights. Any

legislation that is inconsistent with Constitutional rights is likely to be challenged and struck down by the High Court. There are very few rights that are protected by the Constitution.

Section 41 empowers any adult person who has the right to vote in State elections to vote in Federal elections. In 1983, the High Court held in R v Pearson that this section only entitles those who acquired the right to vote at the time of the enactment of the Commonwealth Franchise Act 1902. Thus, one would have to be 124 years old to have the benefit of this provision.

Section 51 (xxxi) provides that the Commonwealth can only acquire property on just terms.

Section 80 provides that a trial on indictment of any offence against any law of the Commonwealth shall be by jury. Many constitutional lawyers regard this section as worthless in practice because the High Court has severely neutralised its operation. A jury trial may only be provided in circumstances where the Commonwealth determines that the trial is on indictment.

Section 116 denies the Commonwealth parliament power to make laws for establishing any religion, imposing any religious observance or prohibiting the free exercise of any religion, and denies the Commonwealth power to require a religious test for public office.

Section 117 protects residents of one State from discrimination on the basis of residence by another State.

Section 75 (v) provides the right to seek review of government decisions in the High Court in relation to the remedies of a writ of mandamus or prohibition or an injunction.

Implied rights. There are also a number of implied rights. Implied rights are rights that are not expressly given in the Constitution, but rather are inferred or suggested through judicial statutory interpretation. For example, there is the freedom to political communication (a right to discuss issues that relate to the Australian government) and an implied right preventing the Commonwealth from retrospectively determining criminal offences.

Indigenous rights under the Australian Constitution

Indigenous peoples have been unsuccessful in the High Court in relation to rights violations. Section 116 of the Constitution in *Kruger v Commonwealth* (the Stolen Generations case) was raised, where the plaintiffs argued that the Aboriginal Ordinance 1918 (NT) that ordered the removal of Aboriginal children from their families was invalid on a number of grounds. Such grounds included that it prevented the free exercise of Aboriginal religion, and infringed an implied freedom of movement, due process and equality before the law. Kruger discussed the race power of the Constitution: s 51 (xxvi):

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: The people of any race, for whom it is deemed necessary to make special laws.

In this case Justice Gaudron found that the race power might only

authorise laws for the benefit of the people of a race. Justices Gummow and Hayne found that the race power might permit legislation that is detrimental as well as beneficial.

In *Kartinyeri v Commonwealth* (the Hindmarsh Island Bridge case) the race power was again considered. This case dealt with the ongoing controversy over the building of a bridge linking Hindmarsh Island to mainland South Australia. The plaintiffs in this case argued that the power to make laws could only be used for the benefit of a race. One of the arguments supporting this claim was that the 1967 referendum extended the Commonwealth's power to make laws relating to Indigenous peoples, and therefore such Commonwealth power could only be for the benefit of Indigenous people. The following exchange took place between Justice Kirby and the Commonwealth Solicitor-General:

> Justice Kirby: Is it the Commonwealth's submission that it is entirely and exclusively for the parliament to determine the matter upon which special laws are deemed necessary or ... is there a justiciable question for the court? I mean, it seems unthinkable that a law such as a Nazi race law could be enacted under the race power and that this court could do nothing about it.
> Mr Gavan Griffith QC: Your Honour, if there was a reason why they could do something about it, a Nazi law, it would be for a reason external to the races power.

What this exchange illustrated to Indigenous people is that the Commonwealth of Australia was prepared to argue that it is constitutional to enact Nazi style laws against Aboriginal and Torres Strait Islander peoples. It is true from these experiences that Indigenous people have refocused on engaging the legislature. However, the experience of Commonwealth and State legislatures is that Parliament is not the best protector of Indigenous rights.

Australian States and Territories

Australia is a federal system. This means that there exists legislation in the various States and Territories that provide human rights protection for Aboriginal and Torres Strait Islander peoples. Federal systems are contemplated by international law. For example, Article 50 of the ICCPR states that in federal structures, the Commonwealth must ensure all members of the federation respect the covenant. The Australian Capital Territory is the only Territory with a Bill of Rights in Australia. No States have a Bill of Rights despite numerous attempts and enquiries in most States. The ACT Bill of Rights is referred to as the *Human Rights Act 2004 (ACT).*

1. **Formal legal recognition of the status and rights of Aboriginal and Torres Strait Islander peoples.**
2. **The design of a legislative framework for identifying and negotiating outstanding issues in the recognition of the rights of Aboriginal and Torres Strait Islander peoples.**
3. **Development of a legislated Bill of Rights that guarantees the rights of all Australian citizens and protects the rights of Aboriginal and Torres Strait Islander peoples.**
4. **Constitutional changes that provide protection against discrimination in the Australian Constitution.**

Objectives: 'Constitutional and legislative implementation', Recognising Aboriginal and Torres Strait Islander Rights—National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights— Roadmap for Reconciliation—Council for Aboriginal Reconciliation. (2000) p.17

CONCLUSION

This paper has provided a brief overview of rights protection internationally and domestically. It is intended to provide a backdrop for discussion around the relevance of the recognition of Aboriginal and Torres Strait Islanders' rights to reconciliation.

It is clear that human rights protection in Australia is limited. Indigenous Australians, for example, experienced the consequences of ineffective protection of basic rights when the Commonwealth suspended the operation of the *Racial Discrimination Act 1975 (Cth)* to facilitate its amendment of the *Native Title Act 1993 (Cth)*. The international system, in particular the CERD complaint mechanism, enabled Indigenous Australians to express their concerns about Australia's actions. While the actual CERD decision invited objections concerning State sovereignty, the existence of an international human rights system was valuable for Indigenous peoples in a number of ways.

Firstly, it drew international attention to the Commonwealth's actions. This is always important because of the ambivalence and hostility toward Indigenous peoples' issues in Australia. It confirmed that the government's actions in suspending the RDA and the failure to consult with Indigenous peoples were a breach of Australia's obligations under international law. That lack of consultation was again reflected in the decision to abolish the Aboriginal and Torres Strait Islander Commission.

Secondly, it illustrated the paucity of protections for Indigenous peoples in Australia. While almost all liberal democracies including the UK now recognise that parliamentary sovereignty must be legitimately tempered by legislated or constitutional bills of rights, the Australian system still maintains an archaic faith in parliament as the best protector of human rights.

The experience of Aboriginal and Torres Strait Islanders in Australia refutes that proposition, and Indigenous Australia remains the perennial footnote to Australia's claim that it has an excellent human rights record. This is why the recognition of the rights of Aboriginal and Torres Strait Islanders continues to be an integral part of the way forward for reconciliation in Australia.