

9 Human rights and Indigenous Australians

One of the most contentious and frequently discussed topics throughout the Consultation was the rights of Australian's Indigenous peoples. There was widespread acknowledgment that the experiences of Aboriginal and Torres Strait Islander peoples are 'generally less favourable' than those of other Australians.¹ There was less agreement, however, about the types of strategies that are needed to respond to disadvantage and whether the situation justifies the invoking of specific 'Indigenous-only' rights. This chapter discusses the merits of the main options for reform, as put forward in the submissions, the community roundtables, the phone survey and the focus groups.

9.1 What are 'Indigenous rights'?

There is in the international community continuing philosophical debate about the nature and source of human rights.² Human rights are the 'rights of humans'. If human rights are universal—that is, rights we all have in common because we are all part of humanity—can some human rights be exclusively enjoyed only by a subset of humanity?

The tensions and complexities in balancing the universal rights of humankind against the legitimate concerns of minorities are highlighted in the case of many of the world's indigenous peoples. On 13 September 2007 the UN General Assembly tried to resolve some of these difficulties when it adopted the UN Declaration on the Rights of Indigenous Peoples (2007). While not legally binding on States parties, the instrument affirms that indigenous peoples are equal to all other peoples, while at the same time recognising the distinct rights of indigenous peoples. The declaration seeks to protect individual and collective rights; cultural rights and identity; and rights to education, health, employment and language. It prohibits discrimination and promotes the full and effective participation of indigenous peoples in all matters that concern them. Additionally, it ensures the right of indigenous peoples

¹ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

² See Chapter 3.

to remain distinct and to pursue their own priorities in economic, social and cultural development.³

At the time of adoption of the declaration a number of countries expressed concern that a balance between the competing interests had not been achieved. Four States—Australia, Canada, New Zealand and the United States, all of whom have sizeable indigenous populations—voted against the declaration. Eleven states abstained and 34 states were absent from the vote.⁴

After the change of government in late 2007 Australia formally announced its support for the declaration in April 2009. The National Human Rights Consultation revealed, however, that the debate about distinctive Indigenous rights is far from settled in the Australian community.

In the context of Indigenous Australians, the rights discussed by many Consultation participants related to the enjoyment of general ‘citizenship’ rights (or general rights that are afforded to all) by Aboriginal and Torres Strait Islander people. ‘Amelia’ posted the following blog on the Australian Youth Forum website: ‘Many [A]boriginal people are living in very poor conditions, and are robbed of basic human rights because ... [the] family they have been brought into has lost their culture, morals and pride’.⁵ In another blog, ‘Nathan’ maintained that Indigenous Australians should be treated the same way as all other Australians:

Aboriginal people are in no way inferior to anyone else and should be able to function in today’s society. Of course you should offer them assistance finding jobs, getting education, but they should be made equal to any other citizen, regardless of race.⁶

In contrast, other consultation participants spoke of the collective rights Indigenous Australians should have because they are the traditional owners of the land and waters: ‘Of course, they are the original inhabitants of Australia, they have a special status’.⁷ The Close the Gap Steering Committee referred to earlier comments made by former Social Justice Commissioner and Australian of the Year Professor Mick Dodson:

It is because Indigenous rights encompass both categories [citizenship rights and distinct Indigenous rights] that a comprehensive recognition of Indigenous rights

³ UN High Commissioner for Human Rights, ‘High Commissioner for Human Rights hails adoption of Declaration on Indigenous Rights’ (Press release, 13 September 2007).

⁴ In all, 143 States voted in favour of the Resolution.

⁵ Australian Youth Forum, Submission.

⁶ *ibid.*

⁷ Hobart participant cited in Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

requires a balancing act; holding in one hand the principle of equality or equity, and in the other the principle of difference.⁸

Universal human rights and Indigenous Australians

Many of the rights numerous participants in the Consultation’s community roundtables felt the rights that are not fully enjoyed by Aboriginal and Torres Strait Islander peoples fall into the category of economic, social and cultural rights—for example, the substandard housing⁹; the poor educational outcomes of students attending schools in Indigenous communities¹⁰; the inferior quality, supply and price of groceries¹¹; the high mortality rates¹²; and the limited physical access to health care facilities and treatment. David Cooper has made the point that ‘it is also important to understand that amongst these issues are some of the significant contributors to the discrimination and injustice faced by Indigenous people today. So getting this right is also a fundamental issue of justice’.¹³ As long as the poor social indicators outlined in the Close the Gap Steering Committee’s submission—such as poor life expectancy, unemployment, homelessness, family violence and imprisonment—exist, the chasm of disadvantage will remain.

These views are consistent with the general sentiments of many Consultation participants who said economic, social and cultural rights should be protected just as much as the civil and political rights of all Australians (as discussed in Chapter 4). The interrelatedness and indivisibility of these rights is particularly relevant to Aboriginal and Torres Strait Islander people:

Whether they are expressed as civil and political rights or economic, cultural and social rights, the fundamental notion underpinning human rights is that they are derived from the inherent dignity of every human person. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.¹⁴

The Centre for Human Rights Education submitted, ‘Introducing human rights legislation which focuses on civil and political rights and excludes economic, social and cultural rights is unlikely to contribute to significant improvements in the day-to-day lives of Indigenous Australians’.¹⁵ The Committee sees merit in this argument, but it also acknowledges that there is among jurists and legal scholars debate about whether economic, social and cultural rights are justiciable. The Committee

⁸ M Dodson, ‘The unique nature of the Australian Indigenous experience’ (1996) 9 *Without Prejudice* 3, cited in Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission.

⁹ Alice Springs, Community Roundtable; Yirrkala, Community Roundtable.

¹⁰ Palm Island, Community Roundtable.

¹¹ *ibid.*

¹² Bourke, Community Roundtable.

¹³ D Cooper, “Close the Gap” to the Rudd Government’s “Closing the Gap on Indigenous disadvantage”, cited in Australians for Native Title and Reconciliation NSW, Submission.

¹⁴ Law Council of Australia, Submission.

¹⁵ Centre for Human Rights Education, Submission.

also notes that the complexities of implementing legislative protections for these rights precluded the Victorian Parliament and the ACT Legislative Assembly from including them in their human rights legislation.

Nonetheless, a number of submissions argued that fundamental civil and political rights, such as the right to a fair trial, are not fully protected and enjoyed by Indigenous people in Australia and that a contributing factor to the over-representation of Indigenous people in the criminal justice system is the lack of ‘accredited professional-level interpreter[s] for Indigenous people who do not speak English as a first language’.¹⁶ Sir Harry Gibbs, former Chief Justice of the High Court of Australia, once said, ‘Justice can be done only if the evidence and arguments are fully and clearly understood by all concerned’.¹⁷ Aboriginal Resource and Development Services submitted that, even outside the court room, the lack of interpreter assistance can exacerbate disadvantage by inhibiting access to essential government services and programs such as Centrelink and Medicare. Aboriginal and Torres Strait Islander Legal Services reported that in remote areas ‘one in five [Indigenous people] experience difficulty in understanding or being understood by service providers’.¹⁸

Indigenous-specific rights

The Declaration on the Rights of Indigenous Peoples recognises a number of rights that are exclusively enjoyed by the world’s indigenous peoples. Arguably these distinctive rights should be enjoyed by indigenous peoples because of their unique status as the traditional owners of land, their relationship with the land and waterways, and their vulnerability to losing their traditional customs, knowledge and language.¹⁹ At the community roundtables Indigenous participants spoke about the importance these rights have for the maintenance of their culture and their physical and spiritual survival: ‘[Living on the homelands] it’s where we belong ... that is why we are strong, it gives us strength’.²⁰ They also saw that protection of their intellectual property rights was integral to their cultural rights and fundamental to the government’s focus on Indigenous economic development activities:



Yarrabah sign

¹⁶ Aboriginal Resource and Development Services, Submission.

¹⁷ Sir Harry Gibbs, Sydney Law Society, ‘Legal interpreting: a fair go for migrants’ (1988) *Law Society Journal* 56.

¹⁸ Aboriginal and Torres Strait Islander Legal Services, Submission.

¹⁹ Mallesons Stephen Jacques Human Rights Law Group, Submission.

²⁰ Yirrkala, Community Roundtable.

Scientists have re-discovered a species they thought was extinct ... only because of the traditional people who showed them ... And the scientist goes back and writes it all up and gets credit from it, but he would never have known all that but for the traditional owner showing him. The traditional owners lose their rights, they don't even get a mention ... Aboriginal people and knowledge aren't recognised and valued in any way. There isn't any payment, no recognised award that pays traditional owners for their knowledge and time.²¹

The New Matilda Bill, a model human rights Act submitted by the Human Rights Act for Australia Campaign, recognises not only collective and individual rights of Aboriginal and Torres Strait Islander people in relation to their culture and traditions but also the right to 'live in freedom, peace and security and to full guarantees against genocide or any other act of violence'.²² Although protection from violence is not a right that should exclusively apply to Indigenous Australians, a number of submissions highlighted the particularly high incidence of family violence and sexual assault in which Indigenous women and children are victims. The Wirringa Baiya Aboriginal Women's Legal Centre described the severity of many of its cases as being so great that this 'domestic violence ... is best described as torture'.²³

Colmar Brunton Social Research's work reveals that Consultation participants are concerned about different rights being granted to different minority groups in Australia at the risk of 'the majority' being marginalised.²⁴ For example, 'If you are white and born in Australia you are discriminated [against]' and 'The majority groups are missing out'.²⁵ This supports the notion that human rights are universal and applicable to all simply because we are all human²⁶; any specific rights for minority groups can be viewed as either a superior class of rights or evidence that a hierarchy of rights exists. Many participants felt they suffered a form of reverse discrimination and resented the additional benefits Indigenous Australians were said to have received.²⁷ Similar views were expressed by some young Australians who contributed their opinions through the Australian Youth Forum website:

Tragically Australia maintains separate law for Aboriginal groups, including land rights and exemption from many laws ... The segregation of Australian society needs to end. Self-governance needs to be discontinued and land rights, at the very least, limited.²⁸

²¹ Coober Pedy, Community Roundtable.

²² Human Rights Act for Australian Campaign (New Matilda), Submission.

²³ Wirringa Baiya Aboriginal Women's Legal Centre, Submission.

²⁴ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Australian Youth Forum, Submission.

Some focus group and survey participants felt that Aboriginal and Torres Strait Islander people had too many rights, giving them ‘more than a fair go’.²⁹ While there ‘was some recognition that Indigenous Australians are a special case’³⁰, it was a common view that the same set of rights should apply to everyone and the difference ‘should be in the expression of rights, rather than different rights’.³¹ To achieve this there might be a need to tailor general ‘citizenship’ rights (which are applicable to all), applying them in a way that attempts to improve the protection of human rights for Aboriginal and Torres Strait Islander peoples. In *Kruger v Commonwealth*³² the High Court considered the constitutional validity of removing Indigenous children from their families under the Northern Territory’s *Aboriginals Ordinance 1918*. The plaintiffs, who were members of the Stolen Generations, unsuccessfully argued that this was in breach of their constitutional rights. This case highlights the weaknesses in the protection of certain rights within the existing Australian human rights framework.³³

9.2 Options for achieving social equality

Consultation participants, especially participants in the survey and the focus groups, were divided on the protection of particular human rights for Indigenous Australians. The Colmar Brunton report suggests that it was recognised as a difficult area, unlikely to be resolved without considerable effort on both sides.³⁴ In spite of the legal complexities surrounding the protection of specific rights, the rights and responsibilities of Indigenous Australians must not be overlooked. Human rights do not exist in a legal vacuum; rather, as Simon Evans suggested in his submission, they should be protected by a suite of mechanisms.³⁵ Earlier chapters in this report outline the political, economic and cultural structures within our national human rights framework. In Chapter 6 the Committee stresses the need to introduce comprehensive cultural change in each of these structures in order to protect and promote human rights and responsibilities for Australians.

Any attempt to achieve social equality by ‘closing the gap’ of Indigenous disadvantage and protecting the basic human rights of Aboriginal and Torres Strait Islander peoples must include a range of well-directed initiatives across the

²⁹ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

³⁰ *ibid.*

³¹ *ibid.*

³² (1997) 190 CLR 1.

³³ L Behrendt, *The 1967 Referendum: 40 years on ...* (2007) <http://www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153_LarissaBehrendt.pdf> at 23 September 2009.

³⁴ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

³⁵ S Evans, Submission.

structures of our national human rights framework. The Queensland Public Interest Legal Clearing House submitted that there is a need for:

... ‘a national human rights campaign’, comprising of legislation, education and other measures, [which] should acknowledge the atrocities of the past, provide better legislative protection of the human rights of Indigenous Australians and ... provide another mechanism to redirect the Australian government’s relationship with the Indigenous people of Australia.³⁶

For this to be workable, a balance must be struck between achieving a degree of rights reform that responds to the legitimate concerns of Indigenous Australians in an environment that is often hostile to perceptions of so-called preferential treatment and separatism.

Recognition of Indigenous-specific rights in legal instruments

Throughout the Consultation—especially at those community roundtables with a large number of Indigenous participants—there was a clear expression of the specific Indigenous rights that needed further protection. People were, however, less forthcoming about the detail of how these rights should be protected. The Committee received a number of submissions, from both Indigenous and non-Indigenous people, recommending the recognition of Indigenous-specific rights in various legal instruments. Some recommended that ‘a treaty and/or treaties between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians’³⁷ be entered into; others preferred a Human Rights Act with Aboriginal and Torres Strait Islander peoples recognised in a preamble and a separate part providing for the protection of specific Indigenous rights relating to land, language, culture and self-determination.³⁸

The New South Wales Reconciliation Council submitted that the rights recognised in the Declaration on the Rights of Indigenous Peoples should be protected and promoted in a federal Human Rights Act. Although acknowledging the legally non-binding status of the declaration, the Mallesons Stephen Jacques Human Rights Law Group submitted that the declaration nevertheless plays an important role in the development of customary international law. For these reasons, it was argued, such declarations ‘should be considered for implementation domestically in a Human Rights Act’.³⁹

³⁶ Queensland Public Interest Law Clearing House, Submission.

³⁷ Australians for Native Title and Reconciliation NSW, Submission.

³⁸ Wirringa Baiya Aboriginal Women’s Legal Centre, Submission.

³⁹ Mallesons Stephen Jacques Human Rights Law Group, Submission.

Another preferred option for reform was enshrining Indigenous-specific rights—including the ‘recognition as first peoples of the land and water’⁴⁰—in the Constitution or a treaty. A participant at the Yirrkala community roundtable said, ‘There is nothing in the Constitution; the basic human rights of Aboriginal people have never been recognised’.⁴¹ There was concern that ‘What the government gives you today by statutory right, they will quite quickly take away tomorrow. Very rarely [are the Acts] amended upwards’.⁴² In Broome Patrick Dodson remarked to Committee members:

It is hard to be enthusiastic about the outcome of this Inquiry ... Do we keep amending and repealing Acts or do we need an overhaul of the entire Constitutional framework? Why do we constantly abrogate to Parliament and judges for our rights? Until there is an overhaul of the Constitution, it will be an injustice for Indigenous Australians ... [because] we are at the mercy of Parliament.⁴³

The Committee’s findings

The Committee accepts that, as traditional owners, Aboriginal and Torres Strait Islander peoples collectively have a unique relationship with the land and waters and are vulnerable to losing their traditional customs, knowledge and language. A strengthening of the existing Australian human rights framework so that it adequately protects certain rights could contribute to improved social and economic outcomes for Indigenous peoples. In a 2008 report Access Economics and Reconciliation Australia found there were ‘sizable economy wide benefits to be achieved from improving the quality of life of Indigenous Australians’.⁴⁴ The Allen Consulting Group, while not specifically doing a cost–benefit analysis of this option, found that, of the options it reviewed, statutory human rights protection would have the greatest potential for protecting human rights (see Appendix D).

The Consultation terms of reference require the Committee to consider, among other things, the level of community support for each option. Despite over 35 000 written submissions being received and the thousands of people who participated in the community roundtables, Indigenous Australians did not put forward a significant number of recommendations about which specific Indigenous rights should be recognised and within what type of legal instrument. Colmar Brunton reported that participants in the survey and focus groups were cautious, if not resentful, about

⁴⁰ Australians for Native Title and Reconciliation NSW, Submission.

⁴¹ Yirrkala, Community Roundtable.

⁴² Coober Pedy, Community Roundtable.

⁴³ Meeting held in Broome, Western Australia, June 2009.

⁴⁴ Access Economics & Reconciliation Australia, *An Overview of the Economic Impact of Indigenous Disadvantage* (2008), cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

Indigenous-specific rights, offering only minimal support for their recognition in a legal instrument such as a Human Rights Act.⁴⁵

In view of the lack of support from the broader Australian community for different rights for different people, and the limited response from the Indigenous community on this point, the Committee is unable to recommend that specific Indigenous rights be recognised in a Human Rights Act, treaty or other legal instrument.⁴⁶ This proposal could, however, be used as a basis for further consultation with the Indigenous community.

Limiting parliament’s ability to pass legislation to the detriment of Indigenous people

During the community roundtables the Northern Territory Emergency Response (the ‘Intervention’) was the most cited instance of the impact of government policy and legislative decisions on the day-to-day lives of Indigenous Australians. The Northern Territory Emergency Response Review Board reported that it had been ‘made abundantly clear’ to it ‘that people in Aboriginal communities felt humiliated and shamed by the imposition of measures that marked them out as less worthy of the legislative protections afforded other Australians’.⁴⁷ This was consistent with anecdotes provided to the Committee: ‘It is demeaning to elders when they use the basics card. Shop assistants have been known to make fun of Yolngu people, giggling when they use the basics card’.⁴⁸ It was also said that the signs erected on the borders of Indigenous communities declaring they are a ‘prescribed area’ and subject to the Intervention ‘label every member of that community a “paedophile” or “pornographer” or “alcoholic”’.⁴⁹



Santa Teresa community roundtable participants

Ninety per cent of the participants in the Colmar Brunton survey and focus groups supported the view that parliament needs to pay attention to human rights when making laws.⁵⁰ Despite participants’ varying views in relation to Indigenous people,

⁴⁵ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

⁴⁶ It should be noted that, in any event, constitutional protection of Indigenous rights would be precluded by the Committee’s terms of reference.

⁴⁷ NTER Review Board, *Report of the NTER Review Board* (2008), cited in Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

⁴⁸ Yirrkala, Community Roundtable.

⁴⁹ Tennant Creek, Community Roundtable.

⁵⁰ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

they nonetheless felt this cohort of the Australian population had generally been subject to inadequate service delivery. These views correlated with those expressed by Aboriginal and Torres Strait Islander people—particularly those who lived in remote locations, where many felt they were passive bystanders and excluded from the decision-making process: ‘Everyone talks about our dysfunction but no one is telling me how to function’⁵¹ and ‘If it is not done by the government, nothing happens. People are taught to depend on government, so they do ... You need to change policies and you need to let Indigenous people take responsibility’.⁵²

On the online forum ‘lucyv’, a social worker in the Northern Territory, submitted that the income management system had not been properly explained to the members of her community. She was in favour of ‘proper consultation with Indigenous people about laws affecting their own lives’. The Gilbert + Tobin Centre of Public Law submission on Indigenous legal matters stated that the Intervention reforms would have been far more effective if there had been proper consultation with Indigenous communities.⁵³

The limitations of the *Racial Discrimination Act 1975* (Cth) and the need to guarantee racial equality were matters of concern for many Consultation participants. For example, it was recommended that the Act be unconditionally reinstated and strengthened with dire urgency⁵⁴, and Aboriginal and Torres Strait Islander Legal Services submitted that the Act should be entrenched in the Constitution:

The RDA [Racial Discrimination Act] does not constitute a genuine guarantee of equal treatment for Australian citizens, on the basis of race. It is submitted that the only effective remedy is that the RDA be entrenched such that its essential principles cannot be interfered with by subsequent legislation of the Australian Parliament ... The RDA should be entrenched as a constitutional amendment to prevent it being subjected to implied or express repeal by the Australian Parliament whenever the Parliament sees fit.⁵⁵

Australians for Native Title and Reconciliation NSW recommended the removal of ‘the racially-discriminatory section 25 of the *Constitution*’⁵⁶, while others sought to replace it ‘with a racial equality clause’.⁵⁷ It was proposed by a number of participants at community roundtables and in written submissions that s. 51(xxvi) of

⁵¹ Palm Island, Community Roundtable.

⁵² *ibid.*

⁵³ Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

⁵⁴ University of Western Australia Boatshed Roundtable, Submission.

⁵⁵ Aboriginal and Torres Strait Islander Legal Services, Submission.

⁵⁶ Australians for Native Title and Reconciliation NSW, Submission. Section 25 of the Constitution provides that ‘if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted’.

⁵⁷ University of Western Australia Boatshed Roundtable, Submission.

the Constitution be amended so that parliament's power to pass legislation with respect to people of any race for whom it is deemed necessary to make special laws cannot be used to the detriment of Aboriginal and Torres Strait Islander peoples.⁵⁸ It should be noted that the subject of constitutional protection of Indigenous rights is not part of the Committee's terms of reference.

Proponents of the protection of racial equality—whether it be through a Human Rights Act, an amendment to s. 51(xxvi) of the Constitution or constitutional entrenchment of the principle of non-discrimination—argue that this would help redress the disparity of Indigenous disadvantage. There is, however, a legitimate view that the extent of disadvantage suffered by many Indigenous Australians is such that future reform might not occur in the absence of invoking the 'race power' under the Constitution. This is not to suggest that racial discrimination should not be prohibited. The Gilbert + Tobin Centre of Public Law made the point that 'this is not a simple issue. The truth is that Australia needs ... either the races power or a power to make laws regarding Indigenous peoples for the federal government to make progress in many areas of reform'.⁵⁹

In the High Court decision in *Gerhardy v Brown*⁶⁰ Justice Brennan set down a test for stipulating when a law applying only to people of a particular race (as authorised by s. 51(xxvi) of the Constitution) could be classed as a special measure. He stressed that the primary purpose of the special measure must be the advancement of the beneficiaries:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.⁶¹

This test is problematic in that it raises practical difficulties in connection with degrees of consent. In the case of the Intervention, the Committee heard compelling but conflicting opinions from Indigenous people who are directly affected by the legislation. Professor Helen Irving noted that the Intervention 'may have adverse effects for some and beneficial effects for others. It may be adverse in the immediate term and beneficial in the long term (or vice versa)'.⁶²

⁵⁸ For example, Australians for Native Title and Reconciliation NSW, Submission. Section 51(xxvi) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

⁵⁹ Gilbert + Tobin Centre of Public Law (S Brennan); Submission.

⁶⁰ (1985) 159 CLR 70.

⁶¹ (1985) 159 CLR 70.

⁶² H Irving, Submission.

How do we determine when consent is deemed to have been given if the beneficiaries have valid and opposing views? It would be an unfair expectation if a people, such as Indigenous Australians, were expected to reach consensus every time a controversial policy decision or controversial legislation was being contemplated. And to do so could cause unreasonable delay at a time when government action is most required. This challenge illustrates the tension that exists, in many areas of human rights protection, when seeking to achieve an equitable balance between rights and responsibilities.

The Committee's findings

The Committee sees merit in parliament enacting a law or at least a Standing Order providing that, if a Bill or a provision contained in a Bill relates to Aboriginal and Torres Strait Islander peoples and is inconsistent with the *Racial Discrimination Act 1975* or can be classed as a special measure, there must be tabled in parliament a statement of impact stipulating the reasons for the suspension of the Act or the institution of the special measure. The statement of impact would need to discuss the following:

- the purpose or object of the measure
- the reasonableness and proportionality of the purpose or object to the proposed act or omission
- the amount of time until the purpose or object is achieved
- whether there has been consent or at least adequate consultation with interested parties and potential beneficiaries in relation to the proposed measure.

Such a provision or Standing Order could ensure a 'proper, sophisticated human rights analysis ... of competing rights and considerations'.⁶³ Although the procedure would not affect the validity of a law and would not prevent future discriminatory laws being passed, it would arguably 'deter scandalously abbreviated parliamentary processes, or inadequate policy development, or shoddy implementation that lacks basic respect for human dignity'.⁶⁴ The cost of implementing this option would be low when one considers the benefits it could have for the rights of Aboriginal and Torres Strait Islander peoples. In addition, the Committee notes the significant support expressed during the Consultation for the general proposition 'Parliament needs to pay attention to human rights when making laws'.⁶⁵

⁶³ Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

⁶⁴ *ibid.*

⁶⁵ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

Recognition of the right to self-determination

Although the concept of self-determination was often discussed in submissions and raised during community roundtables, there was no consistent definition for the term. Participants' opinions varied in relation to the content of such a right and how it could be realised. Some equated the right with Indigenous sovereignty⁶⁶ and thought of it as an inherent birthright⁶⁷; some identified it as a crucial ingredient in redressing disadvantage⁶⁸; yet others viewed it in terms of strategies for increasing Indigenous peoples' participation in the mainstream political process.⁶⁹

The Declaration on the Rights of Indigenous Peoples provides as follows:

Article 3

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.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Some argue that the right to self-determination includes the rights to autonomy or self-government; distinct political, legal, economic, social and cultural institutions; and control of education, languages and media.⁷⁰

The Indigenous Law Centre offered a different perspective on the scope and limitation of the right. It argued, 'There is misinformation about what the right to self-determination means and how it is implemented'.⁷¹ It pointed out that the right of Aboriginal and Torres Strait Islander peoples to self-determination means their right to democratically determine their political destiny.⁷² It was also suggested that the right could be realised and protected by the creation of a representative body that liaises between Indigenous communities and the Federal Government.⁷³

The UN General Assembly has stated that the right to self-determination does not permit action that threatens the territorial integrity of the State.⁷⁴ This position is confirmed in the Declaration on the Rights of Indigenous Peoples, which states that

⁶⁶ Australians for Native Title and Reconciliation VIC, Submission.

⁶⁷ Thursday Island, Community Roundtable.

⁶⁸ Victorian Aboriginal Child Care Agency, Submission.

⁶⁹ Palm Island, Community Roundtable.

⁷⁰ Foundation of Aboriginal and Islander Research Action, Submission.

⁷¹ Indigenous Law Centre, Submission.

⁷² *ibid.*

⁷³ For example, *ibid.*

⁷⁴ For example, UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, (1960).

the right ‘does not permit any action which threatens the territorial integrity of a State Party’⁷⁵ and is ‘subject to such limitations as are determined by law and in accordance with international human rights obligations’⁷⁶:

Thus in contemporary international human rights law the right to self-determination is about procedure and process. Fundamentally for Aboriginal and Torres Strait Islander communities it is about consultation and being consulted on the decisions that affect their lives as individuals and communities.⁷⁷

The Committee’s findings

The Committee notes the results of the Colmar Brunton survey and focus group sessions. Some participants, demonstrating a limited understanding of the concept of self-determination, were opposed to the idea—particularly if it resulted in parallel communities.⁷⁸ This correlates with the differing perspectives Indigenous people themselves have in relation to the scope of this right. The most appropriate interpretation of the right is that Aboriginal and Torres Strait Islander peoples ought to be free to determine their internal and local affairs but in such a way as not to ‘dismember or impair, totally or in part, the territorial integrity’ of Australia and subject to those limits necessary for ‘securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society’.⁷⁹ This interpretation is consistent with the position of the Federal Government, which ‘does not support an interpretation of self determination that has the potential to undermine Australia’s territorial integrity or political sovereignty’.⁸⁰ The Committee finds it is possible for the right of Aboriginal and Torres Strait Islander peoples to self-determination to be meaningfully expressed subject to workable limitations. A number of low-cost but moderate-impact initiatives could enable the government to adhere to the right to self-determination. Two examples are:

- requiring a statement of impact on Aboriginal and Torres Strait Islander persons to be prepared when intending to legislate exclusively for them, having ensured that there has been consent or at least full consultation with interested parties and potential beneficiaries (as discussed)
- developing and implementing, in partnership with local Indigenous communities, a framework for self-determination outlining consultation protocols, roles and

⁷⁵ Mallesons Stephen Jacques Human Rights Law Group, Submission, referring to the UN Declaration on the Rights of Indigenous Peoples (2007), art. 46(1).

⁷⁶ Indigenous Law Centre, Submission, referring to the UN Declaration on the Rights of Indigenous Peoples (2007), art. 46(2).

⁷⁷ Indigenous Law Centre, Submission.

⁷⁸ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

⁷⁹ UN Declaration on the Rights of Indigenous Peoples (2007), art. 46.1, 46.2.

⁸⁰ *Australia—core document forming part of the reports of States Parties* (2007), 45.

responsibilities, so that Indigenous people have meaningful control over their affairs, and strategies for increasing Indigenous people’s participation in the institutions of democratic government.

Statutory acknowledgment of Indigenous Australians’ cultural rights and historical status

Among Indigenous people there was considerable support for legislative recognition of Aboriginal and Torres Strait Islander peoples as Australia’s original inhabitants. The National Native Title Council submitted that this acknowledgment was essential. Additionally, it could be practical if the acknowledgment included a statutory definition of ‘Aboriginal and Torres Strait Islander peoples’. For example, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) primarily provides for the incorporation and regulation of Aboriginal and Torres Strait Islander corporations or organisations, yet ‘there is little statutory guidance provided in the ... Act on the requirements a person must satisfy in order to be considered an Aboriginal [or] Torres Strait Islander person’.⁸¹

The Committee’s findings

The Committee notes the importance of maintaining a balance between achieving some of the desired outcomes expressed during the Consultation and at the same time adhering to the sentiments of the majority of survey and focus group participants—that differences should be in the mode of enjoyment of the same rights, rather than the enjoyment of differing rights.⁸² A cost–benefit analysis of this particular reform option was not done by The Allen Consulting Group, but it did find that statutory mechanisms offer significant potential for human rights protection (see Appendix D). The period of implementation would need to allow sufficient time for consultation with representatives of Aboriginal and Torres Strait Islander communities, the Attorney-General’s Department and the Office of the Parliamentary Counsel in relation to the proposed wording of the provisions. In the Committee’s view, this proposal could be used as a basis for further consultation with the Indigenous community.

Statutory definition of Aboriginal and Torres Strait Islander people

The Committee finds there would be practical benefits in having a statutory definition of Aboriginal and Torres Strait Islander peoples. A definition the Federal Government might consider is the test outlined by Justice Deane in the High Court decision in *Commonwealth v Tasmania*⁸³:

⁸¹ Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, *Policy Statement 11: the indigeneity requirement* (2008).

⁸² Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

⁸³ (1983) 158 CLR 1.

- ‘Aboriginal and Torres Strait Islander’ means a person who—
 - is of Aboriginal and/or Torres Strait Islander descent
 - identifies himself or herself as being Aboriginal and/or Torres Strait Islander descent
 and
 - the community recognises the person as an Aboriginal and/or Torres Strait Islander person.

The test has since been adopted by the government and is commonly endorsed by the Indigenous community.

An important feature of this definition is that it should allay concerns on the part of members of the Torres Strait Islander community that their status as Indigenous Australians is often overlooked and therefore not duly recognised.

Recognition of cultural matters

There would be both symbolic value and practical benefit in the Federal Parliament affording statutory acknowledgment of Aboriginal and Torres Strait Islander peoples as the ‘original inhabitants of Australia prior to European settlement’, as well as the customs and traditions some Aboriginal and Torres Strait Islander people might still observe. The Federal Parliament could acknowledge the following cultural principles:

- Although distinct and culturally diverse, Aboriginal and Torres Strait Islander peoples are recognised as the Indigenous peoples of Australia.
- Aboriginal and Torres Strait Islander peoples, in accordance with their customs and traditions, may—
 - possess specialised knowledge, skills, expertise and language
 - hold a unique and special relationship with their traditional lands and waters and other moveable objects—including human skeletal remains and tissue material—of religious and cultural significance.
- In accordance with customs and traditions, Aboriginal and Torres Strait Islander family and kinship structures may include individuals who would not otherwise be defined as an immediate family member—whether or not the individuals are biologically related.

In recent years state, territory and federal parliaments in Australia have evinced a willingness to recognise certain aspects of Aboriginal and Torres Strait Islander traditions, practices and customs. For example, the New South Wales Parliament has passed the *Succession Amendment (Intestacy) Act 2009*, which recognises that

in the absence of a will an Indigenous person might be ‘entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged’.⁸⁴ Proposed cultural principles might not constitute ‘rights’ conferred automatically on Indigenous Australians but could provide assistance to courts, tribunals and the executive in the following three important areas.

- *Assistance in the statutory interpretation of Commonwealth legislation.* Courts’ use of cultural principles as a statutory interpretation tool is consistent with the view of 69 per cent of the participants in the Colmar Brunton survey and focus groups, who agreed that ‘courts should interpret parliamentary laws in a way that they feel most respects human rights’ and not ‘exactly as they are worded’.⁸⁵ For example, the *Sex Discrimination Act 1984* (Cth) makes it unlawful to discriminate on the grounds of family responsibility. Another section, however, restricts the definition of ‘family responsibilities’ to either a dependent child or any other immediate family member who is in need of care or support. The term ‘immediate family member’ is further restricted by another subsection to mean a spouse or an adult child, parent, grandparent, grandchild or sibling. This notion of ‘family’ has an exclusionary effect for some Aboriginal and Torres Strait Islander people because it is too narrow to allow contemplation of the broader kinship system and extended family relationships.

Additionally, to preserve the sovereignty of the Federal Parliament, these principles should be applied to interpretation of a statute only so far as it is possible to do so consistently with the statute’s purpose or underlying object and the interpretation does not lead to a manifestly absurd or unreasonable result. The Committee notes that there could be occasions when the Federal Parliament seeks to exclude the consideration of cultural principles (or particular cultural matters) from the interpretation of a statutory provision. For example, parliament might consider it inappropriate for courts to consider aspects of Indigenous cultural practices when interpreting the *Marriage Act 1961* (Cth) or the *Crimes Act 1914* (Cth), which expressly exclude customary law from being taken into account when sentencing Indigenous offenders.⁸⁶

- *Additional factors to be considered in the merit review of reviewable decisions of a Commonwealth agency or body.*

⁸⁴ *Succession Amendment (Intestacy) Act 2009* (NSW) s. 133(1).

⁸⁵ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

⁸⁶ The *Crimes Act 1914* (Cth) s. 16A provides that the court must not take into account customary law or cultural practice as a reason for: ‘(a) Excusing, justifying, authorizing, requiring or lessening the seriousness of the criminal behavior to which the offence relates; or (b) Aggravating the seriousness of the criminal behavior to which the offence relates’.

- Assistance to the executive when developing and implementing policy to consider the impact that policy could have on certain aspects of Aboriginal and Torres Strait Islander culture.

The public service has an important role in the protection of human rights: it is through public servants' delivery of government programs and services that many Australians enjoy particular civil, political, economic, social and cultural rights. In the focus group sessions facilitated by Colmar Brunton 'Indigenous Australians' were commonly cited as an example of a group for whom service delivery was perceived to be inadequate.⁸⁷ Merit review by an administrative decisions tribunal is therefore a central component of Australia's existing human rights framework. The cultural principles could provide guidance for tribunals considering relevant information when reviewing a decision involving an Aboriginal or Torres Strait Islander person. This approach is consistent with the established principle that tribunals 'are not fettered by the need to apply the rules of evidence and procedure'⁸⁸ and have some flexibility when considering what matters are relevant in decision making.

Inclusion of Indigenous people in the development and delivery of a national human rights education and awareness campaign

In Chapter 6 the Committee recommends the implementation of a national human rights education plan. In connection with Indigenous Australians, it is recommended that Aboriginal and Torres Strait Islander people be involved in the development and delivery of this plan. Both Indigenous and non-Indigenous participants in the Consultation stressed the importance of incorporating the experiences of Aboriginal and Torres Strait Islander peoples in the content of such a plan—with a particular focus on recent history. A participant in the Busselton community roundtable highlighted the importance of this history being shared:

I grew up in an imaginary Australia and I was fed a myth ... You didn't see Aboriginal people at my school. I only saw them at my church and saw them playing sport at the mission. I didn't realise that the babies were separated from their siblings. It's hard to know how to connect to them ... It's not an intentional misleading of a myth just an absence of contact, friendly contact—we didn't get to listen to each other's stories.⁸⁹

⁸⁷ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

⁸⁸ Council of Australasian Tribunals, *Practice Manual for Tribunals* (2009). See 5.6.1, 'Inapplicability of the rules of evidence and procedure'.

⁸⁹ Busselton, Community Roundtable.

The Committee's findings

It is important that an education and awareness campaign incorporates the experiences of Aboriginal and Torres Strait Islander peoples—with a particular focus on contemporary historical examples of human rights successes and failures. The time frame for implementing the national education and awareness campaign would need to allow for the development of this content. In addition to the costs and risks identified in Chapter 6, there would be research and consultancy costs associated with the inclusion of Indigenous people in the development and delivery of the plan. This proposal could be used as a basis for further consultation with the Indigenous community.

Improving the methods used for collecting data from Indigenous peoples

The census is a problem for us. It doesn't count people properly. The consequence of the census not being reflective is that the community gets a small percentage of funding.⁹⁰

Consultation participants told the Committee about the human rights consequences inaccurate data can have for 'planning, policy development, service delivery and allocation of funding'⁹¹ to deal with Indigenous disadvantage. Examples of how the data collection can be inaccurate are the assumption that the Indigenous respondent is a proficient speaker or reader of the English language⁹², population statistics not recognising the natural migration or movement patterns of local residents within a greater regional area⁹³, and the reluctance of older Indigenous people to have their details recorded by the government as a result of past government practices—for example, memories of living 'under the Act' on government-controlled mission reserves and settlements. A collective submission from about 40 prominent researchers recommended that the involvement of Indigenous people in all stages of the design and data-collection processes would be an important strategy for mitigating the risk of inaccuracies.⁹⁴

The Committee's finding

The Committee notes the value of the Federal Government's collection of data from Indigenous peoples within an Indigenous framework. The Allen Consulting Group did not do a cost-benefit analysis of a model for improving the collection of data from Indigenous people, but it can be said that significant resources would be required in order to develop and apply an agreed research framework across government. This

⁹⁰ Coober Pedy, Community Roundtable.

⁹¹ University of Western Australia Boatshed Roundtable, Submission.

⁹² Coober Pedy, Community Roundtable.

⁹³ Tennant Creek, Community Roundtable.

⁹⁴ University of Western Australia Boatshed Roundtable, Submission.

proposal could be used as a basis for further consultation with the Indigenous community.

Improving Indigenous peoples' access to accredited interpreters

At common law there is no automatic right to an interpreter.⁹⁵ Section 30 of the *Evidence Act 1995* (Cth) appears to confer the right to an interpreter, but this right can be challenged on the basis that 'the witness can understand and speak the English language sufficiently'. It is then generally in the hands of the judge, who might not be adept at assessing language skills, to determine whether a person before the court meets the criteria for excluding the right to an interpreter. Even if a court grants a witness the right to an interpreter, this right can be exercised only if there is available an accredited interpreter who is fluent in the person's language. To be qualified as an interpreter that person must be accredited by the National Accreditation Authority for Translators and Interpreters. The submission from Aboriginal Resource and Development Services referred the Committee to the findings of other important reports—including those of the Royal Commission into Aboriginal Deaths in Custody, which found a need for the government to 'take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts'.⁹⁶

The Committee's findings

The Committee notes the concern of Consultation participants who raised the question of improving Aboriginal and Torres Strait Islander people's access to accredited interpreters.⁹⁷ Although The Allen Consulting Group did not do a cost-benefit analysis of appropriate interpreting models, the Committee is aware of the considerable resources that would be required in order to develop a comprehensive nationally accredited interpreting service for Aboriginal and Torres Strait Islander people who are not proficient in English. The time frame for implementation would need to allow sufficient time for:

- developing a process for identifying Indigenous languages currently spoken and their speakers
- reviewing the recruitment and accreditation framework for speakers of Indigenous languages for which there are insufficient accredited interpreters available

⁹⁵ *Dairy Farmers Co-Operative Co. Ltd. v Acquilina* (1963) 109 CLR 458.

⁹⁶ *Royal Commission into Aboriginal Deaths in Custody: final report* (1991), recommendation 100.

⁹⁷ Aboriginal Resource and Development Services, Submission; Aboriginal and Torres Strait Islander Legal Services, Submission.

- auditing the existing strategies and resources available for assisting Indigenous clients of essential government services who have difficulty communicating with representatives of the Federal Government because they do not speak or understand English well.

The Committee also notes that the question of Indigenous Australians' access to accredited interpreting services was not often raised by Consultation participants. Nevertheless, the foregoing proposal could be used as a basis for further consultation with the Indigenous community.

Recommendations

Recommendation 15

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

Recommendation 16

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

