



## **NSW Aboriginal Land Council**

**Discussion Paper**

**Preparatory Meeting for Pacific Indigenous Peoples on the  
World Conference on Indigenous Peoples 2014**

**Sydney, Australia**

## 1. Introduction

This discussion paper has been prepared by the NSW Aboriginal Land Council ('**NSWALC**') for the Pacific Indigenous Peoples preparatory meeting held between 19 and 21 March 2013, in preparation for the World Conference on Indigenous Peoples. This report identifies some of the key issues currently faced by Indigenous peoples in Australia and references some of the key recommendations from international fora that relate to these issues.

NSWALC has held 'special consultative-status' with the United Nations Economic and Social Council ('**ECOSOC**') since 1998 for the purpose of being able to consult with subsidiary bodies of the United Nations ('**UN**'). The status identifies NSWALC as a body with special competence in relation to some of the fields of activity covered by the ECOSOC. This has allowed NSWALC to contribute to the work of the UN Permanent Forum on Indigenous Issues ('**UNPFII**') and the Expert Mechanism on the Rights of Indigenous Peoples' ('**EMRIP**') and other UN reporting bodies. In the past NSWALC has participated in Expert Group meetings and other high-level plenary sessions under the ECOSOC.

As a preliminary point, NSWALC notes the Australian Government's belated support for the UN Declaration on the Rights of Indigenous Peoples in 2009 ('the **Declaration**'). The Declaration demonstrates best practice and outlines significant principles and international norms concerning the rights of Indigenous peoples. International obligations contain stronger provisions for the right of Indigenous people to self-management, with an obligation for 'free, prior and informed consent', which is not reflected in Australian laws.

As a developed country and an influential member of the Asia-Pacific community, Australia has the potential to provide leadership in relation to the protection and promotion of human rights. This leadership potential is limited by policies and laws which fail to protect economic, social and cultural rights that continue to disproportionately affect Aboriginal and Torres Strait Islander peoples.

## 2. About NSWALC

The Commonwealth of Australia is a federation comprising six states and two territories. The State of New South Wales ('**NSW**') has the highest Aboriginal population of any Australian State or Territory. The Aboriginal population in NSW is served by a two-tiered network of membership-based, democratically operated and non-governmental Aboriginal Land Councils, established by the *Aboriginal Land Rights Act 1983 (NSW)*.

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia.

Under this two-tiered Aboriginal-controlled system, 120 autonomous Local Aboriginal Land Councils ('**LALCs**') serve their local communities and have a legislated responsibility to protect and foster the best interests of Aboriginal peoples in their boundary area; while NSWALC as the peak representative body in NSW has a legislated responsibility 'to improve, protect and foster the best interests of Aboriginal persons within New South Wales'.<sup>1</sup>

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<sup>1</sup> *Aboriginal Land Rights Act 1983 (NSW)*, s105 (a)

NSWALC was initially established by Aboriginal peoples in the late 1970's in a campaign to assist in the struggle for Aboriginal land rights in NSW, and was formally constituted as a statutory corporation following a Parliamentary Committee which led to the NSW Government agreeing to establish land rights legislation in 1983.

Under the *Aboriginal Land Rights Act 1983 (NSW)*:

- A three-tiered system of elected Aboriginal Land Councils was designed to maximise decision-making at the local, regional and state levels (which has since been changed to a two-tiered system),
- Newly established Land Councils were enabled to make claims to Crown land not lawfully used or occupied or required for an 'essential public purpose', and to purchase private land on the open market, and
- Funding was provided for the new Land Council system in the amount of 7.5 per cent of land tax revenue collected each year for the next 15 years that followed the passing of land rights legislation.

In continuation of that struggle, and in implementing our legislative responsibilities, NSWALC advocates and works for:

- The return of culturally significant and economically viable land to Aboriginal peoples,
- Self determination and independence for Aboriginal peoples on cultural, social and economic matters, and
- Government policy and action to address the issues that affect Aboriginal peoples.

The structure of NSWALC and the Aboriginal Land Rights Network provides for a strong representative base that operates independently from government funding and control. As a democratically elected body, NSWALC is supportive of Indigenous representative bodies which provide a platform for Indigenous peoples to self-determine their economic, social and cultural development and priorities, through engagement with other peak organisations nationally and internationally.

### **3. State's duty to consult with Aboriginal and Torres Strait Islander Peoples**

#### **Article 19 of the Declaration states:**

*"Consultation with indigenous peoples is to be carried out in good faith.. in order to obtain the free, prior and informed consent of indigenous peoples."*<sup>2</sup>

The duty of States to effectively consult with Indigenous peoples is also grounded in the core human rights treaties of the United Nations, including the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.

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<sup>2</sup> James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), [36].

Indigenous peoples have long suffered from historic injustices, principally as a result of colonisation and the dispossession of their traditional lands. This has prevented many Indigenous peoples from exercising, in particular, their right to development in accordance with their own needs and interests.<sup>3</sup> The obligation of States to effectively consult with Indigenous peoples on decisions that affect them is ‘firmly rooted in international human rights law’.<sup>4</sup>

The duty of States to consult with Indigenous peoples and its various normative components are premised on widespread acknowledgment, as manifested in the Declaration, of Indigenous peoples’ distinctive characteristics and the need for special measures to address their disadvantaged conditions.<sup>5</sup>

Article 5 of the Declaration enshrines the right of Indigenous people to self-determination and representation through their own distinct institutions<sup>6</sup>. Financial independence for Indigenous institutions needs to be secured to ensure Aboriginal and Torres Strait Islander peoples have a free and distinct voice.

The Australian Government’s obligation to consult with Indigenous peoples is enshrined in a number of international instruments including the Declaration and the ILO Convention 169, among others. More importantly in the context of evaluating the measures of the government’s ‘Closing the Gap’ strategy and the Stronger Futures initiative, state compliance to consult is essential to avoid potentially detrimental outcomes in fulfilling human rights obligations.<sup>7</sup>

Policy failure will continue to occur if there is limited or no direct involvement of Indigenous people in decision- making processes. An essential precondition for any Government measures that affect Aboriginal and Torres Strait Islander peoples is that they are designed and implemented on the basis of prior consultation with, and participation of affected communities.

#### 4. Implementation of the Declaration on the Rights of Indigenous Peoples

**UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples<sup>8</sup> calls for specific state action recommending:**

*“State action required to operationalise the rights affirmed in the Declaration requires legal and policy reform, institutional action and reparations for past wrongs.”*

<sup>3</sup> See, generally, Department of Economic and Social Affairs Division for Social Policy Development Secretariat of the Permanent Forum on Indigenous Issues, *UN Report on the State of the World’s Indigenous Peoples (2009)*, UN Doc ST/ESA/328, available at [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf).

<sup>4</sup> Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, UN Doc A/HRC/12/34 (15 July 2009) [38] <<http://www2.ohchr.org/english/issues/indigenous/indigenous/rapporteur/annualreports.htm> (Duty to Consult).

<sup>5</sup> Ibid.

<sup>6</sup> Article 5, UNDRIP

<sup>7</sup> Ibid.

<sup>8</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/149/40/PDF/G0814940.pdf?OpenElement>

The Declaration facilitates the application of general standards which have the capacity to transform the domestic conditions of States where Indigenous peoples are concerned, through a process which promotes good practices, participation in decision-making, non-discrimination and equality. While welcoming the Government's support for the Declaration, it is disappointingly noted that there still remains no comprehensive plan of action or a strategy for implementing the Declaration as a whole. In addition, there remains no plan regarding how the Commonwealth Government intends to work with the State and Territory Governments to implement the Declaration.

The Australian Government endorsed the Declaration in 2009, however in doing so expressed the view that the document was 'aspirational' rather than pragmatic non-binding instrument designed for the achievement of inter-societal reconciliation. The Government's current 'support' for the Declaration is inadequate and action is now required to fully operationalise the Declaration to enable some of the rights (not already attained through customary international law) set out in the Declaration to have immediate and enhanced Domestic legal effect.

The Declaration bears testament to the commitment to international standards on human rights and is a practical measure to ensure that Australia's rhetorical commitment to international human rights standards translates to practical implementation within the national setting. For Australia:

It was the clear intention of all States that it be an aspirational Declaration with political and moral force, but not legal force. The text contained recommendations regarding how States could promote the welfare of Indigenous peoples, but was not in itself legally binding or reflective of international law.<sup>9</sup>

Irrespective of the unwillingness on the part of states to fully implement into laws and practices the fundamental rights of Indigenous peoples, the Australian Government must take immediate steps to fulfil its obligations to protect and promote the rights of Aboriginal and Torres Strait Islander peoples through incorporation of the Declaration as a core human rights instrument as part of its National Human Rights Framework.

The passing of the fifth anniversary of the Declaration fell in 2012, and 2014 will mark the end of Second International Decade of the World's Indigenous peoples. Although continuous monitoring of the Australian Government's implementation of the Declaration within domestic legislation is necessary, it would be appropriate to consider the actions and commitment of the current Australian Government in addressing the issues faced by Indigenous peoples particularly at the end of the Second International Decade of the World's Indigenous peoples.

## 5. Australia's International Obligations

### **Human Rights Council Concluding Observation (2009)<sup>10</sup>:**

*"Australia should establish a mechanism to consistently ensure compatibility of domestic law with international covenants including the International Covenant on Economic, Social and Cultural Rights."*

<sup>9</sup> Allen S (2011) 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project'

<sup>10</sup> Reference 2009 report

There remains no overarching and comprehensive protection of human rights in Australian law. Australia does not have a Bill of rights enshrined in the Australian Constitution and there is limited human rights protection provided in domestic legislation.

In 2009, an independent review commissioned by the Australian Government found that Australia's legal and institutional protection of human rights is inadequate, particularly for marginalised and disadvantaged communities. Decisions of the Australian Government including its decision not to incorporate specific international instruments such as the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**') into domestic law exemplifies the limited legal protection of human rights in Australia.

NSWALC supports the rights, aspirations and interests of Aboriginal peoples' consistent with the standards set out in the Universal Declaration on Human Rights ('**UDHR**'), International Covenant on Civil and Political Rights ('**ICCPR**') as well as the ICESCR. Central to the Declaration is Article 3, which affirms that 'Indigenous peoples have the right of self-determination.' In addition, the Declaration establishes the right of Indigenous peoples to maintain and develop their own institutions, and underlines the right of Indigenous peoples to participate fully in the political, economic, social and cultural life of the State (Article 5).

Given that the focus of the World Conference on Indigenous Peoples will be to consider how States have performed against the implementation of the specific recommendations made by treaty bodies over the last decade most notably those made by the UN Human Rights Committee and its subsidiary bodies including the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples ('**EMRIP**') and UN Permanent Forum on Indigenous Issues ('**UNPFII**'), Australia must ensure more than a rhetorical commitment to Indigenous rights, incorporating them into the national legal framework and provide substantive assurance to practical human rights outcomes.

Furthermore, despite being party to seven of the core human rights treaties,<sup>11</sup> Australia has not fully implemented these treaties into its domestic law, leaving Australia with a less than comprehensive legal framework for the protection of human rights. The domestic implementation of Australia's commitment to international law should be seen as a key component of the Government's desired renewal of Australia's relationship with the United Nations and its human rights institutions. In publicly articulated terms, the Government's commitment to date includes re-engagement with United Nations human rights institutions<sup>12</sup> and adopting other formal United Nations human rights mechanisms.<sup>13</sup>

Of specific relevance to Indigenous peoples it is important for Australia to ratify the following:

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<sup>11</sup> Australia is a party to the International Covenant on Civil and Political Rights (**ICCPR**), International Covenant on Economic, Social and Cultural Rights (**ICESCR**), International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), Convention on the Rights of the Child (**CRC**), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) and Convention on the Rights of Persons with Disabilities (**CRPD**).

<sup>12</sup> Kevin Rudd, 'Australia's Engagement in Improving Global Human Rights' (Speech delivered to the Australian Government NGO Forum on Human Rights, Parliament House, Canberra, 22 June 2011) <[http://www.foreignminister.gov.au/speeches/2011/kr\\_sp\\_110622.html](http://www.foreignminister.gov.au/speeches/2011/kr_sp_110622.html)>

<sup>13</sup> These activities include ratifying the CRPD and acceding to the Optional Protocol to the CRPD; acceding to the Optional Protocol to the *CEDAW* and signing the Optional Protocol to the *CAT*

- the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment (OP-CAT)*;
- *International Labour Organisation Convention No. 169 (ILO Convention No. 169)*; and
- the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)*.

There continues to be significant gaps in the protection of human rights in Australia and mechanisms are not in place to allow access to effective remedies and for participation of Indigenous peoples in decision-making affecting them.

## 6. National Human Rights Framework – Current situation

**UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples has stated that the partnership between the Australian Government and Aboriginal and Torres Strait Islander Peoples should be:**

*“based on respect, mutual resolve and mutual responsibility, and that is also fully respectful of the rights of Aboriginal and Torres Strait Islander peoples to maintain their distinct cultural identities, languages and connections with traditional lands, and to be in control of their own destinies under conditions of equality.”*

In its current form, the National Human Rights Action Plan under the Federal Government’s ‘Human Rights Framework’ (**‘National Framework’**) - a result of the recommendations accepted during the UPR review in 2011<sup>14</sup>) includes some steps towards Australia’s improved compliance with international human rights standards. However the Action Plan places significant emphasis on existing Government programs, policies and commitments and does not focus on new initiatives.

For any human rights action plan to be meaningful, there must be a clear strategy that will be carried out to further advance the implementation of human rights (that includes the integration of all previous recommendations made by treaty body mechanisms) into Australia’s national laws.<sup>15</sup>

In 2008, the Australian Government appointed an independent committee to conduct a National Human Rights Consultation on Australia’s protection and promotion of human rights. The consultations found that Australia’s democratic and legal institutions do not provide adequate protection of human rights; human rights are not enjoyed fully or equally by all Australian’s; and that there was strong public support for enhanced legal and institutional protection of rights.<sup>16</sup>

In response to the committee’s report, the Australian Government developed the National Framework. The Government nevertheless did not pursue the Committee’s key recommendation - to implement a national Human Rights Act. Rather the Framework’s key focus is on improved education and parliamentary engagement with human rights.

<sup>14</sup> A/HRC/17/10, 24 March 2011.

<sup>15</sup> Concluding observations recently coming out of treaty bodies: The Committee of the Elimination of Racial Discrimination (CERD, 2010); the Committee of the Elimination of All Forms of Discrimination Against Women (CEDAW, 2010); the Committee on the Economic Social and Cultural Rights (CESCR, 2009); the Human Rights Committee (HRC, 2009), the Committee against Torture (CAT, 2008) and the Committee on the Rights of the Child (CRC, 2005).

<sup>16</sup> The National Human Rights Consultation Committee recommended that Australia adopt a Human Rights Act: <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

Since the implementation of the Framework, Australia has been reviewed by a number of UN human rights mechanisms, many of which are directly relevant to Australia's obligations related to Indigenous peoples, including the following UN treaty bodies:

- The committee on Civil and Political Rights in 2012;
- The Committee on the Rights of the Child in 2012;
- The Committee on the Elimination of Racial Discrimination in 2010;
- The Committee on the Elimination of Discrimination against Women in 2010; and
- The Committee on Economic, Social and Cultural Rights in 2009.

In this same period the Australian Government has:

- Established a Joint Standing Committee on human rights;
- Pursued the consolidation of Commonwealth anti-discrimination laws;
- Agreed to enhancing support for human rights education including primary school and the public sector; and
- Committed to Constitutional recognition for Aboriginal and Torres Strait Islander peoples.<sup>17</sup>

While the Framework sets out future action for the protection of human rights, key concerns and relevant recommendations made by previous treaty bodies including that critical areas which continue to affect Indigenous peoples are not adequately identified, and have not been acknowledged. The Action Plan should address the implementation of the UN Declaration on the Rights of Indigenous People in domestic law.

Furthermore, the Framework also commits to broader promotion and protection of human rights in the Asia-Pacific region as a primary goal of engagement with the region, despite not having a comprehensive policy on human rights in the Asia-Pacific.

## 7. The Universal Periodic Review

### **Universal Periodic Review (2011) recommendation<sup>18</sup>:**

*"Australia should develop a detailed framework to implement and raise awareness about the UN Declaration on the Rights of Indigenous Peoples in consultation with Indigenous peoples."*

In January 2011 Australia was reviewed by the UN Human Rights Council and appeared before the tenth session of the Universal Periodic Review ('UPR'). The UPR, established by the United Nations' Human Rights Council in 2006, requires that the human rights record of each of the 192 countries belonging to the UN be reviewed once every four years. Key recommendations in respect to improved outcomes for Indigenous peoples, and commitments made during the UPR process have yet to be adopted into Australia's national legal framework.

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<sup>17</sup> Attorney General Report (2011) 'Australia's Universal Periodic Review – National Report'.

<http://www.ag.gov.au/RightsAndProtections/HumanRights/UniversalPeriodicReview/Pages/default.aspx>

<sup>18</sup> Also see Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia, 77<sup>th</sup> session (2010).



Implementation of some of the UPR recommendations is required for Australia to meet its obligations under international law including recommendations relating to reforms to Australia's constitutional and legislative framework including public policies and programs for the full implementation of the Declaration.<sup>19</sup>

Australia's human rights record has also been subject to country-specific-reports more recently by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples. The failure by the Australian Government to respect and implement decisions of the UN's human rights treaty bodies as independent expert bodies including the Committee against Torture and the Committee on the Elimination of Racial Discrimination is testament to Australia's approach to Indigenous rights.

#### **8. Constitutional and legal framework - Federal Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**

##### **UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples recommended to the General Assembly:**

*The Government should pursue constitutional.. recognition and protection of rights of Aboriginal and Torres Strait Islander peoples in a manner providing long term security for their rights.*<sup>20</sup>

##### **United Nations Periodic Review (2011) recommendation:**

- *Introduce constitutional protection of the rights of Indigenous peoples*
- *Recognise Indigenous peoples as First Nations Peoples in the Constitution*

While taking account of the Government's commitment to recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution, along with the recent consolidation of anti-discrimination laws, there remains an absence of any entrenched protection against racial discrimination at the Federal level. In fact, the Australian Constitution expressly provides the Government with discriminatory power to make laws with respect to "*the people of any race for whom it is deemed necessary to make special laws*".<sup>21</sup>

In 2010 the Australian Government made a commitment to hold a referendum to consider recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. In 2012,

<sup>19</sup> See recommendations at paragraphs 86.104 France; 86.105 Colombia; 86.106 Bolivia, Ghana; Hungary, Denmark; 86.107 Guatemala; 86.26 Slovenia; 86.25 Canada; 86.92 Bolivia; 86.93 Austria; 86.102 United Kingdom; 86.110 Bosnia and Herzegovina; 86.112 Indonesia; 86.113 Austria; 86.114 France; 86.115 Singapore; 86.116 Thailand; 86.117 Jordan; 86.118 Belgium; 86.97 Slovenia; 86.101 Malaysia; 86.103 Slovenia; 86.108 Bolivia

<sup>20</sup> Human Rights Council, 4 March 2010, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, The situation of indigenous peoples in Australia*, Un Doc A/HRC/15/ 4 March 2010. Available:

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>

<sup>21</sup> S51 (xxvi) 'Commonwealth of Australia Constitution Act (1901).

the Australian Government received the final report by the Expert Panel on Constitutional Reform,<sup>22</sup> recommending changes should be made so that:

- Discriminatory aspects be repealed,
- A recognition of Aboriginal and Torres Strait Islander culture be inserted, and
- All racial elements be removed.

In 2012 falling well short of its commitment to Constitutional reform, the Government tabled the 'Aboriginal and Torres Strait Islander Peoples Recognition Bill' in the Australian Parliament. The legislation is proposed as an interim step towards substantive reform to recognise Aboriginal and Torres Strait Islander peoples. This *Act of Recognition* provides an opportunity for the Australian Parliament to show its support and commitment to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Government must remain committed to Constitutional recognition of Aboriginal and Torres Strait Islander peoples and must seek to remove the discriminatory aspects of the Constitution at minimum including at the minimum provide a continued commitment to full constitutional recognition of Aboriginal and Torres Strait Islander peoples; removal of discriminatory aspects including s51(xxvi) and s25; and insert a general guarantee of racial equality.

To ensure these much needed reforms are successfully passed in the public referendum, investment is required in education campaigns specifically targeting areas with lower rates of appreciation of the need for constitutional reform.

#### **9. National Apology and reconciliation – ICCPR (Article 4)<sup>23</sup>**

##### **UN Human Rights Committee (2009) Concluding Observations<sup>24</sup>:**

*The State party should adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies.*

In 2009, the UN Human Rights Committee in its Concluding Observations of Australia's compliance with the ICCPR raised a number of issues and concerns including the need to make adequate reparations to the generations of Aboriginal and Torres Strait Islander peoples separated from their families and their culture as a result of discriminatory and damaging policies of past Governments; know as the Stolen Generations. The UN Committee has previously urged Australia to establish a national compensation scheme. However, despite this recommendation and the existence of inadequate schemes in some states, a National scheme has not been established.<sup>25</sup>

<sup>22</sup> In 2012 a consultation process was undertaken by an Expert Panel consisting of Aboriginal and Torres Strait Islander leaders and other community and political leaders.

<sup>23</sup> ICCPR Article 4 – Freedom from slavery, servitude and forced labour

<sup>24</sup> UN Human Rights Committee (2009), *Concluding Observations*, 95th session\_ UN Doc CCPR/C/AUS/CO/5.

<sup>25</sup> Human Rights Committee (2009) Concluding Observations of the Human Rights Committee on Australia. <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.

Since the *Bringing Them Home Report* which made 54 recommendations, the Government has implemented a number of responses to the recommendations, including the National Apology at both the Federal and State levels. Despite these responses, many recommendations are still yet to be implemented including measures of restitution, rehabilitation and compensation.<sup>26</sup> Monetary compensation which is in accordance with the ‘van Boven principles’ mandated under international law, offers individuals of the Stolen Generations a tangible form of recognition of their suffering which is conducive to the process of reconciliation.

In failing to provide a non-adversarial alternative through which the Stolen Generations can seek compensation, the Australian Government is implicitly not complying with the spirit and practice of reconciliation that the Government espoused in the national apology delivered by the Prime Minister in 2008.

Furthermore, the Australian Government’s overarching Indigenous affairs suite of policies (*Closing the Gap*) is not an adequate response to the demands of justice and reconciliation that the Stolen Generations require. The substitution of a reparations approach aimed at addressing the specific and unique harms suffered by Aboriginal and Torres Strait Islander peoples wrongfully separated from their families requires that, as a matter of restorative justice, a national compensations scheme is implemented as recognised by the *Bringing Them Home Report* and by international law.<sup>27</sup>

#### **10. Anti-Discrimination and Equality – Continuation of the ‘Northern Territory Emergency Response’ measures**

##### **UN Human Rights Committee (2009) Concluding Observations<sup>28</sup>:**

*The State party should redesign NTER measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1975 and the Covenant.*

##### **UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples in the 2010 Human Rights Council report recommended to:**

*Reinstate the Racial Discrimination Act 1975 (Cth) and enact appropriate reforms to the Northern Territory Emergency Response in light of all of Australia’s international human rights obligations*

##### **The UN Committee on the Elimination of Racial Discrimination in the 77<sup>th</sup> session, August 2010 recommended that Australia:**

*Ensure that all Northern Territory Emergency Response special measure comply with human rights obligations.*

In his 2009 country report, the Special Rapporteur condemned the Intervention stating that the provisions are incompatible with Australia’s human rights obligation:

<sup>26</sup> HREOC Submission on the Inquiry into the Stolen Generation Compensation Bill (2008)

[http://humanrights.gov.au/legal/submissions/2008/080409\\_compensation.html](http://humanrights.gov.au/legal/submissions/2008/080409_compensation.html)

<sup>27</sup> Buti, A (2008) ‘Reparations, Justice and Theories and Stolen Generations’ *University of Western Australia Law Review*.

<sup>28</sup> United Nations, Human Rights Committee, 95<sup>th</sup> Session, Concluding Observations, CCPR/C/AUS/CO/5, available online at:

*The NTER...has an overtly interventionist architecture, with measures that undermine Indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy.*

Despite some steps being taken by the Australian Government, including the reinstatement of the operation of the *Racial Discrimination Act 1975* (Cth) and an enhanced effort to engage with affected communities, the extension and expansion of the Northern Territory Emergency Response under the Stronger Futures legislation, as well as the nature of the measures themselves, continue to raise serious concerns with Australia's international human rights obligations.

In June 2012, the Australian Parliament passed the suite of Stronger Futures legislation which sets out a package of measures primarily focused on the Northern Territory for the next decade replacing the Northern Territory Emergency Response (NTER).

The Commonwealth Government introduced the three Bills:

- Stronger Futures in the Northern Territory Bill 2011 ('Stronger Futures Bill');
- Stronger Futures in the Northern Territory Bill (Consequential and Transitional Provisions Bill 2011 ('Transitional Provisions Bill')); and
- Social Security Legislation Amendment Bill 2011 ('Social Security Bill').

Through the Stronger Futures legislation, the Government has claimed to address the discriminatory provisions by purportedly making income management non-discriminatory. These claims are based on two consultation processes (the NTER Redesign consultations and the Stronger Futures consultations) that are used by the Government to justify assertions that the remaining measures of the Intervention are special measures purporting to be in compliance with the reinstated *Racial Discrimination Act 1975* (Cth) ('RDA'). Reforms within the Stronger Futures legislation include reforms to alcohol management, social security and land tenure. However, despite rebranding provisions of the 'Emergency Intervention' under the banner of 'Stronger Futures', many of the features of the Intervention remain unchanged, with measures that undermine Indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy.<sup>29</sup>

Criticism of the Government's Stronger Futures legislation is widespread. Criticisms primarily include that the implementation of the legislation was done without involvement and consultation with Aboriginal communities in the Northern Territory, that the Government has refused to subject the laws to human rights scrutiny and that laws have been enacted without evaluation or review. Concerns regarding the legislation have been echoed by more than 42,000 Australian people who petitioned for the Bills to be withdrawn and for new approaches to be developed based on partnership and respect.<sup>30</sup>

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<sup>29</sup> Special Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. The Situation of Indigenous Peoples in Australia*, UN Doc AIHRC/151 (4 March 2010) <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>

<sup>30</sup> Australians for Native Title and Reconciliation, *Stronger Futures defies Aboriginal community aspiration*, Media Release, 29 June 2012, available at [http://antar.org.au/sites/default/files/stronger\\_futures\\_bills\\_passage\\_28\\_june\\_2012.pdf](http://antar.org.au/sites/default/files/stronger_futures_bills_passage_28_june_2012.pdf)

The Australian Government's disregard for Indigenous communities and leaders prompts continued frustration and highlights the Government's failure to commit to genuine self-determination of Indigenous peoples.

The UN Special Rapporteur on the Rights of Indigenous Peoples previously stated that the continuing NTER measures 'overtly discriminate against Aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatised communities'. It is therefore essential that the Government engage fully with Indigenous peoples to respect collective decision-making structures in Indigenous communities.

Furthermore, despite previous recommendations the Committee on the Elimination of Racial Discrimination's (**CERD Committee**) has reiterated the importance of ensuring genuine reconciliation with Aboriginal and Torres Strait Islander peoples and to take measures to eliminate the discrimination faced by Indigenous Australians in relation to economic, social and cultural rights.<sup>31</sup>

### 11. National '*Closing the Gap*' strategy

**UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples in the 2010 Human Rights Council report recommended to:**

- *Continue efforts to close the gap in life outcomes, inequalities and opportunities between Indigenous and non—Indigenous people*
- *Strengthen access to primary health care, especially in remote areas*
- *Enhance Indigenous peoples' participation in the formation of health policy and delivery of services.*

The Australian Government's *Closing the Gap* initiative is a strategy by all Australian governments to achieve targets relating to life expectancy, infant mortality, early childhood development, education and employment for Aboriginal and Torres Strait Islander peoples.<sup>32</sup> Furthermore, the Australian Government has committed to working towards halving the employment gap within a decade.<sup>33</sup>

While the Government has made a commitment towards *Closing the Gap* between Indigenous and non-Indigenous Australians a national priority, there continues to be a lack of involvement by Aboriginal peoples in the design and development of the national strategy including a lack of community engagement and consultation.

The Australian Government is currently in the process of developing a Health Plan to replace the *National Strategic Framework for Aboriginal and Torres Strait Islander Health 2003-2013* that expires this year. It is essential that the Government ensures the Health Plan is a rights based and equality focussed plan, supported by long term investment and guided by continuous engagement with

<sup>31</sup> CERD Committee, 77<sup>th</sup> Session (2010).

<sup>32</sup> <http://www.fahcsia.gov.au/our-responsibilities/indigenous-Australians/programs-services/closing-the-gap>

<sup>33</sup> National Indigenous Higher Education Workforce Strategy (2010)

Aboriginal and Torres Strait Islander peoples. Partnership with Aboriginal and Torres Strait Islander peoples must be central to the planning, implementation and monitoring processes.

The *Closing the Gap* targets must be met through means of meaningful engagement, cooperation and self-determination, rather than interventionist approaches. In addition, progress towards meeting these goals needs to be independently monitored and publicly reported on to increase accountability.

In 2006, the United Nations Special Rapporteur on Adequate Housing was ‘particularly disturbed’ by the adverse housing conditions he observed in Indigenous communities in Australia, describing it as a ‘humanitarian tragedy’.<sup>34</sup> The Special Rapporteur observed that a lack of affordable housing, lack of appropriate support services, overcrowding, significant levels of poverty, a lack of culturally appropriate housing and underlying discrimination are all factors that contribute to the severe housing crisis.<sup>35</sup> The UN Special Rapporteur found the absence of adequate and comprehensive participation mechanisms for Indigenous communities in decision-making processes to be the ‘most disturbing’ element of the crisis.<sup>36</sup>

The Committee on Economic, Social and Cultural Rights has similarly stressed the central importance of the right to adequate housing for the enjoyment of all economic, social and cultural rights.<sup>37</sup> Indeed, improved housing outcomes for Indigenous peoples are critical to working towards the *Closing the Gap* targets of improved Indigenous health, life expectancy and educational attainment.

## **Conclusion**

Government actions will continue to fail to address Indigenous peoples disadvantage unless communities are empowered and are active decision-makers and participants in the design and implementation of measures concerning their own communities.

Despite being a constitutional democracy that respects the rule of law, Australia continues to fail to comprehensively incorporate its international human rights obligations into domestic law. In addition Australia fails to ensure that policies and programs are non-discriminatory on the basis of race and fails to provide adequate consultation rights about significant matters directly affecting Indigenous people.

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<sup>34</sup> United Nations Special Rapporteur on adequate housing, *Mission to Australia: Preliminary Observations* (2006), [http://www.hreoc.gov.au/social\\_justice/international\\_docs/pdf/un\\_sp\\_housing\\_missiontoaustralia\\_15aug2006.pdf](http://www.hreoc.gov.au/social_justice/international_docs/pdf/un_sp_housing_missiontoaustralia_15aug2006.pdf).

<sup>35</sup> Ibid, 8.

<sup>36</sup> Ibid.

<sup>37</sup> Committee on Economic, Social and Cultural Rights, *General Comment 4: The right to adequate housing* (1991), [1].