

Indigenous Issues in the Durban Review

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*Castan Centre Public Forum: 'Can the UN Combat Racism'
A preview of the Durban Review Conference*

Melbourne

20 February 2009

In September 2001, after a gap of 18 years the United Nations finally held the third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa.

For many groups who are discriminated against on the grounds of race on a daily basis, it was the first opportunity they had to highlight their concerns on the world stage - as no other UN World Conference that was held in the 1990s had allowed them to do.

In many ways, the Durban Conference lived up to its potential by shining the spotlight on some of the most world's disadvantaged groups. To name a few, this included the Dalits and other groups discriminated against on the basis of caste, or descent; the Roma/Gypsy/Sinti/Traveller communities; and the descendants of victims of the transatlantic slave trade.

The international visibility the Durban Conference brought to these groups' issues led to some positive developments. As we have heard, the Durban Conference proposed a range of measures including stopping the slave trade, preventing genocide and combating the continuing effects of colonialism and colonialist ideas perpetuating racial discrimination.

And since the Conference there have been some important developments too. For example, in 2002, the Committee on the Elimination of Racial Discrimination issued a General Recommendation on discrimination against descent-based communities.

So I wanted to highlight tonight that when we talk about the Durban Conference and its forthcoming Review we are talking about a wide range of issues affecting many disadvantaged groups.

Tonight, however, I was asked to bring into this discussion on the Durban Review the issues faced by another disadvantaged group that are commonly discriminated against on the grounds of race, namely Indigenous peoples.

I will explore firstly, what developments Indigenous peoples have seen emerge through the Durban Conference; secondly, to what extent the Durban Conference outcomes have been implemented for Indigenous peoples in Australia; and thirdly, what measures need to be put in place through the Durban Review to protect indigenous peoples' rights.

Indigenous peoples and the Durban Conference

Internationally, the outcomes of the World Conference on racism, racial discrimination, xenophobia and related forms of intolerance (2001) ('Durban conference'), in relation to indigenous peoples were mixed, with some positive outcomes and some provisions that were regressive, as a result of the limited participation of indigenous peoples in the negotiation of the Durban Declaration and Program of Action.

On the positive side, the Durban Declaration states unequivocally that the full realisation by indigenous peoples of their human rights and fundamental freedoms is indispensable for eliminating racism and expressed determination 'to promote [indigenous peoples'] full and equal enjoyment of civil, political, economic, social and cultural rights, as well as the benefits of sustainable development, while fully respecting their distinctive characteristics and their own initiatives'.^[1]

However, on the negative side, the outcome documents did not adequately reflect human rights standards as they should relate to indigenous peoples. The strong declaratory statements and standards contained in the Declaration were not met by commitments in the Program of Action. For example, the outcome documents qualified recognition of indigenous peoples as 'peoples'.^[2]

In assessing the Durban outcome documents and how strategies have been implemented, it is necessary to ensure that:

- indigenous peoples' rights are adequately respected and
- any previous or current endorsements of racism, racial discrimination or xenophobia against indigenous peoples, are removed.

Australia's implementation of the Durban Conference outcomes for Indigenous Peoples

Within Australia, I would argue that not enough has been done to implement the Durban Conference outcomes, particularly in relation to Indigenous peoples.

The first area of concern in this regard has been the suspension of the *Racial Discrimination Act 1975* (Cth) (Race Discrimination Act) from the Northern Territory Emergency Response (NTER).

This intervention strategy was introduced by the Australian Government in 2007 to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.^[3]

However, in my *Social Justice Report 2007* I assessed the Intervention's compliance with Australia's human rights obligations and found that:

- the Government did have an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse.
- the NTER legislation is inappropriately classified as a ‘special measure’ under the Race Discrimination Act because of the negative impacts of some of the measures on Indigenous people and the absence of adequate consultation or consent by Indigenous peoples to the measures.
- the NTER legislation contains a number of provisions that are racially discriminatory.
- some provisions raised concerns for the compliance with human rights obligations (e.g. the lack of access to review of social security matters and the compulsory acquisition of land without just compensation).^[4]

The ease with which the Race Discrimination Act has been set aside highlights the weak status of protections against race discrimination in the Australian legal system. As indicated by the Committee on the Elimination of Racial Discrimination underlying this weakness is the absence of any constitutional protection against race discrimination and the absence of a federal Human Rights Act.^[5]

The Northern Territory Emergency Response Review Board (‘Review Board’) reviewed the NTER and issued its report in October 2008. The three overarching recommendations made were:

- the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory;
- In addressing these needs both the Commonwealth and NT governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
- Government actions affecting Aboriginal communities respect Australia’s human rights obligations and conform to the *Racial Discrimination Act 1975*.^[6]

On 23 October 2008, the federal government issued an initial response to the Review Board’s report,^[7] outlining the government’s intention to continue the current stabilisation phase of the NTER for the next twelve months before transitioning to a long-term, development phase. The government has indicated it will introduce legislation to lift the suspension of the Race Discrimination Act in the Spring 2009 sittings of the Parliament.

The second area where I see a lack of implementation of the Durban Conference outcomes is in the significant inequalities Aboriginal and Torres Strait Islander peoples continue to experience in the realisation of their rights.

There is an estimated gap of 17 years between Indigenous and non-Indigenous life expectancy.^[8] There are a range of other social and economic inequalities including lower incomes, higher rates of unemployment, poorer educational outcomes and lower rates of home ownership.^[9] For example, in 2001 the unemployment rate for Indigenous peoples was 20% - three times higher than the rate for non-Indigenous Australians, and this situation has not substantially changed.

At the Indigenous Health Equality Summit in 2008, the Australian Government made accountable and measureable commitments to achieving equality in health status and life expectancy between Indigenous and non-Indigenous Australians by 2030.

The Council of Australian Governments has similarly committed to closing the life expectancy gap within a generation, halving the mortality gap for children under five within a decade and halving the gap in reading, writing and numeracy within a decade.

But the UN Human Rights Committee has recognised that the high level of exclusion and poverty facing indigenous persons is indicative of the lack of adequate protection of indigenous peoples' cultural rights.^[10]

The third area of limited progress has been in Indigenous representation and participation in decision-making.

The *Social Justice Reports* from 2004-2006 outline a reduction in Indigenous people's participation in decision-making bodies since the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and within the 'new arrangements' for the administration of Indigenous Affairs subsequently put in place by the Australian Government. I have particularly noted the absence of processes for systematic engagement with Indigenous people under the new arrangements.^[11]

The new Australian Government has made a commitment to set up a new national representative body to provide an Aboriginal and Torres Strait Islander voice within government. To this end, the Australian Government has begun formal discussions with Indigenous people about the role, status and composition of this body.

On 16 December 2008 the Minister for Indigenous Affairs, Jenny Macklin, announced that the second stage of consultations would be guided by Indigenous peoples. To further that process, the Minister invited the Social Justice Commissioner to convene an independent Indigenous Steering Committee to develop a model for a new national Indigenous representative body.

The Minister has mandated the Steering Committee to engage with and consult Aboriginal and Torres Strait Islander peoples across the country, in order to gain feedback on the Indigenous community's preferred model for a national Indigenous representative body, by July 2009.

The fourth area of concern has been Indigenous people's over-representation in the criminal justice system.

There continue to be high levels of incarceration of Indigenous people, particularly women and children, and the over-representation of Indigenous people in prisons and juvenile justice facilities.

Indigenous prisoners represented 24% of the total prisoner population at 30 June 2006, the highest proportion since 1996; and only 5% of Australians aged 10-17 years are Indigenous, but 40% of those aged 10-17 years under juvenile justice supervision were Indigenous.^[12]

There is a pressing need for the continued implementation of the 339 recommendations contained in the Report of the Royal Commission into Aboriginal Deaths in Custody, including any outstanding recommendations.^[13] A comprehensive response to the issues raised by this report requires government commitment in two key areas:

- ongoing community justice mechanisms which recognise Indigenous governance models and return control and decision-making processes to Aboriginal and Torres Strait Islander communities

- measures to address the impact of Indigenous marginalisation and socio-economic disadvantage on Indigenous peoples' contact with the criminal justice system.^[14]

There are several other areas of concern I could highlight including:

- the over-representation of Indigenous children and youth in child protection systems;
- the failure to implement the remaining recommendations of the Bringing them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) – in particular the provision of monetary compensation; and
- the lack of government action taken to promote and protect Indigenous languages, as a result of which only a third of the original 300 languages survive today.

However, I shall conclude this section by commenting quickly on the problems with the Native Title system.

The *Native Title Act 1993* (Native Title Act) is the primary mechanism through which Aboriginal and Torres Strait Islander people access their cultural rights to land.^[15] The Act was intended to advance and protect Indigenous people by recognising their traditional rights and interests in the land.^[16] However, the Native Title Act has been drafted and interpreted such that native title rights will only be recognised in very limited circumstances. For example:

- The courts require that Indigenous people claiming native title prove traditional laws and customs at sovereignty and their continued observance, generation by generation, until today. One of the cruel consequences is that the greater the Indigenous peoples were impacted on by colonisation (for example, if they were forcibly removed from their land), the more unlikely it is they will be able to access their native title rights.
- Indigenous peoples bear the burden of proof and strict rules of evidence apply. The result is that Indigenous peoples of a culture based on the oral transmission of knowledge, must prove every aspect, including the content of the law, and custom and genealogy, back to the date of sovereignty (up to almost 200 years) in a legal system based on written evidence. There is very limited flexibility for the court to take into account cultural differences in hearing the case.
- Only traditional laws and customs of Indigenous peoples' that existed at the time of sovereignty and which are still observed and practiced today will be recognised. There is little room for adaptation of the traditions to today. Similarly, the rights recognised are severely limited in terms of how the Indigenous peoples can utilise any resources associated with that land for economic or social benefit.

Native title is at the bottom of the hierarchy of proprietary rights in Australia. Through the Native Title Act, native title rights and interests are regularly permanently extinguished by overriding government and private interests.

In 1999, acting under its early warning procedures, the Committee on the Elimination of Racial Discrimination considered amendments to the *Native Title Act 1998* (Cth) and expressed concern over their compatibility with Australia's international obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*.

The Committee noted several provisions that discriminate against Indigenous title holders under the newly amended Act.^[17] These issues have remained unaddressed and the Committee has repeated its concerns in the 2000 and 2005 Concluding Observations.^[18]

Durban Review – protection for indigenous peoples’ rights

The final aspect I will reflect on tonight is what measures need to be put in place through the Durban Review to protect indigenous peoples’ rights.

It should be noted that since the Durban conference the international community has advanced its understanding of the application of human rights standards to indigenous peoples, primarily through the adoption of the *UN Declaration on the Rights of Indigenous Peoples*.

The *UN Declaration on the Rights of Indigenous Peoples* (‘Declaration’) is now considered to provide the minimum standards for the human rights of indigenous peoples.

The Durban Review should consider the following with respect to indigenous peoples’:

- Reflecting the recognition of the *UN Declaration on the Rights of Indigenous Peoples* in the Durban review Outcome documents; and
- Removing the qualification of indigenous peoples as ‘peoples’ in light of the Declaration’s recognition of indigenous peoples as ‘peoples’.

The UN Expert Mechanism on the Rights of Indigenous Peoples, in its first session (2008), called for the *UN Declaration on the Rights of Indigenous Peoples* as to be recognised in the Durban Review outcomes documents.^[19]

The UN Permanent Forum's Indigenous Issues in its seventh session (2008) requested the UN system, which includes the Durban Review, to consider implementation of the *UN Declaration on the Rights of Indigenous Peoples*. These recommendations included:

- promoting the Declaration and applying it in policies and programmes for the improvement of indigenous peoples’ well-being around the world.
- ensuring that the Declaration reaches indigenous peoples in their communities by appropriate dissemination of the text in indigenous peoples’ own languages
- promoting understanding of the United Nations Declaration on the Rights of Indigenous Peoples among decision makers, public officials, justice systems, national human rights institutions and non-governmental organizations.
- building the capacities of indigenous peoples’ organizations and to develop their knowledge and skills to have their rights respected, protected and fulfilled.
- establishing specific units for indigenous peoples’ issues to contribute to the implementation of the Declaration in accordance with its articles 41 and 42.^[20]

Concerns have been reiterated by Indigenous peoples in the Durban Conference preparatory sessions, as recently as this week, that the current draft outcomes documents “not only ignore the rights of indigenous peoples to self-determination, but go in the direction of encouraging assimilation into the national political system”. There is a concern that the draft outcome documents are insufficient for addressing the racial discrimination against indigenous peoples.

At a domestic level, the promotion of Indigenous people’s rights could be advanced through:

- recognition of Indigenous peoples’ rights by governments – and the Australian Human Rights Commission has also called on the Australian Government to make a statement of support at the UN for the *United Nations Declaration on the Rights of Indigenous Peoples* as a matter of priority;

- restitution and where that is not possible compensation for lost lands and for disruption and destruction of indigenous society;
- acknowledgement of and compensation for past injustices as the basis for genuine reconciliation and co-existence;
- entrenchment of non-discrimination through Constitutional or Treaty provisions;
- adequate funding and resources to overcome indigenous social and economic disadvantage;
- education, training and public information programs to counter prejudice and discrimination against indigenous peoples; and
- laws to prohibit the dissemination of racist and hate material.

In conclusion, I have outlined some of the limitations that have come about for indigenous peoples as a result of the 2001 the Durban Conference and how it has been implemented.

I have also noted my concerns about the Durban Review draft outcome documents and the extent to which indigenous people's rights are being recognised and protected within them.

However, the Durban Review can nonetheless be an important source of protection for indigenous peoples' rights. And there are important measures that can be taken at both the national and international level, key to which will be recognition and implementation of the *UN Declaration on the Rights of Indigenous Peoples*.

^[1] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration* (2001), para 41. At <http://www.un.org/WCAR/durban.pdf> (viewed 13 February 2009).

^[2] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration* (2001), para 24. At <http://www.un.org/WCAR/durban.pdf> (viewed 13 February 2009).

^[3] Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT', (Media Release, 21 June 2007). At: http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm (viewed 18 October 2007). The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'*.

^[4] The *Social Justice Report 2007* is available at: http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2008).

^[5] Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention Concluding observations of the Committee on Australia* (2005), CERD/C/AUS/CO/14; Committee on the Elimination of Racial Discrimination, Sixty-sixth session, 21 February-11 March 2005.

^[6] Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 12.

^[7] Commonwealth Government, Statement: 'Australian Government Initial Response to the NTER Review' (23 October 2008).

^[8] These issues are discussed in detail in the *Social Justice Report 2003*, available at: http://www.humanrights.gov.au/social_justice/statistics/index.html (viewed 9 September 2008); Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005*, available at: www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf (viewed 9 September 2008); Australian Institute of Health and Welfare, *Australia's Health No.11*, 2008, available at: <http://www.aihw.gov.au/publications/aus/ah08/ah08-c03.pdf> (viewed 9 September 2008).

^[9] ICCPR, art 2(1).

^[10] Human Rights Committee, *Concluding observations: Australia*, 24/07/2000 UN Doc A/55/40, paras.498-528 (available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e1015b8a76fec400c125694900433654?Opendocument>)

^[11] These issues are noted in the Common Core Document at pars 181-183. See also Australian Human Rights Commission, *Building a National Indigenous Representative Body – Issues for Consideration*, available at: http://www.humanrights.gov.au/social_justice/rebody/index.html (viewed 23 September 2008).

^[12] Australian Bureau of Statistics, *Prisoners in Australia 2006*. At: <http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/BA368B46230A4118CA2573AF0014B905?OpenDocument> (viewed 23 September 2008). Australian Institute for Health and Welfare, *Juvenile Justice National Minimum Data Set 2005-06: Facts and figures*. At: http://www.aihw.gov.au/chilyouth/juvenilejustice/jj_facts_and_figures.cfm (viewed 23 September 2008).

^[13] See Common Core Document, pars 285-288.

^[14] See the findings of the Cooperative Research Centre for Aboriginal Health regarding the links between preventing recidivism and improving the social, emotional and cultural wellbeing of Aboriginal people: Cooperative Centre for Aboriginal Health Research, *Research Priorities in Aboriginal Prisoner Health: Recommendations and Outcomes from the CRCAH Aboriginal Prisoner Health Industry Roundtable, November 2007*, Discussion Paper Series No. 6, August 2008.

^[15] See Common Core Document, pars 127-135. ICCPR, arts 1, 2(1), 27.

^[16] See the preamble to the *Native Title Act 1993* (Cth).

^[17] These provisions included: validation provisions; the confirmation of extinguishment provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses: Committee on the Elimination of Racial Discrimination, *Decision 2 (54) on Australia* (18/03/1999), UN Doc A/54/18, par 21(2). At: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/a2ba4bb337ca00498025686a005553d3?Opendocument> (viewed 23 September 2008).

^[18] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia* (2005), UN Doc CERD/C/AUS/CO/14, par 16. At: http://www.bayefsky.com/docs.php/area/conclobs/treaty/cerd/opt/0/state/9/node/3/filename/australia_t4_cerd_66 (viewed 23 September 2008). The Human Rights Committee and the Committee on Economic Social and Cultural rights also noted their concerns on these issues in 2000 (Committee on Economic social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (01/09/2000), UN Doc E/C.12/1/Add.50. At: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/693c56f3d2694130c12569580039a1a2?Opendocument> (viewed 23 September 2008); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia* (24/07/2000), UN Doc A/55/40, paras 498-528. At: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e1015b8a76fec400c125694900433654?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e1015b8a76fec400c125694900433654?Opendocument) (viewed 23 September 2008))

^[19] Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples*

on its First Session (1-3 October 2008), UN Doc A/HRC/10/56 (2009). At <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/1st/docs/A-HRC-10-56.pdf> (viewed 31 January 2009).

^[20] Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April-2 May 2008)*, UN Doc E/2008/43, E/C.19/2008/13 (2008). At <http://daccessdds.un.org/doc/UNDOC/GEN/N08/338/82/PDF/N0833882.pdf?OpenElement> (viewed 31 January 2009).