

# Indigenous Rights

## CASE STUDY

### Right to family

“The biggest hurt, I think, was having my mum chase the welfare car – I’ll always remember it – we were looking out the window and mum was running behind us singing out to us. They locked us in the police cell up here and mum was walking up and down outside the police station and crying and screaming out for us. There was 10 of us”.

Testimony from a woman removed in the 1960s and placed in Parramatta Girls Home, NSW.<sup>1</sup>

Australia’s practice of separating Indigenous children from their families was part of a strategy in which the state controlled every aspect of Indigenous peoples’ lives. Indigenous people were presumed unfit to be parents because of their race. This policy continued until the 1970s and destroyed families, culture and human dignity. Many Indigenous people still suffer from the effects of forced removal on their families.

### Indigenous rights and international conventions

The rights of Indigenous people are included in United Nations Conventions recognising human rights relevant to everyone.<sup>2</sup> As a result of the special circumstances of Indigenous people, the United Nations declared 1995–2004 the International Decade of the World’s Indigenous People.

The *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) recognises the right of Indigenous people not to be discriminated against.



While it is not legally binding, the rights of Indigenous people are most explicitly recognised in the Draft Declaration on the Rights of Indigenous Peoples.<sup>3</sup> The Draft Declaration indicates a strong international commitment to human rights principles, including the right to equality and self-determination in political, social and economic terms.

Acknowledging cultural and kinship relations, the Draft Declaration recognises the collective or group rights of Indigenous peoples. It also acknowledges the special relationship of Indigenous peoples to the land and recognises the right of Indigenous peoples to practice their culture.

These rights are not protected in Australia.

### Current Australian policy and Indigenous rights

#### Social and economic situation

The Indigenous population is 2.4% of the total Australian population.<sup>4</sup> Indigenous Australians have lower incomes than the non-Indigenous population, higher rates of unemployment, poorer educational outcomes, and are less likely to own a home.<sup>5</sup> The life expectancy for Indigenous men is 56 years (Australian average 77 years), and for Indigenous women 63 years (Australian average 82 years).<sup>6</sup>

Improving human rights protection for everyone in Australia will have a positive effect on the daily lives of Indigenous Australians.

#### Stolen generations

In the *Stolen Generations* case<sup>7</sup> the High Court considered for the first time whether the government policy of forcible removal of Indigenous children was legal. However, the High Court found that the Constitution was unable to provide protection for Indigenous rights.

#### Sovereignty and self-determination

For Indigenous people, sovereignty can mean many things including:

- recognition of past injustices
- autonomy and decision-making powers in areas that affect Indigenous people’s daily lives
- recognition of land rights and the right to negotiate native title claims
- protection of cultural practices and customary laws; and
- equal protection of rights.<sup>8</sup>

Self-determination is the right of Indigenous people to make their own choices and work towards economic self-sufficiency. Meaningful participation in the democratic process is an important part of this.

Some steps to improve Indigenous self-determination have been taken, such as the establishment of Indigenous health and legal services. However, the Commonwealth

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### Administration of justice

Amanda has been in and out of foster homes and has had no contact with her family since she was 4 years old. She has been living on the streets since her 14th birthday. She was 15 when she came before a children's court on her fourth charge of shoplifting minor amounts of food and toiletries. Amanda pleaded guilty and spent two-and-a-half months in custody waiting for a sentencing report. The Magistrate sentenced Amanda to a good behaviour bond, but she expressed concern that a child who had committed such petty offences had spent so long in custody.<sup>9</sup>

In June 2003, Indigenous women were jailed at a rate 19.3 times that of non-Indigenous women.<sup>10</sup> Since 1999 Indigenous people have constituted 20% of the adult prison population and over 40% of juveniles in detention.<sup>11</sup> Indigenous people are currently jailed at 16 times the rate for non-Indigenous people.<sup>12</sup>

Government has recently announced its intention to abolish the Aboriginal and Torres Strait Islander Commission. It also said that it no longer supports elected Indigenous representation in decision making about services for Indigenous people.

### Native title

The 1992 High Court's *Mabo (No. 2)*<sup>13</sup> decision was the first official recognition of the prior ownership and the pre-existing land rights of Indigenous people. This case overturned the 200-year-old doctrine that Australia was *terra nullius* ("empty land") before colonisation. *Mabo* recognised native title as the right of Indigenous peoples to possess, occupy and enjoy their traditional lands when they can demonstrate continuous connection with the land. The *Native Title Act 1993* (Cth) generally adopted this definition of native title and provided

for compensation where native title had been extinguished after the introduction of the *Racial Discrimination Act 1975*. In 1998 the Howard Government introduced the *Native Title (Amendment) Act 1998* (Cth). This Act made it harder for native title holders to negotiate on pastoral leases, exploration and government activities, and made successful native title claims less likely.<sup>14</sup>

A series of native title decisions have made it increasingly more difficult for Indigenous people to enforce their native title rights. The requirement of continuous connection to the land is extremely difficult for many communities to prove – especially for those who were forced off their land during colonisation.

### Improving Indigenous rights in Australia

#### General rights and special measures

Improving the general protection of human rights in Australia will substantially improve the rights of Indigenous communities. In addition, as a result of over 200 years of discrimination and oppression, special measures or affirmative actions are required to ensure equal enjoyment of human rights. Special measures are not discriminatory because they are intended to ensure the "adequate advancement" of a particular disadvantaged group. They are permitted and required by the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*.<sup>15</sup>

#### International concern about the rights of Indigenous Australians

In 2000 the United Nations Committee on the Elimination of All Forms of Racial Discrimination found that the Australian Government had failed to meet its obligations, particularly with regard to Indigenous Australians.

The Committee criticised continuing social, economic and cultural discrimination faced by Indigenous Australians and the high numbers of Indigenous people in jails and other corrective institutions. It concluded that mandatory sentencing laws target offences committed by

Indigenous people, and seriously questioned their compatibility with the Convention.<sup>16</sup> The Committee expressed concern about provisions in the *Native Title (Amendment) Act 1998* which allow state and territory governments to reduce protection of native title rights.<sup>17</sup> Finally, the Committee noted that the Australian Government has failed to apologise to the Stolen Generations.<sup>18</sup>

Respect and protection of the rights of Indigenous people in line with international standards is essential and must include protections in law and practice.

### "What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N<sup>o</sup> 1: **Background to Human Rights**

#### REFERENCES

- <sup>1</sup> *Bringing Them Home*, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), p 48.
- <sup>2</sup> Article 27 of the *International Covenant on Civil and Political Rights* and Article 30 of the *Convention on the Rights of the Child* recognise the right of ethnic, religious and linguistic minorities to enjoy their culture, religion and language.
- <sup>3</sup> Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1995/2.
- <sup>4</sup> HREOC, "A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia", [www.humanrights.gov.au/social\\_justice/statistics/index.html](http://www.humanrights.gov.au/social_justice/statistics/index.html) (accessed 4/2/2004).
- <sup>5</sup> As footnote 4.
- <sup>6</sup> As footnote 4.
- <sup>7</sup> *Kruger & Ors v Commonwealth of Australia* (1997) 190 CLR 1.
- <sup>8</sup> Behrendt, L. (2003), *Achieving Social Justice – Indigenous Rights and Australia's Future*, Federation Press, Sydney, p 48.
- <sup>9</sup> Case study provided by Sydney Regional Aboriginal Corporation Legal Service, Redfern.
- <sup>10</sup> As footnote 4.
- <sup>11</sup> As footnote 4.
- <sup>12</sup> As footnote 4.
- <sup>13</sup> *Mabo & Ors v Queensland* (No. 2) (1992) 175 CLR 1.
- <sup>14</sup> As footnote 8, pp 86–117.
- <sup>15</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, Articles 1(4) and 2(2).
- <sup>16</sup> Mandatory sentencing laws were abolished in the Northern Territory in 2002, but still exist in Western Australia.
- <sup>17</sup> Decision 2(54) on Australia: Australia 18/3/1999. A/54/18, para 21(2).
- <sup>18</sup> Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, 19/4/2000, UN Doc CERD/D/304/Add.101.