



## **SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEE FROM NSW RECONCILIATION COUNCIL (NSWRC)**

Dear Committee Members,

This submission has been made on behalf of the following individuals:

### **NSWRC Management Committee**

- Indigenous Chairperson: Renee Williamson
- Non-Indigenous Chairperson: David Crew
- Treasurer: Megan Wallace
- Secretary: Sean Lonergan
- Regional Representative (Southern): Roy Kennedy
- Regional Representative (Southern): Karen Gough
- Ordinary Member: Constance Chatfield

### **NSWRC Council**

- Indigenous Elder's Representative: Joan Tranter
- Non-Indigenous Elder's Representative: Raja Jayaraman
- Indigenous Youth Representative: Naomi Moran
- Non-Indigenous Youth Representative: Josh Edwards
- Indigenous New England Representative: Glen Crump
- Non-Indigenous New England Representative: Ainslie Hobson
- Indigenous Northern Representative: Thelma James
- Non-Indigenous Northern Representative: Robert Bruce
- Indigenous Western Representative: Beryl Carmichael
- Non-Indigenous Western Representative: Colin Paterson
- Indigenous Sydney Representative: Taressa Mongta
- Non-Indigenous Sydney Representative: Graeme Cordiner

### **NSWRC Reconciliation Groups**

- Australians for Native Title and Reconciliation (ANTaR) NSW Inc
- ANTaR Inner West
- Australians for Reconciliation Chifley Committee - Mt Druitt and District Reconciliation Group
- Bennelong & Surrounds Residents for Reconciliation
- Blue Mountains People for Reconciliation
- Eastern Regional Local Government Aboriginal and Torres Strait Islander Forum
- Eastern Suburbs Organisation for a Reconciled Australia (ESORA)
- Harbour to Hawkesbury Reconciliation Group
- Hornsby Area Residents for Reconciliation
- Lane Cove Residents for Reconciliation
- Manly Warringah Pittwater Aboriginal Support Group
- Marrickville Residents for Reconciliation
- Mosman Reconciliation Group
- Northern Sydney Region Reconciliation Network
- Older Women's Network Aboriginal Support Circle
- Projects for Reconciliation
- ReconciliACTION NSW
- Reconciliation for Western Sydney

- Redfern Residents for Reconciliation
- Sutherland Shire Citizens for Native Title and Reconciliation
- Sydney Friends of Myall Creek
- "Winga Myamly" Minto Reconciliation Group
- Women's Reconciliation Network
- Nyerna: Deniliquin Reconciliation Group
- Reconciliation Wagga Wagga
- Arts Council of Eurobodalla
- Monaro Aboriginal Reconciliation Committee
- North Illawarra Reconciliation and Treaty Group
- Illawarra Aboriginal Corporation Reconciliation Group
- Wingecarribee Reconciliation Group
- ANTaR Armidale
- Inverell Reconciliation Group
- Moree Reconciliation Group
- Myall Creek Memorial Committee
- Tamworth Branch of Australians for Reconciliation
- Border Reconciliation Group
- Broken Hill Reconciliation Group
- Forbes Reconciliation Group
- Kelso Community Network
- Orange Reconciliation Group
- Parkes Reconciliation Group
- Red Ochre Events Inc
- Wellington Social Justice & Reconciliation Group
- Casino Local Reconciliation Group Ngullingah-gah Wundardun
- Central Coast Reconciliation Group
- Clinton Speedy-Duroux Association Inc.
- Coffs Harbour Reconciliation Group
- Combined Churches Magpie Committee
- Gloucester Aboriginal Working Committee
- Kanuguba Incorporated
- Kyogle Reconciliation Group
- Lismore People for Reconciliation
- Manning Reconciliation Group
- MINGALETTA Aboriginal and Torres Strait Islander Corporation
- Muswellbrook Shire Council Aboriginal Reconciliation Committee
- Newcastle Aboriginal Support Group
- Sisters for Reconciliation (Northern Rivers) & Cavanbah Reconciliation Group

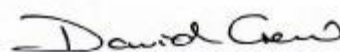
For further information, please contact the Council's Executive Officer, Joanna Lunzer on (02) 9219 0719.

Yours sincerely,



Renee Williamson

Co-Chairperson  
NSW Reconciliation Council



David Crew

Co-Chairperson  
NSW Reconciliation Council

## **About the NSW Reconciliation Council**

The New South Wales Reconciliation Council (NSWRC) is the peak representative body for reconciliation in NSW. The Council is made up of Indigenous and non-Indigenous Australians working through a range of groups and organisations to promote united communities and to address the 'unfinished business' of reconciliation – recognition of rights, promotion of economic independence and social justice for Indigenous people.

NSWRC has been working towards 'a reconciled Australia' since its inception believing strongly that relationships between Indigenous and non-Indigenous people at the community level have a strong bearing on Indigenous peoples' socio-economic status, health, culture and well-being. For this reason, the Council advocates a process of reconciliation through a sharing of cultures and an increase in mutual (cross-cultural) understanding through the 'promotion of equitable and just communities that acknowledge and respect Aboriginal and Torres Strait Islander peoples, cultures and values'. NSWRC believes that the reconciliation process can be advanced by building a peoples movement; raising awareness and understanding; and promoting and supporting social justice, equity and Human Rights. For the life expectancy gap between Indigenous and non-Indigenous people to be reduced, Indigenous peoples' culture (customs, practices, perspectives, values, beliefs) and position as the first peoples of Australia must be recognised, respected and valued.

## **Which Human Rights Should Be Protected and Promoted?**

### **1. A Human Rights Act should promote and protect all economic, social, cultural, civil and political rights which Australia is internationally obliged to protect.**

The Australian Government has supported and ratified a number of international human rights treaties however more than half of our international legal obligations under these treaties have not been recognised in domestic legislation.<sup>1</sup> NSWRC believes a Human Rights Act should include all economic, social and cultural rights and civil and political rights that Australia has international obligations to protect, including those contained in the following treaties and declarations:

- Universal Declaration of Human Rights
- United Nations Declaration on the Rights of Indigenous Peoples
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- First and Second Optional Protocol to the International Covenant on Civil and Political Rights
- Convention on the Rights of the Child
- First and Second Optional Protocol to the Convention on the Rights of the Child

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<sup>1</sup> *Australian Human Rights Commission, Social Justice Report, Chapter 2.*

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of Persons with Disabilities.

**2. Formal protection of the full range of economic, social, cultural, civil and political rights will benefit Indigenous Australians.**

Indigenous peoples in Australia will particularly benefit from formal protection of the rights to:

- Non-discrimination
- Equality before the law
- An adequate standard of living, including access to adequate food, clothing and housing
- The highest attainable standard of physical and mental health
- Be free and safe from violence
- Self-determination (including a guarantee of full, free and effective participation in all aspects of public life, particularly government decision-making)
- The full range of civil, political, economic, social and cultural rights.

While these rights clearly apply to all members of the Australian community, they have a particular importance for Indigenous peoples due to the overwhelming levels of disadvantage faced by Indigenous peoples; the fact that Indigenous Australians are amongst the most vulnerable to human rights breaches; and due to the ongoing impacts of historic collective treatment of Indigenous peoples.<sup>2</sup>

The high levels of disadvantage faced by Indigenous Australians in the areas of health, housing and education mean that protection of general economic and social rights would be of particular value to Indigenous peoples.<sup>3</sup>

**3. The provisions of the Human Rights Act should be interpreted in line with Indigenous rights as expressed in the UN *Declaration on the Rights of Indigenous Peoples*.**

Australia has supported the *Declaration on the Rights of Indigenous Peoples (DRIP)* however has not yet implemented the *DRIP* in domestic legislation. As a minimum, a Human Rights Act should have the *DRIP* scheduled to it as a relevant international instrument so that the general provisions of the Human Rights Act would be required to be interpreted consistently with the *DRIP* and the specific articulation of Indigenous rights contained in the *DRIP*.<sup>4</sup>

**4. A Human Rights Act should promote and protect the specific rights of Indigenous Peoples as recognised in the *Declaration on the Rights of Indigenous Peoples*.**

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<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

To ensure the protection of Indigenous rights, a Human Rights Act should also contain specific protections for Indigenous peoples. Some of these specific rights include:

- The right to a distinct status and culture (to help maintain and strengthen the identity, spiritual and cultural practices of Indigenous communities)
- The right to the enjoyment of culture and use and preservation of languages, and to not be subjected to forced assimilation or destruction of culture
- Recognition and protection of traditional lands, territories and resources, including protection of traditional knowledge and biodiversity (which provides the spiritual and cultural basis of Indigenous communities)
- The right to self-determination, guaranteeing full, free and effective participation in all aspects of public life, particularly government decision-making. Self-determination for Indigenous peoples is about decision-making based on the choice, participation and control of the people concerned. Under the *DRIP*, self-determination is recognised as the principle of free, prior and informed consent.

### **Are These Human Rights Sufficiently Protected And Promoted In Australia?**

#### **5. There is clear statistical evidence demonstrating that the rights of Indigenous Australians are not sufficiently protected or promoted.**

As the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted, democracy alone does not prevent politicians and public authorities from pursuing policies that override the collective or individual rights of minority groups: “When you are 2 percent of the total population, majority rule does not guarantee that your rights will be protected – especially if the interests of more powerful or prominent interests in society are affected.”<sup>5</sup>

On a daily basis, Indigenous peoples live with the consequences of Australia’s failure to protect their basic human rights, and continue to experience racial discrimination in many spheres of life. There are clear differences between the experiences of Indigenous and non-Indigenous people in Australia across all indicators of quality of life. Indigenous people generally experience lower standards of health, education, employment and housing. They are over-represented in the criminal justice system and the care and protection systems nationally compared to non-Indigenous people. For example:

- The life expectancy of Indigenous people is around 17 years lower than that of the Australian population.
- In 2006, the unemployment rate for Indigenous people was 16% compared with only 5% for the non-Indigenous population.
- In 2004-2005, 27% of Indigenous people were living in overcrowded conditions.
- Indigenous people are more likely to experience homelessness than other Australians. In 2006, the rate of homelessness for Indigenous people was three times the rate of other Australians.

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<sup>5</sup> *Ibid*

- Indigenous people are more likely to experience family violence than non-Indigenous people. While it is difficult to estimate the incidence of violence in Indigenous communities, in 2005 it was reported that 18.3% of Indigenous women experienced physical or threatened abuse in the past 12 months, compared with 7% of non-Indigenous women.
- Indigenous prisoners represented 24% of the total prison population in Australia in 2007.
- Indigenous peoples have also suffered from the limited recognition and protection of their cultures, languages and rights and ownership of land and resources.

**6. *Kruger v the Commonwealth* demonstrated the limitations of our Constitution to protect the rights of Indigenous Australians.**

*Kruger v the Commonwealth* was the first case to be heard in the High Court that considered the legality of the policy of forced removal of children from their parents leading to the Stolen Generations. The plaintiffs were unsuccessful - a result highlighting the general lack of rights protection under our Constitution. As Behrendt has pointed out, although members of the High Court have implied some rights, this is an insufficient form of rights protection.<sup>6</sup>

**7. The implementation of the Northern Territory Intervention confirms that there is inadequate protection of the rights of Indigenous peoples.**

The United Nations Human Rights Committee found the Intervention to breach both the domestic *Racial Discrimination Act* and the *International Covenant on Civil and Political Rights* and *Convention on the Elimination of all forms of Racial Discrimination*. The Intervention also violates many of the rights outlined in the *UN Declaration on the Rights of Indigenous Peoples* and the *Universal Declaration of Human Rights*. If Australia had a Human Rights Act and a culture of human rights, the Northern Territory Intervention may not have been politically possible and Indigenous peoples' human rights would have been better protected.

**How Could Australia Better Protect and Promote Human Rights?**

**8. The NSW Reconciliation supports calls for a Human Rights Act for Australia.**

- A Human Rights Act will protect the rights of all Australians, including marginalised, disadvantaged and vulnerable minorities
- A Human Rights Act will give Australians the chance to set down our values and our vision for our society, and make sure that the values that we hold dear - freedom, dignity, respect, equality and fairness - apply to every person in Australia

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<sup>6</sup> Larissa Behrendt, *Indigenous Rights and the Australian Constitution - A Litmus Test for Democracy* <http://www.jumbunna.uts.edu.au/research/public3.html>

- A Human Rights Act will require government to consider human rights when making decisions
- A Human Rights Act will serve to protect human rights regardless of who is in government and regardless of the politics of the day
- A Human Rights Act will ensure that Parliament can't overlook human rights considerations when creating new legislation, such as the legislation introduced for the Northern Territory Intervention
- A Human Rights Act will help Australia meet its obligations under the UN treaties we have signed, and give us credibility when we talk about international human rights issues
- A Human Rights Act will create a human rights 'culture' by giving us a standard to judge the way decisions are made in all areas, and by promoting a climate of mutual respect and understanding in Australia.

**9. A Statutory or Dialogue Model for a Human Rights Act would benefit the Australian community.**

Australia would benefit from a Human Rights Act, following the Statutory or Dialogue Model similar to that of the United Kingdom. This model should:

- provide the judiciary with the ability to advise on whether legislation is incompatible or inconsistent with the Human Rights Act;
- provide a freestanding course of action for breaches of human rights; and
- should provide remedies for breaches of human rights.

**10. A national Human Rights public education campaign is required.**

Australia could also better protect and promote human rights by running a national Human Rights public education campaign, by ensuring all public servants complete human rights and cultural awareness training and by dedicating resources to the progressive realisation of rights.

**11. Additional measures are required in addition to the introduction of a Human Rights Act to ensure the rights of Indigenous Australians are adequately protected and promoted.**

The NSWRC recommends the implementation of the following measures as recommended by the Council for Aboriginal Reconciliation in 2000:

- *Formal legal recognition of the status and rights of Aboriginal and Torres Strait Islander peoples (e.g. with the agreement of Indigenous peoples and governments, include statements recognising the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia).*
- *The design of a legislative framework for identifying and negotiating outstanding issues in the recognition of the rights of Aboriginal and Torres Strait Islander peoples (e.g. Government to consult with Indigenous communities to establish the basis for negotiation with governments and agree on representative structures through which they will undertake those negotiations; the Commonwealth Parliament legislate to establish a framework for negotiation and agreement on the unresolved issues of reconciliation).*

- *Development of a legislated Bill of Rights (i.e. a Human Rights Act) that guarantees the rights of all Australian citizens and protects the rights of Aboriginal and Torres Strait Islander peoples (e.g. the process should include specific consideration of the rights of Aboriginal and Torres Strait Islander peoples and their protection in its Terms of Reference and provide for the involvement of Aboriginal and Torres Strait Islander peoples as witnesses and as specialist advisers).*
- *Constitutional changes that provide protection against discrimination in the Australian Constitution.*
- *The Commonwealth Parliament initiate and support a referendum to:*
  - *provide a new preamble to the Constitution which, among other things, recognises Aboriginal and Torres Strait Islander peoples as the original owners and custodians, and acknowledges the history of dispossession that many have suffered since colonisation;*
  - *entrench the Australian Declaration Towards Reconciliation;*
  - *amend section 51(26) of the Constitution to authorise the Commonwealth to make special laws only for the benefit of any particular race; and*
  - *remove section 25 of the Constitution, and insert a new section making it unlawful to adversely discriminate on the grounds of race.*
- *The Commonwealth government make every effort to obtain bi-partisan support and adequate and accurate community education programs to ensure that a referendum to change the Constitution takes place in a thoughtful and informed environment.)*

The following measures are also essential to ensure adequate protection and promotion of the rights of Indigenous Australians.

- The unique status of Indigenous peoples should be recognised in the Constitution. The NSW Reconciliation Council supports calls from the Aboriginal and Torres Strait Islander Social Justice Commissioner to include a provision in the Constitution similar to Section 35 of the Canadian Constitution. Such a provision in the Australia Constitution might read as *“The pre-existing rights of Aboriginal peoples in Australia are hereby recognised and affirmed, consistent with international human rights standards.”*
- The development and implementation of a National Human Rights Action Plan.
- A review and strengthening of existing anti-discrimination laws.
- Training for public servants about human rights.
- National programs to prevent or address specific issues.
- A national public education program about human rights
- Stronger functions for the Australian Human Rights Commission.