

Mandates of the Special Rapporteur on the right to development and the Special Rapporteur on the rights of Indigenous Peoples

Ref.: AL AUS 2/2023
(Please use this reference in your reply)

3 October 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right to development and Special Rapporteur on the rights of Indigenous Peoples, pursuant to Human Rights Council resolutions 51/7 and 51/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the upcoming Referendum on the "Voice to Parliament" (Referendum) which seeks to amend the Constitution to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice to Parliament.

According to the information received, the proposed amendment will insert into the Constitution:¹

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*
- ii. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*
- iii. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures."*

First Peoples' history of colonisation and disempowerment

As one of the world's oldest living human civilisation, indigenous Australians have lived on their lands for over 65,000 years. The history of colonialism led to dispossession and the forcible removal of children, known as the "stolen generation", has left an enduring legacy of injustices, trauma and vulnerabilities. This has prevented them from exercising their rights to

¹ Australian Government, 'Aboriginal and Torres Strait Islander Voice': <https://voice.gov.au/>

development and self-determination. First Peoples make up approximately 3.8% of the total Australian population and many have lost their connection to their identity, language, land, culture and family.²

The First Peoples, particularly those living in remote areas, experience higher rates of diseases and lower life expectancy than non-indigenous peoples due to lack of access and availability of health services, adequate housing and nutritious food. Remote communities have poor educational and employment opportunities leading to poverty, violence and social problems. The mental, social and emotional well-being for many First Peoples is affected by removal from family, incarceration, deaths of friends or family members, discrimination and unemployment.

The rate of mortality is 1.8 times higher for the First Peoples of Australia compared to non-indigenous Australians.³ The five leading causes of death for First Peoples are coronary heart disease, diabetes, chronic obstructive pulmonary disease, lung cancer and suicide.⁴

Indigenous children face incarceration rates 26 times higher than non-indigenous children.⁵ The number of Indigenous men in prison has doubled over the past 10 years, from 668 in 2007 to 1,327 in 2017. There were 12.5 times more likely to face imprisonment in comparison to non-indigenous men. In the same period, the number of Indigenous women in prison has increased more than three-fold from 30 in 2007 to 106 in 2017. They are likely to face imprisonment 22.2 times more than non-indigenous women.⁶

In 2021, 24,930 Aboriginal and/or Torres Strait Islander people were estimated to be experiencing homelessness, an increase of 6.4% from 2016.⁷ This represents one in five people experiencing homelessness in Australia. In addition, 60% of Aboriginal and Torres Strait Islander people are living in “severely” crowded dwelling, 19.1% in supported accommodation for the homeless, 9.3% in improvised dwellings, tents or sleeping outside with 7.3% staying temporarily in other households.

² Australian Bureau of Statistics, ‘Estimates of Aboriginal and Torres Strait Islander Australians’ (30 June 2021), <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021>

³ Australian Institute of Health and Welfare, ‘Deaths in Australia’ (11 July 2023), <https://www.aihw.gov.au/reports/life-expectancy-deaths/deaths-in-australia/contents/variations-between-population-groups>

⁴ Australian Bureau of Statistics, ‘National Aboriginal and Torres Strait Islander Health Survey’, <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/national-aboriginal-and-torres-strait-islander-health-survey/latest-release>.

⁵ Amnesty International Australia, ‘The Overrepresentation Problem: First Nations Kids are 26 times more likely to be incarcerated than their classmates’ (8 September 2022), <https://www.amnesty.org.au/overrepresentation-explainer-first-nations-kids-are-26-times-more-likely-to-be-incarcerated/>

⁶ Australian Law Reform Commission, ‘Disproportionate incarceration rate’ (9 January 2018), <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/>; Australian Bureau of Statistics, ‘Prisoners in Australia, 2018’ (6 December 2018), <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12018?OpenDocument>

⁷ Australian Bureau of Statistics, ‘Housing Statistics for Aboriginal and Torres Strait Islander Peoples’, <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/housing-statistics-aboriginal-and-torres-strait-islander-peoples/latest-release>.

The First Peoples women face greater levels of homelessness and are overly represented in crowded and supported accommodation.⁸ They are also facing 11 times more risk to die from family violence than non-indigenous women. The First Peoples women experience greater rates of sexual and physical violence, intimate partner violence, hospitalisation and are five times more likely to be victims of homicide.⁹

The Uluru Statement

In 2017, a group of the First Peoples drafted the Uluru Statement from the Heart which called for an extensive legislative reform to protect and realise Indigenous Peoples' rights. There are three key pillars in the Uluru Statement which call for:¹⁰

1. **Voice** – a constitutionally enshrined representative mechanism to provide expert advice to Parliament about laws and policies that affect Aboriginal and Torres Strait Islander peoples.
2. **Treaty** – a process of agreement-making between governments and First Peoples that acknowledges the historical and contemporary cultural rights and interests of First Peoples by formally recognising sovereignty, and that land was never ceded.
3. **Truth** – a comprehensive process to expose the full extent of injustices experienced by Aboriginal and Torres Strait Islander peoples, to enable shared understanding of Australia's colonial history and its contemporary impacts.

The Referendum has reportedly become deeply polarised as there is a strong campaign against the Voice to Parliament. Some supporters of the “No” campaign appears to be spreading myths and misinformation about potential seizure of land and property from non-indigenous Australians, creating anxieties about elevating the rights of First Peoples over others and spreading harmful narratives on racial stereotyping.

Furthermore, some First Peoples are reportedly of the view that the Voice is not enough because the proposed model is too weak to ensure active, free and meaningful participation of the First Peoples in decision making processes affecting them.

Australia is the only country in the Commonwealth to not have entered a treaty with its First Peoples. The State of Victoria is currently working on the first treaty with the First Peoples to recognize indigenous sovereignty and

⁸ Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander peoples experiencing homelessness' (27 June 2023), <https://www.abs.gov.au/articles/aboriginal-and-torres-strait-islander-peoples-experiencing-homelessness>.

⁹ Domestic Violence NSW Aboriginal and Torres Strait Islander Women's Steering Committee, 'Submission to the Committee on the Elimination of Discrimination Against Women general discussion on the rights of Indigenous women and girls', <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/DGD24June2021/16.docx>

¹⁰ Australian Human Rights Commission, 'Voice Referendum: Understanding the referendum from a human rights perspective', <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/voice-referendum-understanding>
The Referendum

compensation for historical harms. Other states of Australia should also consider developing treaties to recognise rights of the First Peoples and promote pathways to their social, economic, cultural and political development.

UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Australia had voted against the adoption of the UNDRIP but subsequently supported it in 2009.¹¹ However, the principles of the UNDRIP were not included in the *Human Rights (Parliamentary Scrutiny) Act 2011*. The 2013 National Action Plan on Human Rights included commitments to UNDRIP, but no human rights law has been enacted yet at the federal level.

As stated in the Australian Human Rights Commission's submission to the *Senate Legislative and Constitutional Affairs Committee* : "Despite the rhetoric employed and public commitments made at international fora from 2014 onwards, the Australian Government, has not: taken steps to implement the Declaration [UNDRIP] into law, policy and practice; negotiated with First Nations people a National Action Plan to implement the Declaration; nor audited existing laws, policies and practice for compliance with the Declaration."¹²

The Australian Government made a voluntary pledge at the 38th Session of the UN Human Rights Council 2017 to promote "the Declaration's principles through national engagement" which would "draw connections between national activity and the principles of the Declaration".

In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples noted with concern how the Australian government was undermining and cutting funding to First Peoples' peak bodies.¹³

In the 2021 UPR review, Australia noted, but stated that it will not consider further at that time several recommendations that were made to revise domestic laws and policies to fully recognise and protect the rights of Indigenous Peoples; develop a National Strategy to adhere to the UNDRIP and constitutional recognition of the First Peoples.

On 15 March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights an inquiry to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan. The inquiry will consider whether the Framework should be re-established and take into account developments since 2010 in Australian human rights laws including relevant case law.¹⁴ A report of the findings will be published in March 2024.

¹¹ Australian Human Rights Commission, note 10.

¹² Ibid, 18.

¹³ 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia' (2 April 2017), <https://www.ohchr.org/en/statements/2017/04/end-mission-statement-united-nations-special-rapporteur-rights-indigenous>

¹⁴ Parliament of Australia, 'Inquiry into Australia's Human Rights Framework', https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework

The Australian Human Rights Commission is also currently engaged in a national conversation on human rights.¹⁵ It released a position paper on the roadmap for a Human Rights Act for Australia. This outlines the need for the Human Rights Act to include protections for the rights of the First Peoples by implementing key principles of the UNDRIP.¹⁶

We welcome the Referendum proposing a constitutional amendment to give voice to the Aboriginal and Torres Strait Islander people in Australia. The Voice to Parliament would recognise the First Peoples' right to self-determination and the right to participate in decision-making affecting them. The body will strengthen the political, economic, social and cultural development of the First Peoples of Australia. Moreover, it should support the First Peoples' pursuit for justice by amending punitive laws in areas such as child protection, law enforcement and corrections, native title and cultural heritage that continue to discriminate against them.

The stark statistics quoted above illustrate the nexus between colonisation, oppression and racism compounding the social, economic, cultural and political marginalisation of the First Peoples of Australia, particularly women and children. The Australian Human Rights Commission's submission to the Senate Legislative and Constitutional Affairs Committee showed clear evidence that the existing laws, policies and actions of the Government have failed to address the social protection, development and human rights of the First Peoples.

We believe that the Referendum is the first important step towards responding to the Uluru Statement to ensure that the First Peoples of Australia benefit from structural changes and are able to realise fully their human rights, including the rights to development and self-determination, in accordance with international human rights law. The Referendum, if successful, will require legislation outlining the composition and functioning of the Aboriginal and Torres Strait Islander Voice institution. It will be critical that the Australian government carries out transparent and meaningful consultation with the First Peoples before enacting this legislation.

While we welcome the initiative, we are of the view that the adoption of the Voice will result in meaningful changes only if the Government creates an enabling environment for the First Peoples of Australia to realise their the right, without discrimination, to the improvement of their economic and social conditions, including in the areas of education, employment, housing, health and social security.

We recommend that a federal Human Rights Act, in line with the international standards enshrined in core human rights treaties and the UNDRIP, be adopted as a matter of urgency. We also urge the Government of Australia to treat the Referendum only as the first step towards the full implementation of the Uluru Statement and the UNDRIP.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

¹⁵ Australian Human Rights Commission, 'Free and Equal: An Australian conversation on human rights', <https://humanrights.gov.au/free-and-equal>

¹⁶ Australian Human Rights Commission, 'Free and Equal Position Paper: A Human Rights Act for Australia', https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) your Excellency's Government may have on the Referendum.
2. Please provide information about the measures taken by your Excellency's Government in building consensus around the Referendum and countering the misinformation campaign.
3. Please provide information about the steps, irrespective of the Referendum's outcome, that the Government propose to take to realise all human rights, including the rights to development and self-determination, of the First Peoples of Australia in accordance with international human rights law.
4. Please provide information about the measures taken, or proposed, to achieve reconciliation with the First Peoples and truth-telling about Australia's history.
5. Please provide information on any measures that your Excellency's Government has taken, or intends to take, to implement UNDRIP and to bring its existing legislation relating to the First Peoples of Australia in compliance with international human rights law.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

Please accept, Excellency, the assurances of our highest consideration.

Surya Deva
Special Rapporteur on the right to development

José Francisco Cali Tzay
Special Rapporteur on the rights of Indigenous Peoples

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to **the UN Declaration on the right to development** (A/RES/41/128) defines the right to development an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development (article 1.1). Article 1(2) of the Declaration further provides that "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." The Declaration also states that the human person is the central subject of development and should be the active participant and beneficiary of the right to development (article 2.1) and requires that States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights (article 8.2). In this line, the ILO Convention 169 prescribes that indigenous peoples of the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the lands their occupy.

We also refer to the Guidelines and recommendations on the practical implementation of the right to development (A/HRC/42/38), which urge states to design and implement development projects after holding meaningful consultations to identify the development priorities of the communities in a project area and benefits-sharing arrangements that would be suitable for those affected. The Guidelines further recommend (para. 37) that States should respect the right of indigenous peoples to self-determination to fulfil the right to development.

We recall that the right to self-determination is contained in article 1 of the International Covenant on Civil and Political Rights as well as in article 1 of the International Covenant on Economic, Social and Cultural Rights. Article 1(1) of both Covenants provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

We also refer to paragraph 2 of the Vienna Declaration and Programme of Action, which reiterates that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development."

We further recall that the United Nations Declaration on the **Rights of Indigenous Peoples**, which reflects existing legal obligations arising from international human rights treaties. Articles 3, 4 and 5 of the UNDRIP affirm that control by Indigenous Peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions and promote their development in accordance with their aspirations and needs. Further, the UNDRIP recognises that respect for indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment. Article 18 of the UN

Declaration on the Rights of Indigenous Peoples states that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions and the adoption of the Voice would align with that commitment.

We also refer to article 21 of the UN Declaration on the Rights of Indigenous Peoples which states that Indigenous Peoples have the right, without discrimination, to the improvement of their economic and social conditions, including in the areas of education, employment, housing, health and social security. Moreover, in line with article 23 of the UNDRIP the First Peoples should have the right to determine and develop priorities and strategies for exercising their right to development through their own institutions. In taking effective measures to ensure continuing improvement of the economic and social conditions of the First Peoples, the Australian government should pay special attention to the rights and special needs of indigenous elders, women, youth, children and persons living with disabilities (article 22 of the UNDRIP).

We would also like to refer to a 2019 report of the Special Rapporteur on the rights of Indigenous Peoples to the General Assembly (A/74/149), where she highlighted that the adequate implementation of the right to self-determination, including the right to establish their own governance and representative institution, implies changes in the general governance of States, which will have a constructive impact on human rights compliance, the remedying of discrimination and inequality, the building of more democratic and inclusive societies and the enhancement of the legitimacy of the State itself. Indigenous-led institutions are crucial to maintain the elements that characterize Indigenous Peoples as distinct societies and give them control of their future. The fulfilment of Indigenous Peoples' rights should therefore not be portrayed as a cost or unwarranted privileges, but rather as an issue of fundamental human rights and justice for historical wrongs. The report strongly recommends that States prioritize the support for proposals of autonomy and self-government developed by Indigenous Peoples.