



18/04/2016

CAPE YORK  
INSTITUTE

Human Rights Inquiry

302-310 Sheridan Street,  
Cairns North Qld 4870  
Submission No: 389

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18 April 2016

The Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
Brisbane QLD 4000  
[lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

Dear Research Director,

It is no exaggeration to observe that the group of Queenslanders most commonly subject to human rights abuses by the Queensland Parliament is Indigenous people. This has been true under colonial policy and legislation and continues to be the case under contemporary legislation and policies enacted under the federal framework pursuant to the Commonwealth Constitution of 1901 and the Constitution of Queensland of 2001.

When discrimination is inflicted against the same group of citizens time and again, it is evidence of a structural, systemic problem. It requires a structural solution. While legislative protections of human rights are important, the history of discrimination against Indigenous peoples in Queensland demonstrates that something more is needed to ensure that the 3% Indigenous minority is not continually trampled by the majoritarian might of the Queensland Parliament. The Parliament needs fairer, more transparent and more efficient ways of interacting and communicating with Indigenous people. A relationship of mutual respect, dialogue and exchange must be created.

#### **History of discrimination against Indigenous people**

There was extensive State violence against Indigenous people in the colonisation of Queensland. This has been well documented. The violence included State authorised killing of Indigenous people, aided by the Queensland Native Police.

There was prolonged discrimination against Indigenous people in Queensland's voting laws. The *Elections Act 1885* provided in s 6 that "no aboriginal native of Australia, India, China or of the South Sea Islands shall be entitled to be entered on the roll except in respect of a freehold qualification." Queensland was the last State to confer equal voting rights on Indigenous people in 1965.

The *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* and the *Aboriginals Preservation and Protection Act 1939* empowered appointed protectors to control many day to day



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aspects of Indigenous people's lives. These laws and policies entailed documented discrimination against Indigenous people, including stolen wages, forcible removal of children, controls of where Indigenous people could live and controls of who they could marry. The protection era in Queensland lasted until the 1970s.

### **Contemporary discrimination: the limitations of the RDA**

The *Racial Discrimination Act (Cth)* (RDA) was enacted in 1975. The human rights protection provided by the RDA has been indisputably important for Indigenous people in Queensland. But alone it has not done enough to prevent unjust and discriminatory parliamentary action in relation to Indigenous people.

In the 1970s, the Wik people of Cape York sought to purchase the Archer River cattle station, which was on their traditional lands. Premier Joh Bjelke-Petersen tried to stop them through a policy to prevent Indigenous people from purchasing large tracts of land. The policy was discriminatory, and Wik leader John Koowarta challenged it under the RDA. The court in 1982 held in favour of Koowarta and found the policy in breach of the RDA.<sup>1</sup> It was a great victory for Wik people. But the Queensland Parliament swiftly dodged the court's decision: it declared the Archer River station a national park, which meant it could not be purchased. Years of legal battling proved ultimately ineffective in curtailing the abusive intent of the Queensland Government.

In 1985, the Queensland Government made another attempt to undermine Indigenous land rights. Wary of the push for Native Title recognition under the *Mabo* claim, Bjelke-Petersen passed the *Queensland Coast Islands Declaratory Act 1985* to stamp out Torres Strait Islander claims. The legislation was snuck through surreptitiously, with minimal public attention until after the fact. The High Court subsequently overturned the legislation as invalid under the RDA, which enabled the recognition of Native Title to ultimately succeed in the *Mabo* case.<sup>2</sup>

More recently, the Wik people spent five years fighting the Queensland Government's *Wild Rivers Act 2005* environmental legislation, which prevented economic development of Indigenous land. The plaintiff was Martha Koowarta. In 2014, the court held that the Queensland Government's decision to impose strict development prohibitions on Indigenous land was made without the proper consultation of the Indigenous traditional owners.<sup>3</sup> Yet again, the State legislated around the court's legal finding. The government re-enacted the Wild Rivers prohibitions under a legislative and

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<sup>1</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>2</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>3</sup> *Koowarta v State of Queensland* [2014] FCA 62.



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regulatory regime of a different name,<sup>4</sup> and also recently proposed a Bill that would forcibly retire what limited residual rights remain for Indigenous people to develop their land for agriculture.<sup>5</sup>

There is an ongoing discriminatory burden on Indigenous land and Indigenous peoples' right to economic development. Indigenous people have won legal recognition of their Native Title and land rights, but government action continues to prevent Indigenous land owners from exercising control and authority over their land. The Indigenous human right to self-determination – the right to freely pursue social, economic and cultural development<sup>6</sup> – is continually and repeatedly violated.

Indigenous land owners are being discriminatorily denied the right to reap economic benefit from their land. Fiona Jose has explained how Bjelke-Petersen's government seized control of Aurukun's extensive bauxite reserves in 1975.<sup>7</sup> He gave it to a French multinational, Pechiney. This was done without consulting with or obtaining the consent of the Aurukun community. The Aurukun community challenged the decision because they felt the Government had not made decisions which were of benefit to them. The case went all the way to the Privy Council and cost thousands of dollars<sup>8</sup> and the mine was never developed.

More recently, the Newman government, again in an overnight decision, announced Glencore as the preferred company to run the bauxite mine, cutting out the Aurukun Bauxite Development (ABD) start-up with traditional owners, which had signed an Indigenous land-use agreement and had offered two seats on the board to traditional owners plus a 15 per cent share in the project. Traditional owner, Kerie Tamwoy, was dismayed at the injustice:

“We are no longer satisfied with mere handouts and breadcrumbs and broken promises, we just want our God-given rights and for the government to do what is right, just and fair.”<sup>9</sup>

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<sup>4</sup> See *Regional Planning Interests Act 2014 (Qld)*.

<sup>5</sup> See *Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016 (Qld)*.

<sup>6</sup> UN Declaration on the Rights of Indigenous Peoples, Article 3 provides: “Indigenous 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.” The right to self-determination is also reflected Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>7</sup> Fiona Jose, ‘Smallbone report: past wrongs to blame for Aurukun crisis’, *The Courier Mail*, 18 March 2016: <http://www.couriermail.com.au/news/queensland/smallbone-report-past-wrongs-to-blame-for-aurukun-crisis/news-story/deb5578b59083a5631210d32e4e6f157>

<sup>8</sup> *Director of Aboriginal and Islander Advancement v Peinkinna* (1978) 17ALR 129, 52ALJR286 (PC): 183.

<sup>9</sup> Michael McKenna, ‘Owner’s bid to share Aurukun bauxite dream,’ *The Australian*, 28 August 2014.



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The new Labor government did not overturn the decision. Instead it recently tried to legislate away the Wik people's right to negotiate regarding development on their land,<sup>10</sup> again in stealthily passed legislation, with no Wik engagement. It is now 2016 and the Wik people of Cape York are again in a legal battle challenging the validity of discriminatory Queensland legislation under the RDA. This time the Queensland Government has pre-emptively undercut any just legal outcome. The Aurukun specific law removing Wik rights to negotiate, implemented itself without genuine Wik consultation or negotiation, is in no way a valid special measure under the RDA. It is clear discrimination. That is why the government has legislated to ensure that the outcome of the tender favouring Glencore cannot now be challenged.

Court challenges under the RDA are important in protecting Indigenous rights. But the RDA relies on litigation, which has not been enough to prevent government abuse of Indigenous rights. Indeed, litigants can only mount a challenge after legislation infringing Indigenous rights has already been enacted. And as the history shows, even where the court finds in favour of the Indigenous litigant, government can legislate around court decisions. More must be done to re-balance a system fundamentally geared against Indigenous interests. More must be done to prevent Indigenous rights being legislatively violated in the first place.

This is an important lesson that must be borne in mind in considering the implementation of a Queensland Human Rights Act. We already have the RDA, and Queensland already has anti-discrimination laws.<sup>11</sup> But legislation alone, whether at the State or Commonwealth level, has not proven enough to protect Indigenous rights. Other structural mechanisms for Indigenous rights protection are also required, in addition to and incorporated into any new Human Rights Act.

### **The importance of Indigenous consultation and participation in political decisions affecting Indigenous rights**

Guarantees and processes for fair engagement, consultation and negotiation between Indigenous peoples and government would help prevent government abuse of Indigenous rights. The international human rights framework requires that special measures and Indigenous-specific laws and policies be devised and implemented in genuine consultation, and where possible with the informed consent, of the Indigenous beneficiaries. This is a practical way of preventing

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<sup>10</sup> The purpose of the legislation was to amend the special provisions in the *Mineral Resources Act 1989* that apply to an Aurukun project (the Aurukun provisions) to give communities the opportunity to object to resource projects and have the Land Court consider those objections.

<sup>11</sup> See *Anti-discrimination Act 1991 (Qld)*.



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discrimination. It is international best practice. It is at the core of respecting Indigenous human rights.

The right of Indigenous peoples to be consulted and to give free, prior and informed consent where legislative action affects their rights is incorporated into the UN Declaration on the Rights of Indigenous Peoples (DRIP)<sup>12</sup> but also into racial non-discrimination principles at international law. Special measures or positive measures to ensure disadvantaged groups – including Indigenous groups – equal enjoyment of their human rights, particularly in a context where there has been past or historical discrimination,<sup>13</sup> are supposed to be implemented with the informed consent of the beneficiaries.<sup>14</sup> The Australian High Court has noted that proper consultation and the “wishes of the beneficiaries” are an important factor in ascertaining whether a particular law or measure is a valid special measure.<sup>15</sup> Chief Justice French said in *Maloney* that:

“...it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure. That is particularly so where ... the measure ... involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members.”<sup>16</sup>

Both the Victorian and ACT Human Rights Acts recognise Indigenous cultural rights<sup>17</sup> and the right to equality before the law and non-discrimination<sup>18</sup> (a right already protected at the Commonwealth level by the RDA),<sup>19</sup> but they do not fulsomely recognise Indigenous peoples’ rights to self-determination, consultation and participation in the political decisions made about their affairs. Both Acts require Statements of Compatibility to be prepared to encourage human rights compliance in law-making processes,<sup>20</sup> a requirement that is now mirrored at the Commonwealth

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<sup>12</sup> Articles 18 and 19.

<sup>13</sup> Convention of the Elimination of all forms of Discrimination (CERD), Article 1(4).

<sup>14</sup> CERD, General Recommendation No 23, ‘Indigenous Peoples’, 18/08/97 [4(d)]; Australian Human Rights and Equal Opportunities Commission, *Social Justice Report 2007*, Recommendations 7, 14.

<sup>15</sup> “The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.” *Gerhardy v Brown* (1985) 159 CLR 70, 135 per Brennan J.

<sup>16</sup> *R v Maloney* (2014) 252 CLR 168, 186.

<sup>17</sup> *Human Rights Act 2004 (ACT)*, s 27; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 6.

<sup>18</sup> *Human Rights Act 2004 (ACT)*, s 8; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 8.

<sup>19</sup> RDA, s 10.

<sup>20</sup> *Human Rights Act 2004 (ACT)*, s 37; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 28.



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level.<sup>21</sup> But neither Act requires Indigenous consultation or participation where laws have specific or substantial impact on Indigenous rights. This is a major weakness in the Acts, and a major weakness in Australia's Indigenous rights protection regime both at the Commonwealth and State levels.

It is not enough that human rights protection in Australia requires Parliament to consider whether their own laws, in their own opinion, breach the human rights of Indigenous peoples – there is a clear conflict of interest present in asking the parliamentary majority to objectively assess whether its own laws are breaching the rights of the Indigenous minority. Parliament should also be required to consider the advice of *Indigenous people themselves* in relation to laws and policies impacting upon Indigenous rights.

### **There should be a Queensland First Nations representative body**

Indigenous peoples are a unique constituency within Australian citizenship. They are the only group that was dispossessed by colonisation. They are the only group that was uniquely discriminated against by the Commonwealth Constitution of 1901. In Queensland, they are the only group that has been subject to repeated and prolonged discrimination under State laws and policies. Accordingly, Indigenous people are the only group that has distinct rights and interests arising out of this history, for example laws recognising Indigenous land rights, heritage and cultural rights – as is reflected in existing State Human Rights Acts and under State and Federal land rights regimes.

Given the extensive history of discrimination against Indigenous people and the unique historical, political and legal position of Indigenous peoples within Queensland and Australia, Indigenous people should have a formal and permanent platform on which to express their views on whether proposed laws and policies are beneficial or detrimental to them, and how such laws might be improved. This would help create a productive ongoing dialogue between Indigenous peoples and the Queensland Government in respect of Indigenous rights, rather than just between the courts and the Queensland Government as is currently the case.

Indigenous input is important where laws and policies are aimed at alleviating Indigenous disadvantage – genuine consultation with Indigenous people can increase the wisdom of Parliament by providing on the ground, lived experience and expertise, helping to increase the effectiveness of such policies and helping to close the gap. Explicit Indigenous input is especially crucial, however, where laws are intended to breach Indigenous rights, as has often been the case in the past. A parliamentary process to create formal, respectful dialogue between the Parliament and Indigenous peoples would help such matters become public, would increase political pressure on Parliament to

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<sup>21</sup> *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*.



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act justly in relation to Indigenous peoples, and would thus help prevent discriminatory legislation being snuck through without adequate scrutiny, dialogue or consultation with Indigenous people.

The Queensland Parliament should be required to hear the advice of Indigenous peoples whenever it considers a proposed law or policy that affects Indigenous rights and interests. This can happen through an Indigenous representative body, established to give voice to the Indigenous First Nations of Queensland. The advice of the body would be non-binding, and there should be time limits and rules to ensure that pending advice cannot unreasonably delay Parliament. Where a law or policy is place-specific, the mechanism should require consultation with the Indigenous peoples most immediately affected. Indigenous representatives should have the opportunity to address Parliament and answer questions regarding proposed laws and policies that affect Indigenous rights, as well as making written submissions. All advice should be public, and the Parliament should give public reasons where it chooses not to follow Indigenous advice.

It is important that this mechanism not be restricted to laws and policies that are intended to affect Indigenous rights – it should also apply where there is indirect or unintended impact. The Indigenous representatives should have discretion regarding which matters they wish to advise on – the advice would be non-binding after all. In this way, Parliament and the public can be alerted to potential negative impacts and Indigenous rights breaches of which they might not otherwise be aware. This will help improve policy.

Ideally, the requirement for Indigenous consultation and participation in the making of laws and policies that affect their rights should be incorporated into the Queensland Constitution as an entrenched law. It should be part of the standard law and policy making procedures set out by the State Constitution. This will help ensure that the requirement cannot be explicitly or impliedly repealed or amended by subsequently legislation.

Any new Human Rights Act for Queensland would be incomplete and ineffective in improving Indigenous human rights protection without a requirement that Indigenous peoples must be heard in the political decisions made about them.

### **Previous attempts at Queensland Indigenous advisory bodies**

It is uncontroversial that consultation with Indigenous people in the making of laws and policies about them and their affairs is a sensible idea, and a part of good government. This is repeatedly acknowledged in government policy. Yet Australian governments thus far have been half-hearted in making the principle a practical reality. Previous attempts to implement Indigenous consultative and



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advisory arrangements have been unsuccessful. They all share important characteristics in common: they are not constitutionally entrenched and so do not carry the gravitas of being part of the State's permanent political decision-making procedures, and they are not supported by formal constitutional or legislative procedures that require Parliament to interact with and consider the advice of the body. State bodies have included:

- Aboriginal and Torres Strait Islander Overview Committee, 1992
- Aboriginal Justice Advisory Committee, 1993
- Indigenous Advisory Council (IAC) replaced the two previous bodies, 1997
- Aboriginal and Torres Strait Islander Advisory Board replaced the IAC, 1999
- Community Justice Reference Group, 2008
- National Indigenous Law and Justice Advisory Body, 2009
- Queensland Aboriginal and Torres Strait Islander Advisory Council, 2009

Currently there are no representative arrangements for the Indigenous peoples of Queensland to have a permanent voice and exercise leadership and authority in their affairs. There are no formal arrangements for respectful dialogue and consultation to occur. This is a major deficit in Queensland's Indigenous human rights protection regime. Consideration of a Human Rights Act for Queensland affords an opportunity to seriously address this problem, and to do so in an enduring and meaningful way.

### **New Zealand: an example of how to protect Indigenous rights while maintaining parliamentary supremacy**

The *New Zealand Bill of Rights Act 1990* (NZBRA) requires the Attorney-General to report on whether legislation breaches human rights, rather than empowering the judiciary to strike down legislation in breach of human rights – a similar approach to that taken in existing Human Rights Acts in Australia. However the difference is that the NZBRA does not work in isolation as the sole mechanism for the protection of Maori rights. New Zealand has in place practical Maori recognition measures enhancing Maori human rights protection including:

- Maori reserved seats in Parliament<sup>22</sup>
- The Maori Council<sup>23</sup>
- The Treaty of Waitangi<sup>24</sup>
- Waitangi Tribunal<sup>25</sup>

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<sup>22</sup> *Electoral Act 1993* (NZ).

<sup>23</sup> [Maori Community Development Act 1962](#) (NZ).

<sup>24</sup> The Treaty protects Maori rights to equality before the law and property rights and establishes principles of partnership in the relationship between Maori and the Crown.





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- Legislative recognition of Maori language.<sup>26</sup>

The practical effectiveness of New Zealand's Maori rights protection is enhanced by the strong political representative arrangements ensuring that Maori people have a voice in law and policy making procedures. The reserved Maori seats mean that Maori people have a dedicated voice in the law making procedures of Parliament, thus helping prevent the enactment of laws which infringe Maori rights. The Maori Council is a representative and consultative body which gives Maori a further formal platform for national advocacy and political and policy influence.

If Queensland is serious about protecting Indigenous human rights, it should look carefully at arrangements in New Zealand which include formal measures for Maori representation and participation in the political decisions made about them, in addition to their NZBRA. We do not propose reserved Indigenous seats in Parliament, an issue the Queensland Parliament has already investigated but not pursued.<sup>27</sup> A better and less complex solution would be to create a Queensland First Nations representative body, akin to the Maori Council, but constitutionally empowered to advise and consult with Parliament.

### Conclusion

A serious discussion of human rights in Queensland must grapple with the power imbalance that exists in the constitutional relationship between Indigenous peoples and the Queensland Government, and with the fact that Indigenous peoples have suffered more human rights violations than any other group. It must find a way of addressing this structural problem in a way that respects Indigenous peoples, but that is also respectful and fair to all Queenslanders. This can be achieved through a procedural requirement to guarantee the Indigenous voice in the governance of Queensland's Indigenous affairs.

Queensland has the opportunity to lead Australia in building a better and fairer relationship with its Indigenous peoples, by constitutionally requiring that Parliament hear the advice of Indigenous peoples when making laws and policies that affect Indigenous rights. We do not propose a veto: the advice must be non-binding. The mechanism must not unduly delay the workings of Parliament. But it must create a genuine, transparent and respectful dialogue. Such a reform would make Queensland a leader in Indigenous rights protection in Australia.

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<sup>25</sup> *Treaty of Waitangi Act 1975 (NZ)*.

<sup>26</sup> The *Maori Language Act 1987 (NZ)* establishes Maori as an official language of New Zealand and sets up the Maori Language Commission to promote, revitalise and protect Maori language rights.

<sup>27</sup> See Brian Stevenson and Wayne Jarred, 'The allocation of parliamentary seats for Indigenous minority groups', Queensland Parliamentary Library, Research Brief 13/01, June 2001.



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We recommend:

- Queensland should establish an Indigenous representative body to give voice to the Indigenous First Nations of Queensland
- the Parliament should be required to consult with and hear the non-binding advice of Indigenous peoples when making laws and policies affecting Indigenous rights and interests
- this mechanism should be entrenched in the State Constitution, however it should also be included and reiterated in any new Human Rights Act for Queensland.

Cape York Institute would welcome the opportunity to discuss this with you further [REDACTED]

Yours sincerely,

[REDACTED]

**Noel Pearson**  
**Adviser**  
**Cape York Partnership**

[REDACTED]

**Fiona Jose**  
**General Manager**  
**Cape York Partnership**