

HUMAN RIGHTS COUNCIL
UNIVERSAL PERIODIC REVIEW
STATEMENT ON AUSTRALIA - UPR 2015



NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

The National Congress of Australia's First Peoples (Congress) is the national representative organisation for the Aboriginal and Torres Strait Islander Peoples of Australia. Congress is accredited by ECOSOC to hold NGO Special Consultative Status.

This Shadow Report is prepared for the assessment of Australia under the Human Rights Council's Universal Periodic Review (UPR) in 2015. The report addresses the human rights of Aboriginal and Torres Strait Islander Peoples as defined in instruments including the UN Declaration on the Rights of Indigenous Peoples, the Outcome Document of the World Conference on Indigenous Peoples, and the reports, general recommendations and findings of the human rights treaty bodies and the special mechanisms of the Human Rights Council.

Congress was established in 2010, five years after the Australian Government abolished the Aboriginal and Torres Strait Islander Commission (ATSIC). Congress is registered as a company owned by the Aboriginal and Torres Strait Islander Peoples, primarily to prevent the Australian Government from controlling its structure and operations. Congress is established for the purposes of:

- (1) providing national leadership and recognition of the status and of the rights of Aboriginal and Torres Strait Islander people as first nations peoples;
- (2) protecting and advancing the wellbeing and rights of Aboriginal and Torres Strait Islander peoples and communities;
- (3) providing a representative voice of, and a conduit for communications with and between, Aboriginal and Torres Strait Islander peoples;
- (4) securing economic, political, social, cultural and environmental futures for Aboriginal and Torres Strait Islander peoples and communities by working with governments, service providers, communities and other stakeholders;
- (5) building strong relationships with government, industry and among Aboriginal and Torres Strait Islander peoples and communities, based on mutual respect and equality;
- (6) identifying issues, researching solutions and educating government, service providers and Aboriginal and Torres Strait Islander peoples and communities to achieve the above purposes.

Congress actively represents the rights and freedoms of the Aboriginal and Torres Strait Islander Peoples at the United Nations through participation at the UN Permanent Forum on Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples. In 2014 Congress was also a participant in the preparations for and operations of the World Conference on Indigenous Peoples (WCIP). Congress also adopts the Declaration on the Rights of Indigenous Peoples¹ as the minimum standard for the human rights of the Aboriginal and Torres Strait Islander Peoples in Australia. Congress also acknowledges and agrees with the undertakings by the UN Member States, including Australia, as endorsed in the Outcome Document² of the World Conference on Indigenous Peoples, convened as a high-level segment of the UN General Assembly.

The National Congress of Australia's First Peoples presents this report to the United Nations Human Rights Council in 2015 on behalf of the Aboriginal and Torres Strait Islander Peoples of Australia.

RECOMMENDATIONS FROM UPR 2011

The Working Group on the Universal Periodic Review formally considered Australia's human rights record on 27 January 2011.

The Working Group report on Australia³, following the examination by States, contained 145 recommendations. Of these, 54 recommendations were directly related to the human rights of the Aboriginal and Torres Strait Islander Peoples. Australia rejected only two (2) of those recommendations. The Australian Government accepted 42 of the recommendations - 16 of which were accepted with qualification - and a further 10 recommendations were accepted in part.

Despite the strong concerns and proposals presented during the UPR hearing by its peers the Australian Government has not pursued in good faith the recommendations pertaining to the interests of the Aboriginal and Torres Strait Islander Peoples and, consequently, Australia has failed to make any significant progress or achieve positive results as an outcome of the UPR examination. Very few actions have been attempted, and these are discussed in the next section, but many important proposals for improvement arising from the UPR remain ignored and untouched.

Primarily the Australian Government did not act in accordance with its commitment under Recommendations 26, 109, 110, 111, 112, 113 and 118 to consult and cooperate with the Aboriginal and Torres Strait Islander Peoples. The Government gave the Human Rights Council a clear message that it was to engage with Congress regarding the many recommendations concerning the Aboriginal and Torres Strait Islander Peoples.

*"The National Congress of Australia's First Peoples will provide a central mechanism with which government, the corporate and community sectors can engage and partner on reform initiatives."*⁴

However we find in 2015 the Australian Government still refuses to formally acknowledge the role and representative status of the National Congress of Australia's First Peoples⁵. In 2013 the newly elected Government withdrew the financial aid⁶ that had been approved by the previous government to sustain the role and operations of Congress. The Government unilaterally appointed a small advisory council 'to advise Government on practical changes which can be made to improve the lives of Indigenous people'. The Prime Minister's Indigenous Advisory Council⁷ is a directly appointed, non-representative group. This consultation process is a breach of the human rights of the Aboriginal and Torres Strait Islander Peoples and does not comply with standards set out in Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples. It also fails to implement the commitments under Operative Paragraphs 3, 4, 7 and 8 of the WCIP Outcome Document.

At no time since 2011 has the Australian Government engaged with Congress to follow up or implement the recommendations of the Universal Periodic Review in 2011. Congress rejects absolutely the proposition by the Australian Government that it has engaged with Congress, amongst others, when designing policies, programmes and implementing services that affect Aboriginal and Torres Strait Islander Peoples. This has never happened.

Congress notes also that the Council of Australian Human Rights Authorities, incorporating the Australian Human Rights Commission, has produced annual reports on the progress towards implementation of the UPR recommendations by Australia. The 2014 report⁸ includes a table that identifies the extent to which the UPR recommendations have been implemented. It shows only 11% of the entire UPR recommendations to Australia have been fully implemented. Congress is deeply concerned that none of the recommendations pertaining to the Aboriginal and Torres Strait Islander Peoples have been implemented.

The next section provides some confirmation of ongoing efforts which have a positive opportunity for Aboriginal and Torres Strait Islander Peoples but which continue to languish and suffer because of inadequate engagement with and participation from our Peoples.

ADVANCEMENTS SINCE UPR 2011

RACIAL DISCRIMINATION

The National Congress of Australia's First Peoples is satisfied that the Racial Discrimination Act 1975 (RDA) is in full application in Australia, having been restored in operation of the Northern Territory intervention laws. However, recent legal actions have identified that the definition of 'Special Measures' under the RDA is not consistent with the definition under the International Convention on the Elimination of All Forms of Racial Discrimination. In Australia special measures relating to Indigenous Peoples are not required to have the consent of the Peoples concerned. There are other inconsistencies in the Australian interpretations that ultimately mean that the Aboriginal and Torres Strait Islander Peoples are not able to enjoy the same rights and freedoms as all other Peoples of the world. The criteria for special measures in Australian law are considered in the High Court case of *Maloney vs The Queen*⁹. As another matter of concern, recent efforts by the Government to alter the provisions concerning racial vilification¹⁰ were opposed by Congress in association with representation from a wide section of Australian society, concerned about the vulnerability of minority cultural groups as well as the Aboriginal and Torres Strait Islander Peoples. Congress continues to seek some guarantee from the Australian Government that racial discrimination is prohibited in Australia. This guarantee can be given in the Constitution of Australia, by including a provision that prevents legislatures from adopting racist laws. The RDA in itself does not stop the legislatures from enacting such laws.

CONSTITUTIONAL REFORM

The Australian Government continues to promote changes to the Constitution to recognise the Aboriginal and Torres Strait Islander Peoples. While Congress remains in support of Constitutional reform our Peoples are increasingly worried that the changes remain a mystery, and that the changes to ultimately be achieved will have no benefit to them. In fact, it may lead to further denial of their identity and rights. The Government is not showing enough leadership or commitment to ensure that positive outcomes are to be achieved. The progress is wallowing and support is waning.¹¹

SOCIAL EQUALITY - 'CLOSE THE GAP'

The Government continues to support established targets to overcome social inequality between the non-Indigenous and Indigenous populations in Australia. The Government continues with its 'Closing The Gap' strategy. Congress encourages this approach for accountable and transparent government. The approach helps ensure that adequate funding is provided to overcome disadvantage, due to the statistical information being generated. However the progress towards achieving the targets is slow and unlikely to meet the target dates¹². The problem is the lack of adequate engagement with the Aboriginal and Torres Strait Islander peoples, at the national level and community level, leading to poorly designed and culturally inappropriate programs and service delivery. Congress has endeavoured to engage with Government to improve the strategic approach, without success.

DATA GATHERING AND DISAGGREGATION

Congress commends the Australian Government for the efforts towards obtaining and analysing data on Aboriginal and Torres Strait Islander disadvantage. The regular and independent reports on social and economic statistics¹³ provide good evidence on the levels of disadvantage and the progress or lack of progress in government policies and programs. Congress welcomes the continued reporting of the statistics but notes the lack of Aboriginal and Torres Strait Islander engagement in analysing the data and in decision-making on the key policies and programs linked to the statistical reporting.

COMMITMENTS ARISING FROM WCIP OUTCOME DOCUMENT

On 22 September 2014 the United Nations General Assembly adopted a resolution to take specific actions to promote and protect the rights of Indigenous Peoples. The resolution was adopted by consensus. The General Assembly was convening the World Conference on Indigenous Peoples (WCIP) and the resolution was the adoption of the Outcome Document from that World Conference.

For the UN Member States the Outcome Document is an action-oriented document intended to achieve the ends of the Declaration on the Rights of Indigenous Peoples. For Indigenous Peoples the Outcome Document represents the next significant step towards the realisation of their human rights, mostly in an environment of opposition and reluctance by the State to recognise their distinct rights and identity as self-determining 'peoples'.

A key action in the Outcome Document is the undertaking by the UN Member States to report to the Universal Periodic Review and in periodic reports to the human rights treaty bodies on the situation of Indigenous Peoples and the measures taken to pursue the objectives of the Declaration on the Rights of Indigenous Peoples.

*'We invite Human Rights Treaty bodies to consider the United Nations Declaration on the Rights of Indigenous Peoples in accordance with their respective mandates. We encourage Member States to include, as appropriate, information on the situation on the rights of indigenous peoples, including the measures taken to pursue the objectives of the United Nations Declaration on the Rights of Indigenous Peoples in reports to Human Rights Treaty bodies, and in the Universal Periodic Review.'*¹⁴

Accordingly, Congress provides this report to the UPR procedures based upon the priorities of the Declaration and the WCIP Outcome Document, in the context of Australia's human rights record on the treatment of the Aboriginal and Torres Strait Islander Peoples.

The UPR should ensure that the Australian Government does not continue to discriminate against Aboriginal and Torres Strait Islander rights as a Peoples by denying key principles of equality and by avoiding its international obligation to respect our self-determination. In the WCIP Outcome Document the Member States 'reaffirm our solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration'.

*We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples and our commitments made in this respect to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, in accordance with the applicable principles of the United Nations Declaration on the Rights of Indigenous Peoples.*¹⁵

Congress has taken the Declaration and the WCIP Outcome Document into account in the preparation of this report and proposals concerning the Australian Government.

CENTRAL HUMAN RIGHTS CONCERNS

The Australian Government has a long-standing poor record in its treatment of the Aboriginal and Torres Strait Islander Peoples. The colonisation of Australia has resulted in an ongoing legacy of injustice and racial discrimination because no treaties, agreements or negotiations were made from the time of English settlement. Over the life of the colonies and the nation the governments have failed to establish a comprehensible social contract between the invaders and the First Peoples of Australia.

This injustice has resulted in massive disadvantage for the First Peoples that remains unresolved in the modern times, with the only contemporary undertaking by the Australian Government being to transition the First Peoples into the dominant Australian society. The Aboriginal and Torres Strait

Islander Peoples of Australia are being strictly regulated and controlled, by centralised and remote government, using laws, policies, programs and actions which are beyond the reach or influence of the peoples concerned.

The Australian Government has rejected the notion of remedy or restitution to the Peoples for the unjust and damaging policies of the past¹⁶. The current Government steadfastly refuses to acknowledge the national representative structure of the National Congress of Australia's First Peoples. This Government has withdrawn funding assistance to all Indigenous structures that are advocacy bodies for the rights of the Aboriginal and Torres Strait Islander Peoples.¹⁷

Contemporary policies of the Government are heavily focussed upon education and training of the young generation to conform to social norms of Australian society while Aboriginal and Torres Strait Islander cultural interests are at worst discouraged and at best unassisted. In the Northern Territory, in an irrational reaction to the cultural gulf between Indigenous and non-Indigenous viewpoints, Aboriginal and Torres Strait Islander laws and customary practices are prevented from consideration in criminal cases before the Federal Court, even as mitigating argument.¹⁸

The adult population of the Aboriginal and Torres Strait Islander Peoples are being frustrated and splintered by heavy-handed actions involving excessive policing and applied welfare controls over entire communities and populations. The evidence of this imposition on the First Peoples lies in the extreme numbers of children, youth and adults taken from their families and communities and placed in foster homes, detention centres and prisons. Despite the human rights recommendations repeated over decades by the United Nations to address the rates of separation and imprisonment of the First Peoples, the levels of incarceration are continuing to increase dramatically.¹⁹

As clearly demonstrated in the review of the UPR recommendations in 2011, and the overall failure to make any realistic progress towards advancement of the human rights situation for the Aboriginal and Torres Strait Islander Peoples, Australia is unwilling to act and unwilling to promote the rights of the Aboriginal and Torres Strait Islander Peoples.

The reluctance by Australia to formalise the rights of the Aboriginal and Torres Strait Islander Peoples in Australian law can be interpreted as an effort to deny the collective identity as a Peoples. This can prohibit the exercise of self-determination including the important rights to political, economic, social and cultural development. Most Aboriginal and Torres Strait Islander communities are still encumbered and frustrated when making or implementing their own decisions about the identity and culture for their future generations. This anguish can lead to despair, ill-health and dysfunction within the population.

The following proposals are framed to advance the human rights of Aboriginal and Torres Strait Islander Peoples of Australia in accordance with our human rights as determined and reaffirmed by the United Nations.

PROPOSED RECOMMENDATIONS FOR UPR 2015

GENERAL

It is recommended that Australia:

- Enact legislation to incorporate all of Australia's international obligations into domestic law; and
- Review the national Constitution to remove powers to enact racist laws.

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

It is recommended that Australia:

1. Ratify ILO Convention No. 169 and revise national, regional and local constitutions, laws and policies to fully recognise and protect the rights of the Indigenous Peoples in domestic law, consistently across the nation.
2. Collaborate with the National Congress of Australia's First Peoples at the national level to establish and maintain legal and formalised agreements, including a national plan of action, that acknowledge and respect decision-making by Aboriginal and Torres Strait Islander Peoples, consistent with the Declaration on the Rights of Indigenous Peoples.
3. Promote full awareness of the Declaration on the Rights of Indigenous Peoples amongst the legislature, the judiciary and the civil service, as well as incorporate awareness and understanding of these human rights standards at all levels in the education system.
4. Establish at the national level, in conjunction with the indigenous peoples concerned, a fair, independent, impartial, open and transparent mechanism and processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources.
5. Ensure Aboriginal and Torres Strait Islander Peoples have access to equitable financial and technical assistance from the government to maintain their cultures, languages and practices, including their spiritual and custodial association with their lands, territories and resources.
6. Support Aboriginal and Torres Strait Islander self-governance including through the delivery of culturally-sustainable services through their own institutions within their communities for health, employment, education, welfare and other social needs
7. Significantly and immediately reduce the high rate of separation of Aboriginal and Torres Strait Islander individuals from their families and communities, caused by removal of babies and children, incarceration of youth and adults, and other government policies which target or are primarily directed towards the Aboriginal and Torres Strait Islander Peoples.
8. In collaboration with the Aboriginal and Torres Strait Islander Peoples continue to provide and appraise financial assistance to the Aboriginal and Torres Strait Islander Peoples, nation-wide, to further long-term development programs which have the consent of their communities and which will achieve genuine equality in living standards.
9. Cooperation with initiatives by the Aboriginal and Torres Strait Islander Peoples to promote and protect the rights of their women, youth and children in conjunction with the security of the Peoples within their own families and communities.
10. Provide greater attention and assistance to Aboriginal and Torres Strait Islander Peoples who experience physical and mental disability, to identify and meet their specific needs and to provide support within their families and communities.

FOOTNOTES

- ¹ A/RES/61/295, UN General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples”, 13 September 2007
- ² A/RES/69/2, UN General Assembly, 22 September 2014, “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples”
- ³ A/HRC/17/10, 24 March 2011, Report of the Working Group on the Universal Periodic Review – Australia
- ⁴ A/HRC/17/10/Add.1, 31 May 2011, Report of the Working Group on the Universal Periodic Review – Australia – Addendum, Recommendation 110
- ⁵ “The Government will achieve savings of \$15.0 million over three years by ceasing funding for the National Congress of Australia’s First Peoples from 1 July 2014. The savings from this measure will be redirected by the Government to repair the Budget and fund policy priorities.”; Budget 2014-15: Budget Paper No. 2 Part 2: Expense Measures Prime Minister and Cabinet: National Congress of Australia’s First Peoples — cessation, 13 May 2014
- ⁶ *ibid*
- ⁷ <http://iac.dpmmc.gov.au>
- ⁸ Australia’s Universal Periodic Review: Progress Report Prepared by the Australian Human Rights Commission on Behalf of the Australian Council of Human Rights Authorities – 2014; ISSN 2203-2614, December 2014, <https://www.humanrights.gov.au/sites/default/files/document/publication/upr-progress-report-2014.pdf>
- ⁹ <http://www.austlii.edu.au/au/cases/cth/HCA/2013/28.html>
- ¹⁰ http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s978_first-senate/toc_pdf/1421120.pdf;fileType=application%2Fpdf#search=%22legislation/bills/s978_first-senate/0000%22
- ¹¹ <http://nationalcongress.com.au/statement-to-the-joint-select-committee/>
- ¹² http://pc-funnelback01.squiz.net/s/redirect?rank=2&collection=productivity-commission-web&url=http%3A%2F%2Fwww.pc.gov.au%2Fresearch%2Frecurrent%2Fovercoming-indigenous-disadvantage%2Fkey-indicators-2014&index_url=http%3A%2F%2Fwww.pc.gov.au%2Fresearch%2Frecurrent%2Fovercoming-indigenous-disadvantage%2Fkey-indicators-2014&auth=EmbH5PAw%2BHPc8BRHOZbQig&query=%21padrenull+%7C%5Bv%3AProject+v%3APublication%5D+%7Cy%3A%22%24%2B%2B+overcoming+disadvantage+%24%2B%2B%22+%7Cd%3D2014&profile=_default
- ¹³ <http://www.pc.gov.au>
- ¹⁴ Para 29, A/RES/69/2, UN General Assembly, 22 September 2014, “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples”
- ¹⁵ Para 3, A/RES/69/2, UN General Assembly, 22 September 2014, “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples”
- ¹⁶ Refer to Australia’s response to Recommendation 97, A/HRC/17/10/Add.1, 31 May 2011, Report of the Working Group on the Universal Periodic Review – Australia – Addendum
- ¹⁷ 26 July 2014, “Brandis ties NGO funding to non-advocacy”, The Saturday Paper, <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CFEQFjAI&url=http%3A%2F%2Fwww.thesaturdaypaper.com.au%2Fnews%2Fpolitics%2F2014%2F07%2F26%2Fbrandis-ties-ngo-funding-non-advocacy%2F1406296800&ei=SdMPVbngA4e3mwW374GoAw&usq=AFQjCNGWqxGFBy0sxYjNscWGVXDY1LEDVA&sig2=TmCj4WgTh4x3JJP-YFXRjw&bvm=bv.88528373,d.dGY>
- ¹⁸ Paper, ‘Summary of Customary Law Issues’; by Pamela Nathan, <http://www.casse.org.au/wp-content/uploads/2013/10/Aboriginal-Program-Resources-Summary-of-Customary-Law-Issues.pdf>
- ¹⁹ ‘The Aboriginal and Torres Strait Islander imprisonment rate increased to 2,174.5 prisoners per 100,000 Aboriginal and Torres Strait Islander population in 2013’; <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Imprisonment%20rates~10009>

