

**ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES
(ATSILS)**

**JOINT SUBMISSION IN RESPONSE TO THE
AUSTRALIAN GOVERNMENT'S DRAFT NATIONAL
REPORT TO THE UNITED NATIONS UNIVERSAL
PERIODIC REVIEW**

AUGUST 2010



**Victorian Aboriginal Legal
Service Co-operative Limited**



**Aboriginal Legal Service
of WA**



**Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd**



**Aboriginal Legal Rights
Movement Inc**



NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY



CAALAS
CENTRAL AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC.



Aboriginal Legal Service (NSW/ACT) Limited

JOINT ATSILS SUBMISSION IN RESPONSE TO THE AUSTRALIAN GOVERNMENT'S DRAFT NATIONAL REPORT TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW (UPR)

The Following is a submission in response to the Australian Government's draft National Report to the United Nation's (UN) Universal Periodic Review (UPR) from the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
- Aboriginal Legal Rights Movement Inc.
- Aboriginal Legal Service (NSW/ACT)
- North Australian Aboriginal Justice Agency
- Victorian Aboriginal Legal Service Co-operative Limited
- Aboriginal Legal Service of Western Australia (Inc.)

The UPR offers the Australian Government a unique opportunity to take stock of its progress in the area of human rights and identify areas for improvement. In order to genuinely participate in the UPR process the Australian Government must be completely transparent and open about the reality of human rights promotion and protection on the ground.

The ATSILS note that while the current draft of the Australian Government's National Report (National Report) identifies numerous important human rights developments and issues, there are still significant gaps in the information provided by the Government in relation to critical human rights issues affecting Aboriginal and Torres Strait Islander peoples.

The ATSILS are also concerned about the overly descriptive nature of the National Report and the lack of critical analysis evident within it. It appears that the Government has deliberately overlooked many human rights issues it has not adequately addressed over the past four years in an attempt to avoid critical judgement. The ATSILS strongly suggest that the National Report be amended to include the following points:

II BACKGROUND AND FRAMEWORK

B. LEGAL SYSTEM

The ATSILS recommend that there be recognition in the National Report of the fact that while in theory the common law legal system should provide the necessary protection of human rights, failure by the Government to provide the relevant associated services needed to support this system, has meant that common law guarantees have failed to ensure substantive protection of human rights. For example, the right to a fair trial is enshrined in Australian common law yet this right continues to be violated as a result of the Government's failure to provide adequate interpreter services to Aboriginal and Torres Strait Islander peoples.

C. INSTITUTIONS

1. Australian Human Rights Commission

The ATSILS recommend the National Report be amended to address the potential for an increase in the Australian Human Rights Commission's (AHRC) powers beyond conciliation so that individuals experiencing human rights violations can have access to stronger, more effective remedies.

6. National Congress of Australia's First Peoples

The ATSILS recommend the National Report mention that there is no legislative requirement that the Government take on board the advice or recommendations of the National Congress of Australia's First Peoples (Congress). The ATSILS are concerned that the Government will merely inform the Congress of pre-determined actions rather than genuinely engage with it at the policy development stage.

The ATSILS are further concerned that the National Report implies that the Congress represents all Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples consist of diverse peoples who are divided over the merits of the Congress. It is likely that participation in the Congress will not be universal.

The ATSILS recommend the National Report include recognition that consultation with the Congress does not equate to consultation with all Aboriginal and Torres Strait Islander peoples and that further more widespread consultation will also need to take place, especially in matters relating to obtaining free, prior and informed consent.

E. INTERNATIONAL OBLIGATIONS

The ATSILS recommend the National Report detail action the Government is taking to address its shortcomings, as identified by relevant UN treaty bodies, in regards to the full implementation of the international human rights treaties that it is a party to.

The ATSILS further recommend the National Report detail how the Government is progressing towards withdrawing the reservations it has under the International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of Racial Discrimination (CERD), International Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC); or alternatively, provide justification as to why reservations will remain.

II PROMOTION AND PROTECTION OF HUMAN RIGHTS

A. AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

In discussing the promotion and protection of human rights in Australia the omission of any mention of a Human Rights Act within the National Report is glaringly obvious. UN treaty bodies have repeatedly questioned Australia regarding the lack of a comprehensive constitutional or legislative entrenchment of human rights at the Federal level.

The National Report is also misleading in that it implies that by complying with the Human Rights Consultation Committee's (Committee) recommendation regarding education, the Government has been fully compliant with the major outcomes of the consultation. There is no mention that the Committee recommended that Australia adopt a Federal Human Rights Act.¹ The reality that the Government only adopted a handful of the Committee's recommendations and rejected the majority, which were arguably more significant, has been neglected.

B. EQUALITY AND NON-DISCRIMINATION

The National Report points to the range of anti-discrimination legislation that exists as the means by which the rights to equality and non-discrimination are protected within Australia. In order to paint a complete picture, this section must acknowledge that these protective instruments are not absolute.

The ATSILS recommend the National Report acknowledge that such legislation is vulnerable to suspension, such as occurred recently in relation to the Northern Territory Emergency Response (NTER), and that therefore, they do not provide satisfactory protection of the right to equality and non-discrimination.

1. Aboriginal and Torres Strait Islander Peoples

The National Report rightly praises the national apology made by the Government to the Stolen Generations. However, there is no mention of providing compensation to victims of the Stolen Generations or Stolen Wages. Given the ongoing and highly visible advocacy campaigns surrounding the issue of compensation it is unacceptable for this issue to be denied mention. The ATSILS recommend the National Report be amended to include information as to how the Government plans to address this issue.

The National Report lists the 'Closing the Gap' targets as evidence of action being taken to address the extreme disadvantage faced by many Aboriginal and Torres Strait Islander peoples, but does not detail progress made towards reaching these targets. The ATSILS recommend the National Report be amended to include the most up to date qualitative and quantitative data on progress the Government has made in relation to each target, rather than restating the aspirational policies.

The National Report points to support given by the Australian Government to the Declaration on the Rights of Indigenous Peoples (Declaration) as evidence of its reaffirmation of Aboriginal and Torres Strait Islander peoples' entitlement to human rights and fundamental freedoms. This is insufficient evidence for such a claim in light of the fact that other pieces of policy adopted by the Government have been deemed to expressly deny Aboriginal and Torres Strait Islander peoples' human rights.²

The ATSILS recommend the National Report be amended to include detail as to specific actions the Government is taking to provide for the rights contained within the Declaration.

The National Report currently describes the National Indigenous Law and Justice Framework (Framework) as being designed to "tackle serious Indigenous law and justice issues". This is misleading as it purposefully fails to mention that the Framework has no funding attached to it and is therefore not actively involved in the provision of any programs or initiatives to do so.

The ATSILS recommend the National Report outline how the Framework will achieve its stated goals of preventing deaths in custody, reducing the over-representation on Aboriginal and Torres Strait Islander peoples in jail and the rate of recidivism, and providing full and equitable justice to Aboriginal and Torres Strait Islander communities.

The information provided in the National Report regarding the NTER is disappointing. The ATSILS disagree with the statement that the Government accepts and has commenced action to give effect to the overarching recommendations made by the independent review of the NTER. We assert that action taken by the Government to date under the NTER does not address disadvantage and social dislocation,³ show genuine consultation, engagement and partnership with Aboriginal and Torres Strait Islander peoples,⁴ respect Australia's human rights obligations,⁵ nor conform with the *Racial Discrimination Act 1975* (Cth).⁶

The ATSILS are specifically concerned that the National Report does not mention the income management scheme implemented by the Government. The National Report fails to address, or even make reference to the expressed and repeated concerns of high level UN officials, such as the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, regarding the income management scheme.⁷

The ATSILS recommend the National Report be amended to include the Australian Government's justification for why income management has been not only retained but extended despite a wealth of evidence pointing to its ineffectiveness, incompatibility with human rights and detrimental effect on Aboriginal and Torres Strait Islander peoples.⁸

4. Children

The National Report does not acknowledge the over-representation of Aboriginal and Torres Strait Islander children within the child protection system⁹ and fails to recognise the link between contact with the child protection system and future criminal offending.¹⁰

The ATSILS recommend the National Report be amended to outline exactly what action the Government has taken, and will take, in relation to reducing this rate of contact, ensuring universal adherence to the Indigenous Child Placement Principle¹¹ at all levels of government, and addressing the underlying factors that often lead to contact with the child protection system.¹²

7. Multiculturalism and Combating Racism

The National Report points to a range of Government policy instruments, including the RDA and the powers of the AHRC, as evidence of effective protection for individuals against racism. The ATSILS assert that the degree of protection and effectiveness of these instruments, as implied by the National Report, is misleading, especially given the recent suspension of the RDA and expressed concern from the CERD Committee regarding direct racial discrimination on behalf of the Government against Aboriginal and Torres Strait Islander peoples.¹³

The ATSILS recommend the National Report be amended to state that such protections are often ineffective in preventing racial discrimination and addressing violations, especially in regards to Aboriginal and Torres Strait Islander peoples.

D. ADMINISTRATION OF JUSTICE

The National Report recognises access to justice as an essential element of the rule of law, democracy and human rights protection. However, it only discusses access to justice within the context of the Federal civil justice system, excluding the criminal justice system which is primarily administered by the State. This is of significant concern to the ATSILS due to the high over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system, and because of the potential consequences related to coming into contact with this part of the justice system, and the associated restrictions that can be placed on numerous human rights.¹⁴

In regards to the provision of legal aid, the National Report does not identify the human rights issues associated with the gross under-funding of the ATSILS. No connection is made between the over-representation of Aboriginal and Torres Strait Islander peoples in the justice system, the fact that Aboriginal and Torres Strait Islander peoples are the most disadvantaged peoples in Australia and the provision of legal aid in relation to ensuring equal access to justice.

The ATSILS recommend the National Report be amended to include information as to how the Government is ensuring equal access to justice within the criminal justice system, including information regarding the underfunding of the ATSILS.

G. RIGHT TO SOCIAL SECURITY

As mentioned above, the ATSILS are concerned that the National Report does not make any mention of the income management scheme implemented by the Government. The ATSILS recommend the National Report be amended as outlined above.

H. RIGHT TO HEALTH

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, in his recent report provided to the Government found that the right of a significant proportion of Aboriginal and Torres Strait Islander peoples to the highest attainable standard of physical and mental health is being violated.¹⁵ The Special Rapporteur stated that while this is sometimes due to lack of transportation and communication infrastructure, it is more often due to direct discrimination against Aboriginal and Torres Strait Islander peoples and the provision of culturally inappropriate services.¹⁶ The Special Rapporteur also expressed concern that the rights of prisoners in Australia, a population in which Aboriginal and Torres Strait Islander peoples are significantly over-represented, to the highest attainable standard of physical and mental health is not being universally met.¹⁷

The ATSILS recommend the National Report be amended to include information regarding how the Government is addressing the disproportionate rate at which Aboriginal and Torres Strait Islander peoples, and those in prisons and other detention facilities, are being denied the right to the highest attainable standard of physical and mental health.

V. KEY NATIONAL PRIORITIES

Listed below are the recommendations made by the ATSILS in their joint submission to the UPR. We urge the Government to include these recommendations in the National Report:

1) FULFILLMENT OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The ATSILS recommend the Government:

- (a) develop a framework to implement and raise awareness about the Declaration in consultation with Aboriginal and Torres Strait Islander peoples;
- (b) initiate a process of constitutional reform to recognise and better protect the rights of Aboriginal and Torres Strait Islander peoples, including freedom from discrimination and equality before the law;
- (c) withdraw its reservations to article 4(a) of the CERD and article 20 of the ICCPR; and
- (d) ratify the Optional Protocol to the ICESCR.

2) THE OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN THE CRIMINAL JUSTICE SYSTEM

The ATSILS recommend the Government:

- (a) incorporate targets to reduce the high involvement of Aboriginal and Torres Strait Islander peoples with the criminal justice system into the Closing the Gap agenda;
- (b) implement Justice Reinvestment strategies that include therapeutic jurisprudence approaches, such as the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;
- (c) increase the use of non-custodial sentencing options (such as community based orders, community work orders, diversionary programs, cautioning and home detention);
- (d) abolish mandatory sentencing policies; and
- (e) establish independent bodies in each State and Territory to independently investigate and determine police complaints.

3) THE STATE OF DETENTION FACILITIES

The ATSILS recommend the Government:

- (a) take steps to reduce the overall number of people in detention and address the disproportionate number of Aboriginal and Torres Strait Islander peoples in detention by implementing recommendations above at 2;
- (b) ensure that adequate medical care and living conditions are guaranteed for all people in detention, including during transport of detained persons;
- (c) implement the Optional Protocol to the Convention Against Torture (OPCAT) into domestic law and establishing National Preventative Mechanisms in consultation with the WA Office of the Inspector of Custodial Services;
- (d) withdraw its reservations to article 10(2) and (3) of the ICCPR, and article 37(c) of the CRC;
- (e) reform death in custody investigations so that they are carried out by an independent body; and
- (f) introduce legislation that requires governments to act on Coronial recommendations.

4) EQUAL ACCESS TO JUSTICE

The ATSILS recommend the Government:

- (a) ensure that the funding of the ATSILS and Family Violence Prevention Legal Services (FVPLS) is proportionally increased to equal that of mainstream legal aid services and departments of public prosecutions;
- (b) provide the ATSILS and the FVPLS with long term funding agreements, rather than three year agreements;
- (c) implement initiatives, in consultation with Aboriginal and Torres Strait Islander communities, to reduce the high incidence of family violence;
- (d) provide additional funding to the ATSILS and FVPLS) so that they can increasingly conduct human rights law, research and advocacy work at the local, national and international level; and
- (e) provide adequate resources for the establishment and ongoing delivery of a national Aboriginal and Torres Strait Islander interpreter service.

5) THE STOLEN GENERATIONS AND VICTIMS OF STOLEN WAGES

The ATSILS recommend the Government:

- (a) establish a national compensation scheme for members of the Stolen Generations and, where they are deceased, their descendants; and
- (b) establish a national scheme for the return of all Stolen Wages to living victims and, where they are deceased, their descendants.

6) RACIAL DISCRIMINATION AGAINST ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The ATSILS recommend the Government:

- (a) abolish compulsory welfare quarantining, or where quarantining continues, make it available on a voluntary basis, or employed only as a measure of last resort, applied on an evidence-based, case-by-case basis, that maintains full recourse to administrative and judicial review;
- (b) review all policies and legislation in order to identify and eliminate structural discrimination against Aboriginal and Torres Strait Islander peoples and develop a national action plan to target systemic racism, including in the media and online; and
- (c) grant the ATSILS and other representative bodies, through the process of harmonising existing anti-discrimination legislation, the standing to commence legal proceedings on behalf of aggrieved Aboriginal and Torres Strait Islander peoples collectively.

7) THE OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN THE CHILD PROTECTION SYSTEM

The ATSILS recommend the Government:

- (a) implement a holistic approach to child protection that incorporates a public health and prevention model to reduce the over-representation of Aboriginal and Torres Strait Islander children in the system and address the underlying causes of child abuse and neglect; and
- (b) adhere to the Indigenous Child Placement Principles at all levels of government and provide clarification of the definitions for compliance.

8) ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' RIGHT TO SELF-DETERMINATION

The ATSILS recommend the Government:

- (a) commit to obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects their communities, and to genuine collaboration by developing and implementing a framework for self-determination, outlining consultation protocols, roles and responsibilities and strategies for increasing Aboriginal and Torres Strait Islander participation in all institutions of democratic governance.

ENDNOTES

¹ Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer, *National Human Rights Consultation Report* (2009) xxxiv.

² The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, on his visit to Australia found that the NTER denied Aboriginal and Torres Strait Islander peoples access to numerous human rights including non-discrimination, collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, social security, land tenure and property, and cultural integrity (James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia Appendix : Observations on the Northern Territory Emergency Response in Australia*, Human Rights Council, 15th sess, [16-18], UN Doc A/HRC/15/ (2010)).

³ There is a wealth of research which reveals the stark lack of evidence in support of the effectiveness of the NTER in achieving its purported goals of addressing Aboriginal and Torres Strait Islander disadvantage and social dislocation. Please see Australian Institute of Health and Welfare, *Report on the Evaluation of Income Management in the Northern Territory* (2009); Menzies School of Health Research, *Impact of Income Management on Store Sales in the Northern Territory* (2010); Australian Indigenous Doctors' Association and Centre for Health Equity Training, Research and Evaluation, UNSW, *Health Impact Assessment of the Northern Territory Emergency Response* (2010); and Paddy Gibson, *Working for the Basics Card in the Northern Territory: The impact of the Northern Territory Emergency Response and associated policies on employment conditions in NT Aboriginal communities* (2010).

⁴ An independent review of the Australian Government's public consultation process found that the process was fundamentally flawed and that it could not be relied upon as evidence of the consent of Aboriginal and Torres Strait Islander peoples in the Northern Territory to the 'special measures' related to the NTER. The review found that the NTER consultations took place on plans and decisions already made by the Australian Government, lacked Aboriginal and Torres Strait Islander involvement in the design of the consultation process, did not adequately utilise interpreters, did not provide Aboriginal and Torres Strait Islander communities with sufficient notice which meant that all relevant stakeholders were not able to attend, did not properly explain the full range of amended NTER measures, and failed to explain complex legal concepts including the meaning of 'special measures' (Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *Will they be Heard-a response to the NTER Consultations June to August 2009*).

⁵ Above n 2.

⁶ Despite recent amendments to widen its application beyond Aboriginal and Torres Strait Islander peoples, the income management scheme implemented by the Government remains discriminatory due to the disproportionate impact that it has on Aboriginal and Torres Strait Islander peoples who have a high rate of welfare dependency. Consequently, income management, even in its amended form, does not conform with the *Racial Discrimination Act 1975* (Cth) contrary to statements made by the Government.

⁷ James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia Appendix : Observations on the Northern Territory Emergency Response in Australia*, Human Rights Council, 15th sess, [16, 18], UN Doc A/HRC/15/ (2010).

⁸ Above n 3, 7.

⁹ Aboriginal and Torres Strait Islander children are more than five times more likely to be the subject of child protection substantiations than non-Aboriginal and Torres Strait Islander children (Kelly Richards, 'Juveniles Contact with the Criminal Justice System in Australia', AIC Monitoring Reports 07, 2009, 19). In Queensland for example, Aboriginal and Torres Strait Islander children comprise only 6.3 per cent of the child population yet comprise 31.5 per cent of all children in the child protection system. This over-representation continues to increase.

¹⁰ Brenda Bailey, *Special Commission of Inquiry into Child Protection Services in NSW* (2008) 2-3; Anna Stewart, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) Office of Crime Statistics and Research <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf> at 24 May 2010). Stewart found that in Queensland, for example, 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.

¹¹ The Indigenous Child Placement Principle requires Aboriginal and Torres Strait Islander children and young people to be cared for within their own families and communities wherever possible. The principle provides guidance in relation to making decisions about where an Aboriginal or Torres Strait Islander child or young person should live if they are placed in out-of-home care.

The order of priority is:

- a member of the child or young person's family
- a member of the child or young person's community or language group
- another Aboriginal person or Torres Strait Islander who is familiar with the child or young person's community or language group
- another Aboriginal or Torres Strait Islander person.

Where a child or young person cannot be placed in line with the principle, the child or young person should be placed with a carer who lives close to their family, community or language group so that the child or young person's ongoing affiliation with their culture and community can be promoted.

¹² It is widely accepted that there is a close link between child abuse and neglect and the broader issues of poverty, in all indicators of which Aboriginal and Torres Strait Islander peoples rate as the most disadvantaged peoples in Australia. Approximately 40 per cent of Aboriginal and Torres Strait Islander peoples living in major cities, outer regional, remote and very remote areas of Australia live below the poverty line and this rate increases to over 50 per cent in inner regional areas (B. Hunter, *Assessing the evidence on Indigenous socioeconomic outcomes: A focus on the 2002 NATSISS* (2006) 100).

¹³ Please see Rachael Brown, *Australia appears before UN over Human Rights* (2010) ABC News <http://www.abc.net.au/news/stories/2010/08/11/2979620.htm> at 11th August 2010.

¹⁴ Contact with the criminal justice system can lead to numerous consequences, including incarceration, that involve placing restrictions on numerous human rights. For example, incarceration can limit an individual's enjoyment of their right to freedom of movement, liberty, work, family, privacy, education, standard of living, freedom of association, and to vote.

¹⁵ Anand Grover United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Mission to Australia: Preliminary Observations and Recommendations* (2009) 2.

¹⁶ Ibid

¹⁷ Ibid.