



Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
AUSTRALIA
P: + 61 3 9225 6695
F: + 61 3 9225 6686
hrirc@vicbar.com.au
www.hrirc.org.au
ABN: 31 117 719 267

30 November 2006

Mr Rodolfo Stavenhagen
UN Special Rapporteur on the Human Rights of Indigenous Peoples
Office of the United Nations High Commissioner for Human Rights
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland

Dear Mr Stavenhagen

The Human Rights and Fundamental Freedoms of Indigenous Australians¹

Country Visit to Australia

On behalf of the Aboriginal and Torres Strait Islanders Legal Services Network, the Castan Centre for Human Rights, the Foundation for Aboriginal and Islander Research and Action, the Human Rights Law Resource Centre, the National Association of Community Legal Centres Human Rights Network, the North Australian Aboriginal Justice Agency Ltd, Oxfam Australia, the Victorian Aboriginal Community Controlled Health Organisation, the Victorian Aboriginal Legal Service Co-operative Limited and the Victorian Council of Social Service, we write collectively to outline our concerns about the violation of the human rights and fundamental freedoms of Indigenous Australians and to request your investigation of, and action in relation to, these issues. Specifically, we consider it desirable that you undertake a country visit to Australia.

A significant gap exists between Indigenous and non-Indigenous Australians relating to, among other things, standards of living and health, political participation and the right to self-determination, the administration of justice, land rights, access to adequate housing and education. This letter outlines what we consider to be some of the most significant issues confronting Indigenous Australians under international human rights standards.

¹ In this letter, Aboriginal and Torres Strait Islander peoples are collectively referred to as 'Indigenous Australians' or 'Indigenous peoples' unless otherwise specified.

1. Australia's International Obligations

Australia has ratified the following international legal instruments that are of particular relevance to the human rights and fundamental freedoms of Indigenous Australians:

- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**), ratified on 30 September 1975;
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**), ratified on 10 December 1975;
- International Covenant on Civil and Political Rights (**ICCPR**), ratified on 13 August 1980;
- Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), ratified on 28 July 1983; and
- Convention on the Rights of the Child (**CROC**), ratified on 17 December 1990.

2. Health Issues Facing Indigenous Australians

Article 5(e)(iv) of the ICERD guarantees the right of everyone to public health, medical care, social security and social services. Similarly, article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. These rights require a state to ensure that its population enjoys the opportunity, and an *equal opportunity*, to be as healthy as possible.

In our view, the state of Indigenous health in Australia results from and represents serious human rights breaches. Indigenous Australians do not have an equal opportunity to be as healthy as non-Indigenous Australians. Many Indigenous Australians do not have the benefit of equal access to primary health care and many Indigenous communities lack basic needs, such as adequate housing, safe drinking water, electricity and effective sewerage systems.

The seriousness of the situation is reflected in the following statistics:

- life expectancy for Indigenous Australian males born in 1999-2001 is expected to be 56.3 years, almost 21 years less than the 77.0 years expected for all Australian males, and for Indigenous Australian females life expectancy is 62.8 years, almost 20 years less than the expectation of 82.4 years for all Australian females. These statistics are attributed to poor health at all levels and age-groups within the Indigenous population;
- life expectancy for Indigenous Australians is between 8 and 15 years less than that of Indigenous populations in Canada, the USA and New Zealand;
- median age at death for Indigenous Australians is currently about 53 years, which is 25 years less than that for non-Indigenous Australians. This is considerably lower than the median age at death for Indigenous peoples in other Western countries;
- in 1999-2003, the infant mortality rate for Indigenous infants was 3 times that of non-Indigenous infants;
- Indigenous Australians are 8 times more likely to die from diabetes, 3 times more likely to die from circulatory disease, 4 times more likely to die from chronic kidney disease and have one of the highest rates of rheumatic heart disease in the world;
- one in ten Indigenous children in Australia under the age of 15 report having hearing problems, about three times the rate of non-Indigenous children;

- in 1999–2003, two of the three leading causes of death for Indigenous peoples in Queensland, South Australia, Western Australia and the Northern Territory were chronic diseases of the circulatory system and cancer; and
- the number of Indigenous Australians diagnosed with AIDS has more than doubled in the past four years.

The crux of the problem is the fact that Indigenous health services are severely under-funded by Australian governments. The Committee on the Elimination of Racial Discrimination has recommended that Australia intensify its efforts to achieve equality for Indigenous peoples in the enjoyment of rights and allocate adequate resources to programs aimed at the eradication of these disparities.

In addition, an indirect result of the severe health problems referred to is their impact on the capacity of Indigenous Australians to effectively participate in school, obtain and retain employment, and to achieve secure and adequate housing. Furthermore, these existing inequalities also have significant effects on Indigenous children (in breach of article 2 of the CROC) and Indigenous women (in breach of article 12 of CEDAW).

3. Political Representation and Self Determination

In recent years, the Australian Government has moved away from recognising self-determination as the basis of its Indigenous policy. Indigenous Australians have been disenfranchised by the abolition of the Aboriginal and Torres Strait Islander Commission (**ATSIC**), which consisted of elected Indigenous representatives and was the main policy-making body in Aboriginal affairs. ATSIC has been replaced by a national Indigenous Advisory Council, a board of experts appointed by the Government to advise on Indigenous issues. The Australian Government has also returned Indigenous policy and funding responsibilities to mainstream departments.

As a consequence, Indigenous Australians now lack proper representation, can no longer elect their own representatives, and do not have the same mechanisms for participation in governance and decision-making in relation to matters that directly and indirectly affect them. In our view, the abolition of ATSIC breaches article 25 of the ICCPR and articles 2 and 5(c) of ICERD as it deprives many Indigenous Australians of adequate and proper representation and the ability to participate meaningfully in public affairs. Indeed, the Committee on the Elimination of Racial Discrimination has expressed its concern that the abolition of ATSIC and establishment of the Indigenous Advisory Council, as well as the transfer of most programs previously provided by ATSIC to government departments, will reduce participation of Indigenous peoples in decision-making and thus alter Australia's capacity to address the full range of issues relating to Indigenous peoples. As you know, participation and engagement of Indigenous Australians in decision-making processes is central to a human rights based approach to development. Principles relating to non-discrimination, self-determination, equality before the law and minority group cultural rights require governments to work with Indigenous Australians in a fair and open manner.

Further breaches of these international obligations were evidenced in the 2004 Federal elections in Australia, when the only Indigenous senator was not re-elected. Political representation for Indigenous peoples continues to be extremely limited and affirmative action measures have not been put into place to address this.

4. Administration of Justice

Many Indigenous Australians confront serious human rights issues in the justice system, including in relation to the disproportionate impact of certain criminal laws, and the incidence and impacts of incarceration. The issues faced by Indigenous peoples in their interaction with the justice system are further compounded by limited access to legal and interpretative services, both of which may be necessary for a fair hearing.

While mandatory sentencing provisions for minor property offences in the Northern Territory were repealed in 2001, mandatory sentencing laws for many offences remain in the Northern Territory as well as in the Criminal Code in Western Australia and Indigenous Australians continue to be disproportionately affected by that legislation. Indigenous youths, who are a small fraction of the youth population of Western Australia, comprise three quarters of mandatory sentencing cases.

Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2% of the Australian population, around 20% of the prison population is Indigenous (based on 2001 figures). Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23%, while the ratio of Indigenous to non-Indigenous Australian incarceration has increased from 9.9 to 12.1. This is much larger than the disparity between African-American and white imprisonment rates in the United States, where the ratio is about 6.95. The incarceration rate for Indigenous Australians is more than 16 times higher than for non-Indigenous Australians and Indigenous women constitute the fastest growing prison population in Australia. The rate of imprisonment of Indigenous Australians has been of ongoing concern to the Committee on the Elimination of Racial Discrimination. The Committee on the Rights of the Child has also noted the disproportionately high percentage of Indigenous children in the juvenile justice system in Australia.

In addition to being disproportionately incarcerated, Indigenous Australians are disproportionately affected by incarceration. Overcrowding and lack of access to adequate health care, particularly mental health care and drug and alcohol services, is a feature of many, if not all, Australian prisons. The deaths of Indigenous Australians in custody also continues to be of serious concern, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody over 15 years ago. In 2003, 75% of deaths in custody were of Indigenous Australians detained for no more than public order offences. We consider that the striking over-representation of Indigenous Australians in prison, as well as the percentage of Indigenous deaths in custody and the lack of fair treatment under the criminal justice system, all constitute serious breaches of article 5(a) of ICERD as well as articles 6 (right to life), 7 (freedom from cruel treatment or punishment), 9 (freedom from arbitrary detention), 10 (humane treatment in detention) and 14 (right to a fair hearing) of the ICCPR.

5. Rights and Access to Traditional Lands and Preservation of Indigenous Culture

Access to and control over traditional lands continues to be a major human rights issue for Indigenous Australians. Despite significant developments in the recognition of Indigenous land rights in the early 1990s, the Australian Government made amendments in 1998 and 2006, and is likely to make further amendments in late 2006 or early 2007, that wind back some of the protections previously afforded to Indigenous peoples. Onerously high standards of proof are required to obtain recognition of their relationship with their traditional lands. The

Committee on the Elimination of Racial Discrimination has expressed its concern that evidence of continuous observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title.

In our view, measures withdrawing existing guarantees of Indigenous land rights, and the high standard of proof to establish entitlement to native title, constitute breaches of article 5 of the ICERD. Furthermore, in many cases, the participation or informed consent of Indigenous Australians was not sought before decisions relating to their rights to land were adopted, arguably contrary to articles 25 and 27 of the ICCPR.

In addition to a strong connection with traditional lands, art is also an essential component of the preservation of Indigenous cultures. For many Indigenous Australians, art expresses all aspects of life and identity and is a major way of passing on culture to future Indigenous generations. However, 'Western' intellectual property rights systems are conceptually limited in their ability to afford adequate recognition and protection of the cultural products and expressions of Indigenous Australians. For example, the accuracy of the reproduction of an artwork is of great importance to Indigenous peoples, as an inaccurate reproduction can cause deep offence. Australia's failure to provide adequate means to attribute and maintain the integrity of Indigenous arts and traditional ritual knowledge poses a threat to the maintenance of Indigenous culture in Australia.

6. The 'Stolen Generations'

The Stolen Generations is a term used to describe the forced removal of Aboriginal children from their families by Australian Government agencies and church missions between approximately 1910 and 1970. According to a Human Rights and Equal Opportunity Commission report released in 1997 entitled *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Report)*, at least 100,000 children were removed forcibly or under duress from their families during that time, which constituted somewhere between 10-30% of all Aboriginal children during that time.

Some of the key findings of the Report were that many Indigenous children:

- were placed in institutions, church missions, adopted or fostered;
- received little education and were expected to perform low grade domestic and farming work, and that many never received wages for their labour;
- suffered, or were at risk of suffering, physical and sexual abuse; and
- welfare officials failed in their duty to protect Indigenous wards from abuse.

The Report made 54 recommendations aimed towards restoring justice and dignity to the Stolen Generations and to rectify the present effects of family separation. However, many of those recommendations have not been implemented by the Australian Government and its response to the Report has clearly been inadequate and inappropriate (although in recent days, Tasmania's upper house passed landmark legislation to provide financial compensation to Aboriginal Tasmanians who were removed from their families).

The forcible removal of Indigenous children from their families constitutes breaches of:

- the *Convention on the Prevention and Punishment of the Crime of Genocide* (ratified by Australia in 1949);
- various provisions of the CROC, including article 3 (best interests of the child) and article 9 (a child shall not be separated from his or her parents against their will);
- various provisions of the ICERD;
- various provisions of the ICCPR, including article 23 (protection of the family) and article 26 (non-discrimination); and
- various provisions of the above instruments relating to the provision of remedies and reparations for human rights violations.

7. Adequate Housing for Indigenous Australians

Indigenous communities in both urban and rural areas are facing a severe housing crisis. Indeed, the UN Special Rapporteur on Adequate Housing was 'particularly disturbed' by the adverse housing conditions he observed in Indigenous communities during his country visit to Australia earlier this year, describing it as a 'humanitarian tragedy'. Unaffordability of housing, lack of appropriate support services, significant levels of poverty and underlying discrimination are all factors that contribute to the situation faced by Indigenous Australians.

Australia has not explicitly incorporated the right to adequate housing into its domestic legislation. Without a right to adequate housing, many other basic rights may be compromised, including the right to family life and privacy, the right to freedom of movement, the right to assembly and association, the right to health and the right to development. The causal links between, on the one hand, inadequate housing, severe overcrowding and inappropriate styles of housing, particularly in remote areas, and, on the other hand, adverse health and justice outcomes, is well established. As you know, inadequate housing conditions are also likely to have a greater adverse impact on women and children.

8. Education for Indigenous Australians

Although the situation is slowly improving, both the levels of participation and the levels of attainment in education and training among Indigenous Australians remain well below those of non-Indigenous Australians. The difficulties that Indigenous Australians face with regard to education are reflected in the following statistics (from 2001):

- 39% of Indigenous students stayed on to year 12 at high school, compared to 75% for the Australian population as a whole;
- 22% of Indigenous adults had a vocational or higher education qualification, compared to 48% for the Australian population as a whole;
- 4% of Indigenous Australians held a bachelor degree or higher, compared to 21% for the population as a whole; and
- since 1999, the number of Indigenous Australians participating in university has declined by 6%.

The serious difficulties that Indigenous children face with regard to education, and in particular their lower level of achievement and high dropout rate, are breaches of article 13 of the ICERD. The Committee on the Rights of the Child has also expressed its concern about

breaches of articles 28 and 29 of the CROC relating to the right of the child to education and the development of the child's personality, talents and mental and physical abilities to their fullest potential.

Lower participation by Indigenous Australians in education also results in discrimination in other areas, including employment and income. In 2001, the unemployment rate for Indigenous Australians was 20.0%, almost three times higher than non-Indigenous Australians (7.6%). Further, in 2001, the average gross household income for Indigenous peoples was 62% of the rate for non-Indigenous peoples, and just 40% of that rate in very remote areas of Australia.

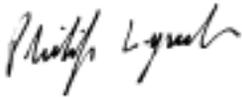
9. Country visit to Australia

Based on the serious issues facing Indigenous Australians discussed above, we consider that a visit by you to Australia to investigate, report on and make recommendations regarding the realisation of the human rights and fundamental freedoms of Indigenous Australians would be an important and valuable exercise. Particularly following the abolition of ATSIC, it is important that mechanisms be used and developed to open a constructive dialogue between Australian governments, Indigenous Australians, non-governmental organisations and the broader community.

We would be deeply grateful if you would be minded to approach the Australian Government requesting that you be officially invited to Australia.

Please contact Philip Lynch on hrlrc@vicbar.com.au or + 61 3 9225 6695 or Les Malezer on les.malezer@faira.org.au or + 61 7 3391 4677 or if you have any questions or would like to discuss this letter further.

Yours sincerely



Schedule of Supporting Organisations

Aboriginal and Torres Strait Islanders Legal Services (ATSILS):

ATSILS provide legal representation and advice to Aboriginal and Torres Strait Islander people. They also undertake policy, advocacy, law reform, community legal education and community development work.

Castan Centre for Human Rights:

The Castan Centre was established to meet the need for, and interest in, the study of human rights law, globally, regionally and in Australia. It seeks to bring together the work of national and international human rights scholars, practitioners and advocates from a wide range of disciplines in order to promote and protect human rights. The Centre's key activities are research, teaching, public education, applied research, advice work and consultancies.

Foundation for Aboriginal and Islander Research and Action (FAIRA):

FAIRA is a community organisation owned and managed by Aboriginal and Torres Strait Islander people to address human rights issues as they affect Indigenous people.

Human Rights Law Resource Centre (HRLRC):

The HRLRC aims to promote human rights in Victoria and Australia, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. The HRLRC seeks to achieve this aim by supporting, conducting, coordinating, resourcing, facilitating and enhancing the provision of legal services, litigation, education, training, research and advocacy regarding human rights.

National Association of Community Legal Centres Human Rights Network (NACLC):

NACLC is the peak body representing the eight state associations of community legal centres and 270 community legal centres nationally. The Human Rights Network consists of people who work in community legal centres around Australia and that have an interest in human rights. The work of the Network includes encouraging human rights work within the community legal centre sector and lobbying the government on human rights issues.

North Australian Aboriginal Justice Agency Ltd (NAAJA):

NAAJA was created by bringing together three Aboriginal Legal Services to provide legal aid and justice initiatives for Aboriginal and Torres Strait Islander people in the Northern Territory. NAAJA's programs include community legal education with prisoners and others, juvenile justice campaigns and advocacy and liaison with government decision-makers, police and other key stakeholders.

Oxfam Australia:

Oxfam Australia is an international development organisation which pursues a rights-based approach to the elimination of poverty and injustice. In Australia, Oxfam develops partnerships with Aboriginal and Torres Strait Islander organisations to support program, policy and advocacy activities to further the rights of Indigenous Australians. Oxfam Australia has been working with Indigenous Peoples, organisations and communities for over 30 years, both in Australia and overseas.

Victorian Aboriginal Community Controlled Health Organisation (VACCHO):

VACCHO represents the collective of all Aboriginal community controlled health organisations around Victoria. Most members of VACCHO are multi functional community organisations with health as a key part of their responsibility.

Victorian Aboriginal Legal Service Co-operative Limited (VALS):

VALS is a community owned and controlled co-operative society that plays an important role in providing legal aid and assistance to Aboriginal and Torres Strait Islander people. VALS maintains a strong client service focus and is actively involved in community development, research and law reform.

Victorian Council of Social Service (VCOSS):

VCOSS is the peak independent coordinating body of the social and community services sector in Victoria. VCOSS works together with its members on issues such as poverty and inequality to ensure everyone has access to, and a fair share of, the community's resources and services.