

## **2. Heritage Protection**

*This issue relates to question 8 of the List of issues to be taken up in connection with the consideration of the third and fourth reports of Australia.*

### **Summary of Issue**

- The religious and cultural practices of Indigenous people are inextricably linked to land and water.
- In 1995/6, the Australian government commissioned a review of legislative protections for sites of religious, cultural and ancestral significance.
- Extensive reforms were suggested, and widely supported by Indigenous groups.
- The reforms have not been implemented.
- Protection remains inadequate and sites remain vulnerable to desecration and destruction.

### **Relevance to the ICCPR**

- Article 27: Rights of minorities
- Article 18: Freedom of thought, conscience and religion
- Article 17: Privacy
- Article 23: Family
- Articles 2 and 26: Non-discrimination and equality

**The following section expands on this summary under the following headings:**

- Legislative Framework
- The Mirrar People
- Relevance to ICCPR

## Legislative Framework

- 2.1 Legislative regimes which address the preservation of Indigenous religious, cultural and ancestral areas and objects exist at the Commonwealth, state and territory tiers of government.<sup>1</sup>
- 2.2 The Commonwealth Act is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSI HP Act). The Act was passed as “an interim measure” to be replaced by more comprehensive legislation after two years.<sup>2</sup> That legislation has not been enacted.
- 2.3 There is no uniformity between different state and territory laws. Legislation in a number of states is incompatible and inadequate.<sup>3</sup>
- 2.4 Therefore, the role of the Commonwealth through the ATSI HP Act has been essential in:
  - directly providing heritage protection where State and Territory heritage protection regimes have failed indigenous people; and
  - acting as a deterrent to States and Territories ignoring their responsibilities under their own cultural heritage protection schemes.

This is because the ATSI HP Act operates as a ‘safety net’: an indigenous person may apply at any time for Commonwealth protection.
- 2.5 The ATSI HP Act has been found lacking, particularly with respect to its administration and processes.<sup>4</sup> In response to concerns about its inadequacy, the legislation was reviewed by the Hon. Elizabeth Evatt AC<sup>5</sup> Her report, which was broadly supported by Indigenous people, made extensive recommendations to strengthen protections available under the Act. The recommendations included more rigorous uniform minimum standards for State and Territory schemes, extensive revision of administration at Commonwealth level.
- 2.6 Where a State or Territory legislative scheme was accredited under the Commonwealth legislation, the role of the Commonwealth would be maintained such that indigenous people could seek heritage protection from the Commonwealth as a ‘last resort’. Access to Commonwealth heritage protection would be improved where a State or Territory failed to achieve accreditation.

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<sup>1</sup> See generally, Australian Government Report, CCPR/C/AUS/98/3, pp. 271-276.

<sup>2</sup> Hansard, Repts 9 May 1984, 2130. “The original title of the Act was the *Aboriginal and Torres Strait Islander Heritage (interim Protection) Act 1984*. Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Elizabeth Evatt AC, 21 June 1996 <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt>

<sup>3</sup> Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Elizabeth Evatt AC, 21 June 1996 para 2.30. <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt>

<sup>4</sup> *ibid* paras 2.25 – 2.41

<sup>5</sup> Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Elizabeth Evatt AC, 21 June 1996 <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt>

## ***Aboriginal and Torres Strait Islander Heritage Protection Bill 1998***

- 2.7 In November 1999, the Government introduced the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (the Bill) into the Senate. The Bill was intended to replace the ATSI HP Act.
- 2.8 While the Bill adopts the structure recommended by the Evatt Review, it fails to provide sufficient reform to protect heritage. State and territory legislation remains the primary source of heritage legislation, subject to accreditation by the Commonwealth. The standard for accreditation is inadequate. Indigenous people must exhaust all remedies at this level however, before accessing the Commonwealth scheme. The Commonwealth will intervene only in the case of matters which effect the 'national interest'.
- 2.9 Major changes to the Bill are required including reform of state and territory standards of accreditation and increased Commonwealth role in protection and preservation.

### **Reforms to minimum standards at state and territory level.**

- The provision of access to indigenous people to fulfil their religious and cultural responsibilities in relation to significant areas.
- The integration of heritage protection into State and Territory planning procedures.
- Indigenous people to have reasonable access to judicial review of decisions affecting their cultural heritage.
- Heritage responsibilities to be administered by an independent heritage body (with significant Indigenous representation).
- Provision for emergency or interim protection of significant indigenous areas and objects.

### **Reforms to role of Commonwealth**

- open access to the Commonwealth protection scheme where a State or Territory does not have an accredited scheme operating; and
- last resort access to Commonwealth heritage protection where a State or Territory does have an accredited scheme operating; and
- administer and resource indigenous cultural heritage protection in a manner recommended by the Evatt Review;
- provide an acceptable process for the regulation and repatriation of significant indigenous objects in Australia and elsewhere.

## The Mirrar People<sup>6</sup>

- 2.10 The Mirrar people are the traditional owners of land in the Kakadu region of the Northern Territory, encompassing the Ranger and Jabiluka Mineral leases, the mining town of Jabiru and parts of Kakadu National Park. The Mirrar speak approximately three Aboriginal languages. Cultural and religious beliefs require protection of sites of significance and sacred sites in Mirrar country. The language, culture and religious practices of the Mirrar are typical of those protected by article 27.
- 2.11 Places regarded as sacred by the Mirrar are sites where ancestral creation beings journeyed and rested. Cultural and spiritual practices of the Mirrar require that these sites and Mirrar burial sites are protected.<sup>7</sup> These practices fall within the types of protections of privacy and family offered by articles 17 and 23, as they are understood *in Hopu's* case.<sup>8</sup>
- 2.12 Knowledge of sites is held exclusively by specific members of the clan, and Aboriginal law requires that detailed knowledge is not revealed to non-Aboriginal people. In order to seek heritage protection under Australian legal processes, Mirrar custodians are called upon to prove their claims by disclosing cultural material to people who are excluded by Aboriginal law. This failure to protect customary religious laws regarding secrecy is inconsistent with article 18.<sup>9</sup>
- 2.13 The Mirrar have always opposed the operation of uranium mining on their country.<sup>10</sup> They continue to express this opposition at both nationally and internationally.<sup>11</sup>

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<sup>6</sup> Additional information on the Mirrar People is available at <http://www.mirrar.net>

<sup>7</sup> <http://www.mirrar.net> *Location of Sacred Site Complexes* para 8.

<sup>8</sup> *Hopu and Bessert v France* (549/93), See para X this submission

<sup>9</sup> A similar concern was addressed in the case of the Ngarrindjeri women who were asked to disclose gender specific information. This was reported in *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Report submitted by Mr Abdelfattah Amor, Special Rapporteur, E/CN.4/1998/6/Add.1. paras 93-96.

<sup>10</sup> The Mirrar state that senior Traditional owners were pressured into consenting to an agreement to mine in 1982. The Mirrar allege duress. *Ibid* para 7.

<sup>11</sup> The UNESCO World Heritage Committee expressed grave concerns over ascertained and potential dangers to the cultural and natural values of Kakadu by the proposed uranium mining at Jabiluka. Decision of the Third Extraordinary Session of the World Heritage Committee, 12 July 1999. Para 1(b) recalls the expression of "grave concern" at the 22<sup>nd</sup> Session of the World Heritage Committee in Kyoto in 1998. Para 1(e) restates that concern by the 23<sup>rd</sup> session.

## Article 27

2.14 The rights protected by Article 27 of the Covenant include protection of cultural, religious and ancestral sites.

2.15 Regarding article 27 rights, the HRC has stated in General Comment 23, at paragraph 6.1:

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

2.16 At paragraph 6.2:

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

2.17 Australian law does not provide sufficient protection to Aboriginal heritage sites as is required under Article 27.

2.18 The HRC found a violation of article 27 entailed in the threat posed to the continuity of Indigenous traditions and practices by oil and gas exploration in *Ominayak and the Lubicon Lake Band v Canada*<sup>12</sup>.

2.19 Furthermore, at paragraph 7 of General Comment 23, the HRC have stated:

The enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

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<sup>12</sup> *Lubicon Lake Band v Canada*, Communication NO 167/1984(26 March 1990), U.N.Doc.Supp.No.40(A/45/40) at 1 1990 para 33.

- 2.20 Australian law should guarantee effective Indigenous representation in resource heritage committees. Its failure to do so constitutes a breach of article 27.<sup>13</sup>

## **Article 18**

- 2.21 Cultural and religious practices such as ceremonies, ritual maintenance of sites and cultural gatherings, are always linked to geographical sites of significance. Requirements of economic development may result in damage to or interference with these sites or objects and protective mechanisms are required to secure the rights to religious and cultural practices recognised in articles 18 and 27 of the ICCPR.
- 2.22 The rights to manifest religion or belief in worship, observance, practice and teaching protected in article 18 are limited by the circumstances enunciated under article 18(3). In General Comment 22, at paragraph 8, the HRC has stated:

Article 18(3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. ... In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.

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<sup>13</sup> In General Recommendation 23, CERD have stated at paragraph 4:

The [CERD] Committee calls in particular upon States parties to:

- a. recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b. ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- c. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d. ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- e. ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. ...

- 2.23 The destruction of sites of religious significance for the purposes of economic development is not authorised under article 18(3). Economic development activities can rarely if ever be characterised as a 'fundamental right or freedom' of another.

## Articles 2 and 26

- 2.24 Where institutional protection of heritage sites and objects is inadequate, and the rights of non-Indigenous interests in development are preferred over Indigenous rights to culture and religion, articles 2 and 26 are contravened.

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## Article 17

- 2.25 Failure to protect cultural heritage may violate a people's right to privacy as protected under article 17 as well as their family rights in article 23. In *Hopu and Bessert v France* (549/93), the authors alleged that a hotel development on the sacred burial grounds of their ancestors breached, *inter alia*, their rights to privacy. The HRC majority agreed, as the authors' relationship with their ancestors constituted an important part of their identity. At paragraph 10.3, the HRC stated:

The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognised as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right

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<sup>14</sup> General Comment 22 paragraph 8.

to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

- 2.26 Aboriginal culture and religious beliefs link ancestry and lineage of descent to particular geographical sites, the structures of culture and religious belief extend to the meaning of family and privacy recognised in the *Hopu* case.