The intention of this publication is to give some coverage of the ideas, issues and concerns which were current during that period. The 18 papers discuss the politics of the native title amendment act process, women and native title, mediation and negotiation, the registration test, maps and boundaries, national and international human rights issues, and Aboriginal title in Canada and New Zealand. RRP $21.50 ISBN 0 85575 359 5

CURRENT ISSUES

CERD and the Native Title Amendment Act 1998

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund have released the report of their 'Inquiry Concerning the Consistency of the *Native Title Amendment Act 1998* with the *Convention on the Elimination of All Forms of Racial Discrimination*'. The report, and the dissenting report of the non-government members of the Committee, are substantial and set out the opposing views regarding the CERD Committee's criticisms of Australia's treatment of native title under the 1998 amendments.

The report of the government members reiterated the government's argument that the *Native Title Act 1993*, as amended, is consistent with Australia's international obligations, in particular its obligations under the Convention on the Elimination of Racial Discrimination. The report concedes that equality, under international law, incorporates ideas of difference in treatment to achieve substantive or real equality where those differences in treatment are not arbitrary and are justified according to the distinctive characteristics of the group or individual. The report argues, however, that it is for Parliament to decide whether substantive equality is to be provided and if so what this will encompass. That is, substantive equality is presented in the report as an optional addition to formal equality. Moreover, the report argues that consent of groups affected by substantive equality measures, or indeed special or affirmative measures, is not required under international law.

The report relied upon the notion that there is a margin of appreciation in the implementation of international obligations and that 'novel' areas of law, such as native title, attract a wider margin of appreciation in this regard. Therefore, the report argues, that it is a matter for national institutions to best determine the need for substantive equality measures and, as has been repeatedly argued by the government, to determine the balance between competing interests. In relation to the four contentious sets of provisions specifically identified by the CERD Committee, the report suggested that while on the surface these provisions may appear discriminatory, they are justified because they: balance

competing interests; they are within the allowed margin of appreciation; there is little or no impact on native title; and there are countervailing measures for any effect on native title, including the provision of compensation.

Relying almost exclusively on submissions by the Attorney General's department and government submissions to the CERD Committee, the report supported government criticisms of the CERD Committee's finding, arguing that the Committee appeared to consider only the amendments and that the Native Title Act, with its remaining beneficial provisions, should be considered as a whole. The report argued that the Committee should not have considered the comparison between the position of Indigenous peoples rights under the amended Act and under the original Act in reaching its conclusions that the government had treated native title in a discriminatory manner in the 1998 amendment process.

The report supports government arguments further, saying that in balancing the competing interests of groups in society, the Committee should have examined the position of Indigenous peoples rights in relation to the interests of others, and in so doing would have found that the amended Act strikes a balance between them. The report points to the equivalent protection provided to native title and 'comparable interests', and notes the 'significant benefits' provided to native title holders that are not enjoyed by non-indigenous title holders.

The report argues that the consultation process leading to the passage of the Amendment Act was extensive. Moreover, Indigenous peoples had enjoyed equal participation in the public policy development process in relation to the Amendment Act. The report therefore concludes that further discussion about the Act at this stage would not be helpful.

The non-government members, in contrast, concluded that the Native Title Act as amended is racially discriminatory and in breach of Australia's international obligations particularly under CERD. They relied on the broad range of submissions from other government departments and government agencies, native title bodies and Indigenous organisations, and legal practitioners and academics to argue that this conclusion was supported by the weight of informed opinion demonstrated in submissions to the inquiry.

The non-government members' report was also launched, by Elizabeth Evatt, as a separate volume entitled 'Undertakings Freely Given: Australia's International

Obligations to Protect Indigenous Rights'. The report contains a comprehensive discussion of the issues raised by the CERD Committee's criticisms and makes a number of recommendations for action to address the Committee's concerns.

The minority report identifies a positive obligation upon nation states to ensure true and effective equality in the enjoyment of human rights and to ensure that, in relation to Indigenous peoples, no decisions directly affecting their rights are taken without their informed consent. The report suggests that the Native Title Act requires further amendment to ensure that it is non-discriminatory and in compliance with Australia's international obligations.

The minority report also expresses concern for Australia's international reputation, particularly in relation to human rights, which may have been damaged by the government's attitude toward the CERD Committee and its international obligations. The report recommended that the government acknowledge the competence and expertise of the CERD Committee and other UN expert bodies and the right of individuals and groups to bring alleged breaches of the international obligations to the attention of such committees.

They recommended that the government amend not only the Native Title Act but also their approach to the substantive and procedural implementation of the Act through responses to court decisions and practical experiences of the Act.

The non-government members' report also recognises that native title is separate from the 'extant traditional title' emerging from, and contained within the laws and customs of Indigenous people. They go further to recommend the enactment of legislation to recognise and respect that fact, regardless of developments in the courts from time to time. They also recommend that the government acknowledge that native title legislation is only one early element of the process for 'a lasting settlement or accord between Indigenous and non-Indigenous Australians'.

The official report (which also contains the non-government members' report) is available on-line at
http://www.aph.gov.au/senate/committee/ntlf_ctte/report_16/index.htm
Or from the Secretary to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament House Canberra.

Lisa Strelein
Native Title Research Unit, AIATSIS

Visit by Nunavut Sivuniksavut

On Tuesday 9 May AIATSIS was visited by the Nunavut Sivuniksavut student group from the new territory of Nunavut in Canada. The 18 students and 3 instructors showed a short video and discussed issues of cultural maintenance and survival with Institute staff. The students are enrolled in a special tertiary program based in Ottawa. They have studied their own history (colonisation and de-colonisation), contemporary Inuit organisations and issues, the efforts of their leaders to negotiate the largest land rights settlement in Canada, and the creation of the new political territory of Nunavut. The program, called Nunavut Sivuniksavut ('Nunavut is our future') is sponsored by various Inuit organisations and the Canadian government. More information about Nunavut can be found at http://www.gov.nu.ca/

The students illustrated their language and writing by providing us with a translation of our names and the name of the Institute:

Aastuailijan pilirijii t nunaqaqaatunut amma Tuuris Qikiktani Ilinniaqtut
Australian Institute of Aboriginal and Torres Strait Islander Studies

NATIVE TITLE IN THE NEWS – MAY & JUNE 2000

National

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund has tabled its 16th report in Parliament. The inquiry required the Committee to consider whether the amended *Native Title Act 1993* is inconsistent with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD). The report concluded that the Native Title Act is not racially discriminatory. *(Media Release, 28 June)** (see report page 4)

New South Wales

Five new members have been appointed to the National Native Title Tribunal in New South Wales. Ms Jennifer Stuckey-Clarke, Dr Gaye Sculthorpe and Ms Ruth Wade have been appointed as part-time members and Mr John Sosso and Mr Bardy McFarlane have been appointed as full-time members. *(NTN NSW, June 2000, p1)*