



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

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3 December 2021

Excellency,

I write to inform you that in the course of its 105th session, the Committee on the Elimination of Racial Discrimination considered information received under its early warning and urgent action procedure, related to the Western Australian Government's draft Aboriginal Cultural Heritage Bill 2020 (Draft Bill), and its impact on Aboriginal peoples.

According to the information before the Committee, Western Australian legislation, including the Aboriginal Heritage Act of 1972, did not prevent the damage and destruction of sacred sites and other cultural heritage of Aboriginal peoples, such as the Juukan Gorge rock shelters. The information received indicates that the Draft Bill will supersede the Act of 1972 and that it could constitute an opportunity to overcome the multiple failures of the current legislation. However, the Draft Bill allegedly fails to respect, protect and fulfil the right to culture of Aboriginal peoples who strongly oppose it, due to the serious risk it poses to their cultural heritage.

The Committee is concerned about the allegations that the consultation process on the Draft Bill was not adequate, notably by not assigning enough time to evaluate particularly important topics for Aboriginal peoples, such as whether the draft appropriately incorporates the right to free, prior and informed consent of concerned communities. Similarly, it is reported that Aboriginal peoples have not been informed if consultations will continue or if there is a new version of the Draft Bill.

Moreover, according to the information received, the Draft Bill:

- (i) Provides the final decision maker, the Minister for Aboriginal Affairs, with overly wide discretion to approve activities that could have an impact on Aboriginal cultural heritage, based on an "interests of the State" test and without establishing a clear requirement to protect such heritage from degradation or destruction;

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(ii) Initially included the possibility for Aboriginal peoples to request the review of the Minister's decision in the State Administrative Tribunal of Western Australia, but that such review opportunity has been removed from the Draft Bill;

(iii) Does not require free, prior and informed consent of Aboriginal Traditional Owners with respect to decisions that could impact the Aboriginal heritage;

(iv) Includes a mechanism for the creation of "protected areas", which would only protect Aboriginal heritage of "outstanding significance", that is to be decided by the Minister for Aboriginal Affairs, without a possibility to review its decision.

According to the information received, the discretionary power attributed to the Minister of Aboriginal Affairs and the absence of effective remedies and legal redress for Aboriginal peoples to challenge his decisions will maintain the structural racism of the cultural heritage legal and policy scheme, which has already led to the destruction of Aboriginal cultural heritage in Western Australia.

The Committee recalls its general recommendation No. 23 (1997) on the rights of indigenous peoples. It further recalls its concluding observations of 2017 (CERD/C/AUS/CO/18-20, para. 22), in which the Committee recommended the State party to ensure that the principle of free, prior and informed consent is incorporated into pertinent legislation and fully implemented in practice. The Committee further recommended the State Party to respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

Accordingly, the Committee requests the State party to provide information on:

- (a) The allegations mentioned above regarding the Draft Bill;
- (b) The current status of the Draft Bill, including information on any recent modifications that addresses the concerns raised by Aboriginal peoples;
- (c) The measures adopted to fully and adequately guarantee the right to consultation of Aboriginal peoples in Western Australia regarding the drafting and discussion of this Draft Bill, as well as on any steps taken to consider suspending its adoption or withdrawing it until such consultations take place and consent is obtained.

In this regard, the Committee encourages the State party to consider engaging with the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) that is mandated by the Human Rights Council (resolution 33/25, paragraph 2), to provide States with technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples and to facilitate dialogue between States and indigenous peoples.

In accordance with article 9 (1) of the Convention and article 65 of its Rules of Procedure, the Committee requests the State party to submit its response before 30 March 2022.



Allow me, Excellency, to reiterate the wish of the Committee to continue to engage in a constructive dialogue with the Government of Australia, with a view to ensuring the effective implementation of the Convention.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Bossuyt', written over a horizontal line.

Marc Bossuyt
Vice-Chair

Committee on the Elimination of Racial Discrimination

