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## **The Question**

- **Why do we spend so much money on Indigenous issues yet make so little difference in the socio-economic status between Indigenous and non-Indigenous Australians?**

## The Australian Constitution

- Two decisions:
  - The legislature will deal with rights
  - Laws can be discriminatory
- 1967 Referendum
  - Not the right to vote or to be citizens
  - Inclusion in the census
  - Federal Government has the power to make laws about Indigenous people
- But unintended consequences - cost-shifting

## Legacies from the Constitution

- Cost-shifting - under-funding on health, housing, education, employment
- Lack of rights protections
  - Kruger v Commonwealth
- Legislative rights can be repealed
- Kartinyeri v Commonwealth (Hindmarsh Island case)
- Racial Discrimination Act
- No rights framework or culture

## Current policies that breach human rights

Two examples:

- Welfare quarantining
  - No evidence of links to school attendance
  - Racially discriminatory
  - Goes against what the evidence shows works (cf. bilingual language)
- Housing policy

## Another Question

- If there are no human rights benchmarks within Australia, how do we measure well we protect Indigenous rights?
  - International benchmarks
  - Comparative jurisdictions
    - Canada
    - the United States
    - New Zealand

## **Key International Human Rights Instruments**

- **United National Declaration of Human Rights (UNDHR)**
- **International Covenant on Civil and Political Rights (ICCPR) - Article 1**
- **International Covenant on Economic, Cultural and Social Rights (ICESCR) - Articles 1 and 27**
- **Convention to Eliminate all forms of Racial Discrimination (CERD)**
- **Convention to Eliminate Discrimination Against Women (CEDAW)**
- **Convention Against Torture (CAT)**

## **Other Forums**

- Working Group on Indigenous Peoples - part of ECOSOC and supposed to be a forum for the drafting of the Declaration on the Rights of Indigenous Populations - established 1994. See <http://www.iwgia.org/sw248.asp>
- Permanent Forum - part of ECOSOC - established 28 July 2000
- <http://www.un.org/esa/socdev/unpfii/en/members.html>

## **Declaration on the Rights of Indigenous People**

- <http://www.iwgia.org/sw248.asp>
- Benchmarks of indigenous people internationally

## **International Comparisons - Canada**

- Constitutional Recognition - 1982 -  
Section 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- Assembly of First Nations - <http://www.afn.ca/>
- Inherent Right to Self Government - <http://www.ainc-inac.gc.ca/index-eng.asp>

- Treaties
- Aboriginal Title - *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010
- Residential Schools - <http://www.afn.ca/residentialschools/index.html>
- <http://www.aph.gov.au/library/Pubs/rp/1999-2000/2000rp27.htm>

## **International Comparisons - the United States**

- The Cherokee Cases
  - *Johnson v McIntosh* - held that the “discovery” of lands in the New World gave the discovering European power sovereignty and good title against all other European powers and gave them “the sole right of acquiring the soil from the natives. The “Indians” retained the right of occupancy which the discovering nation could extinguish “by purchase or by conquest.” The sovereign could grant land occupied by First Nations people but it was subject to the right of First Nations people to occupy it. The impact of the decision was to recognize a legal right of First Nations to their lands, good against all third parties but existing at the sufferance of the federal government.
    - *Johnson v McIntosh* 21 US (8 Wheat.) 543 (1823)

- *Cherokee Nation v Georgia* – The Cherokee nation was considered a “state”, that is “a distinct political society separated from others, capable of managing its own affairs and governing itself.” However, it was not a “foreign” state. Chief Justice Marshall described them as *domestic dependant nations*.
  - Cherokee Nation v Georgia 30 US (5 Pet.) 1 (1831)
- *Worcester v Georgia* – Chief Justice Marshall held that:
  - The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force.
  - Worcester v Georgia 31 US (6 Pet.) 515 (1832)

## **International Comparisons - New Zealand**

- Treaty of Waitangi - <http://www.nzhistory.net.nz/category/tid/133>  
(New Zealand history site)
- Waitangi Tribunal  
<http://www.waitangi-tribunal.govt.nz/>
  - Fishing
  - Language

## **Resources for Australian Indigenous People**

- **Australian Human Rights Commission** - [http://www.hreoc.gov.au/Social\\_Justice/index.html](http://www.hreoc.gov.au/Social_Justice/index.html)
- **Behrendt, “Achieving Social Justice” - The Federation Press**
- **National Indigenous Times - [www.nit.com.au](http://www.nit.com.au)**

## **General Resources**

- Behrendt, Cunneen and Libesman, *Indigenous Legal Relations in Australia*, 2009 (Oxford University Press)
- <http://www.liac.sl.nsw.gov.au/> - Hot Topics