



Submission to Legal & Constitutional Affairs References Committee

Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

Friends of the Earth Australia

nuclear.foe.org.au/racism

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Article 29 of the UN Declaration on the Rights of Indigenous Peoples:

- 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*
- 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.*
- 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.*

https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

1. SUMMARY & RECOMMENDATIONS

Friends of the Earth Australia welcomes the opportunity to provide a submission to this inquiry and would be happy to appear at a public hearing.

This submission argues that successive Australian federal governments have repeatedly breached the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in relation to nuclear waste management plans, and that the National Radioactive Waste Management Act contains multiple indefensible clauses designed to disempower Aboriginal Traditional Owners.

The recommendations are as follows:

1. The Committee should recommend revocation of the Morrison Coalition Government's declaration of a site near Kimba in SA for a national nuclear waste dump. The opposition of Barngarla Traditional Owners is unanimous. It would be unconscionable for the Labor Government to do anything other than to revoke the declaration and abandon the former government's plan for a nuclear dump on Barngarla Country.
2. The Committee should recommend that the federal Albanese Labor Government adopt South Australian Labor policy whereby traditional owners have a right of veto over any nuclear waste sites.
3. The National Radioactive Waste Management Act is racist through and through, it breaches the UNDRIP on multiple counts, and the Act must be amended or repealed and replaced.

2. THE PROPOSED NATIONAL NUCLEAR WASTE DUMP ON BARNGARLA COUNTRY IN SA

The Morrison Coalition Government's plan to establish a national nuclear waste dump on Barngarla Country on SA's Eyre Peninsula – despite the unanimous opposition of Barngarla Traditional Owners – clearly violates Article 29 of the UNDRIP:

"States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent".

In a 2018 submission to the UN OHCHR United Nations Expert Mechanism on the Rights of Indigenous Peoples, the Morrison Coalition Government claimed that "the [radioactive waste] facility will not be forced on an unwilling community, in line with Article 29(2) of the Declaration [on the Rights of Indigenous Peoples]."

Article 29(2) of the UN Declaration stresses free, prior and informed consent:

"States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."

The proposed Kimba dump does not have the "free, prior and informed consent" of Barngarla Traditional Owners. They are unanimous in their opposition. There is no consent.

The Morrison Government excluded Barngarla Traditional Owners from a sham 'community ballot'. So the Barngarla Determination Aboriginal Corporation (BDAC) engaged the Australian Election Company to conduct an independent ballot which revealed unanimous opposition among Traditional Owners. The ballot was ignored by the federal government.

Jason Bilney, Chair of BDAC, noted:

"It is a simple truth that had we, as the first people for the area, been included in the Kimba community ballot rather than unfairly denied the right to vote, then the community ballot would never have returned a yes vote."

In April 2020, federal parliament's Joint Committee on Human Rights Committee concluded that the Morrison government was violating the human rights of Barngarla people. The Committee noted the unanimous opposition of the Barngarla Traditional Owners to the proposed nuclear dump and it concluded that the National Radioactive Waste Management Amendment Bill did not sufficiently protect the rights and interests of Traditional Owners and that "there is a significant risk that the specification of this site will not fully protect the right to culture and self-determination."

Importantly, the Human Rights Committee's report was unanimous and was endorsed by Liberal and National Party members as well as Labor members. However the Morrison Coalition Government ignored the Human Rights Committee's report and continued in its efforts to dispossess and disempower Barngarla Traditional Owners.

The National Radioactive Waste Management Amendment Bill was the Morrison Government's attempt to amend federal legislation to prevent Barngarla Traditional Owners from launching a legal challenge against the nomination of the dump site. Thankfully, the attempt to prevent a legal challenge failed due to opposition from Labor and cross-bench Senators.

Barngarla Traditional Owners have launched a legal challenge in the Federal Court against the Morrison Government's declaration of the Napandee site, near Kimba, for a national nuclear waste dump. It would be unconscionable for the incoming Labor Government to engage in a legal fight in order to allow the government to ignore and override the unanimous opposition of Barngarla Traditional Owners to the proposed nuclear dump.

The Barngarla Determination Aboriginal Corporation states:

*"It remains shocking and saddening that in the 21st Century, First Nations people would have to fight for the right to vote in Australia and that the Federal Government would deliberately remove judicial oversight of its actions in circumstances where the Human Rights Committee, a bipartisan committee no less, has considered the process to locate the NRWMF flawed."*¹

A 22 June 2021 joint statement by Barngarla Determination Aboriginal Corporation and No Radioactive Waste on Agricultural Land in Kimba or SA group states:²

"The Government has completely and utterly miscarried the site selection process. There are many examples of this. No proper heritage assessment of the site was ever undertaken, and they have marginalised the voices of the farming community throughout the entire process. However, the most obvious and appalling example of this failed process was when the Government allowed the gerrymandering of the Kimba "community ballot", in order to manipulate the vote. The simple fact remains that even though the Barngarla hold native title land closer to the proposed facility than the town of Kimba, the First Peoples for the area were not allowed to vote. They prevented Barngarla persons from voting, because native title land is not rateable. Further, they did not allow many farmers to vote, even

¹ <https://www.aph.gov.au/DocumentStore.ashx?id=3a6091d5-1671-4d4d-a6e7-916d05f197b2>

²

<https://www.facebook.com/barngarla.napandee.7/posts/pfbid0V2Gp2KPQL953kkfFWaVKRogknHRAPWFEMtsB3vjsx6xeL55oAnWYJC82DFL6edal>

though they were within 50km of the proposed facility, because they were not in the Council area. They targeted us, because they knew that if they had a fair vote which included us, then the vote would return a "no" from the community."

BDAC has written to Prime Minister Albanese calling on the Labor government to scrap Morrison's plans for a nuclear waste dump in SA.³ The letter states:

"Although we appreciate all that Labor have done in opposition, the Barngarla people unequivocally make it clear that we request that the new Labor minister revoke the declaration or consent to the orders quashing the declaration. We call for this to occur at the earliest opportunity possible."

The BDAC letter further states:

"Sadly, the former Government at every turn tried to silence us in this process, as the Government did not allow us access to the land to undertake a proper heritage survey, tried to remove our right to judicial review, sought to legislate the location directly, abandoned their commitment to ensure that the facility had broad community support, altered the proposal to include military waste inconsistently with the treaty and tried, through various affiliated organisations, to interfere with our ability to bring judicial review including having parties costs orders against us as a means to blocking the Barngarla people from going to Court.

"Despite this, we stood tall, and we have brought these legal proceedings. They were brought against Minister Pitt, but because you have won the election, the matter now becomes your Governments to deal with.

"Although we appreciate the right to bring these proceedings and all that Labor have done in Opposition, the Barngarla people unequivocally make it clear that we request that the new Labor Minister revoke the declaration or consent to the orders quashing the declaration. We call for this to occur at the earliest opportunity possible in the new Labor Government, because we do not want to fight against your Government in Court which would not only take a number of years, but result in spending our vulnerable community's resources protecting our people against the contemptuous behaviour of the last Government; nor do we want your Government to be tarnished by these horrible failures of the former Government. ...

"The Uluru Statement from the Heart makes clear that our "sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown". Again, as we said to the new Minister, our spiritual sovereignty has been violated by the former Government, and we hope and believe in your Government that you will not violate it further."

³ <https://www.perthnow.com.au/news/environment/labor-urged-to-scrap-nuclear-dump-c-7018147>

Right of Veto

The Albanese Labor Government should adopt South Australian Labor's policy whereby traditional owners have a right of veto over any nuclear waste sites. This is of course consistent with UNDRIP principles regarding free, prior and informed consent.

Susan Close, now Deputy Premier of South Australia, noted in a September 2020 media statement:

"This was a dreadful process from start to finish, resulting in fractures within the local community over the dump. The SA ALP has committed to traditional owners having a right of veto over any nuclear waste sites, yet the federal government has shown no respect to the local Aboriginal people."

Likewise, in October 2021 SA Labor supported a parliamentary motion stating that in light of the opposition of the Barngarla Traditional Owners, the (since defeated) Marshall Government should oppose the federal government's attempt to impose a national nuclear waste dump in SA and stands condemned for its failure to do so.⁴

Labor's Kyam Maher spoke in favour of the parliamentary motion:⁵

"We have had since before the last election, and maintained the view since the election, that for a nuclear radioactive storage facility it is fundamental that traditional owners' views are taken into account. Since Jay Weatherill was Premier we have taken the view – and that has continued in this term while we are in opposition – that for a nuclear radioactive dump or storage facility the traditional owners should have a right of veto, a right of refusal of such a thing on their land. That has not changed and that is why we support this motion, from that one very simple principle which we have had and which remains unchanged."

The Albanese Labor Government should respect SA legislation banning the import, transport, storage and disposal of nuclear wastes – the SA Nuclear Waste Storage (Prohibition) Act 2000. The Act states:

"The Objects of this Act are to protect the health, safety and welfare of the people of South Australia and to protect the environment in which they live by prohibiting the establishment of certain nuclear waste storage facilities in this State."

The Nuclear Waste Storage (Prohibition) Act is supported by South Australians; the proposed nuclear waste dump is not. A 2018 poll found that 55% agreed that SA should stop the federal government from building a national nuclear dump in SA while 35% disagreed. A 2016 Sunday Mail-commissioned poll found that support in SA for a national dump (39.8%) was well short of a 50% majority and even further short of the Morrison Coalition Government's own benchmark of 65% to demonstrate 'broad community support'. A 2015 Advertiser-commissioned poll found just 15.7% support for a nuclear waste dump in SA.

SA Unions, the peak body representing trade unionists in South Australia, unanimously passed a resolution in March 2022 supporting Barngarla Traditional Owners in their struggle

⁴ <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-34556>

⁵ <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-34556>

against the Morrison government's proposed nuclear dump.⁶ SA Unions Secretary Dale Beasley said that South Australian labour movement stood shoulder to shoulder with the Barngarla Traditional Owners:

"South Australian unions are completely united in their support of the Barngarla Traditional Owners and their opposition to the proposed nuclear waste site at Kimba. ... We have in South Australia a shameful legacy of imposing the impact of nuclear technology on aboriginal communities. Decades after the end of British nuclear tests around Maralinga, radioactive particles containing plutonium and uranium still contaminate the landscape. Given that history, we would have expected Steven Marshall to stand up for the Barngarla Traditional Owners. ... South Australian unions join with the Traditional Owners and the South Australian Community in complete opposition to the dangerous proposal."

Recommendations:

1. The Committee should recommend revocation of the Morrison Coalition Government's declaration of a site near Kimba in SA for a national nuclear waste dump. The opposition of Barngarla Traditional Owners is unanimous. It would be unconscionable for the Labor Government to do anything other than to revoke the declaration and abandon the former government's plan for a nuclear dump on Barngarla Country.
2. The Committee should recommend that the federal Albanese Labor Government adopt South Australian Labor policy whereby traditional owners have a right of veto over any nuclear waste sites.

3. THE NATIONAL RADIOACTIVE WASTE MANAGEMENT ACT

The National Radioactive Waste Management Act (NRWMA) is wildly inconsistent with UNDRIP principles.

The NRWMA gives the federal government the power to extinguish rights and interests in land targeted for a radioactive waste facility.⁷ In so doing the relevant Minister must "take into account any relevant comments by persons with a right or interest in the land" but there is no requirement to secure consent – or to back off if consent is not forthcoming.

Aboriginal Traditional Owners, local communities, pastoralists, business owners, local councils and State/Territory Governments are all disadvantaged and disempowered by the NRWMA.

The NRWMA goes to particular lengths to disempower Traditional Owners. The nomination of a site for a radioactive waste facility is valid even if Aboriginal owners were not consulted and did not give consent. The NRWMA states that consultation should be conducted with

⁶ <https://www.techbusinessnews.com.au/news/strongsa-unions-stands-with-traditional-owners-in-rejecting-nuclear-waste-dump-nbspstrong/>

⁷ For more information see: Amanda Ngo, March 2017, 'National Radioactive Waste Management Act 2012', <http://tinyurl.com/nrwma-2017> or <https://d3n8a8pro7vhmx.cloudfront.net/foe/pages/199/attachments/original/1489231658/NRWMA-Report-FINAL-March-2017.pdf>

Traditional Owners and consent should be secured – but that the nomination of a site for a radioactive waste facility is valid even in the absence of consultation or consent.

Needless to say, that is in no way, shape or form compliant with UNDRIP clauses regarding free, prior and informed consent.

The NRWMA has sections which nullify State or Territory laws that protect the archaeological or heritage values of land or objects, including those which relate to Indigenous traditions.

The Act curtails the application of Commonwealth laws including the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Native Title Act 1993 in the important site-selection stage. The Native Title Act 1993 is expressly overridden in relation to land acquisition for a radioactive waste facility.

The NRWMA has been criticised in both Senate Inquiries and a Federal Court challenge to an earlier federal government attempt to impose a national radioactive waste facility at Muckaty in the Northern Territory.

The NRWMA needs to be radically amended or replaced with legislation that gives local communities and Traditional Owners the right to say 'no' to nuclear waste dumps.

Sadly, the only recent attempt to amend the NRWMA was the Morrison Coalition Government's attempt to strip ever more rights from Traditional Owners, by removing the right for judicial review. Thankfully, that attempt to further weaken the legislation failed.

Recommendation:

3. The National Radioactive Waste Management Act is racist through and through, it breaches the UNDRIP on multiple counts, and the Act must be amended or repealed and replaced.