



PARLIAMENT OF AUSTRALIA

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

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

November 2023

CANBERRA

© Commonwealth of Australia 2023

ISBN 978-1-76092-533-8 (Printed version)

ISBN 978-1-76092-534-5 (HTML version)

All material in this report is provided under a Creative Commons Attribution-NonCommercial-NoDerivs 4.0 Australia licence. The material may be shared, copied and redistributed provided that:

- it is for non-commercial purposes
- the committee named on the previous page is credited as the author
- the committee is not represented as endorsing the use of the material
- any changes are clearly identified
- no additional legal or technical restrictions are applied to restrict use that complies with the licence.

If the material is remixed, transformed or built upon, the modified material may not be distributed.



Full details of this licence are available on the Creative Commons website:
<https://creativecommons.org/licenses/by-nc-nd/4.0/>.

Contents

Acknowledgement.....	vii
Foreword	ix
Members.....	xi
Terms of reference	xiii
Abbreviations	xv
List of recommendations.....	xix

Report

Introduction and UNDRIP Background	1
Senate Standing Committees on Legal and Constitutional Affairs inquiry—46th Parliament.....	1
Referral of inquiry to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs—47th Parliament	1
Conduct of inquiry	2
UNDRIP background	2
Colonisation and dispossession	2
International Labour Organisation Conventions 107 and 169	3
UNDRIP development	5
UNDRIP enforceability and relationship with human rights covenants	11
UNDRIP Articles	14
Australian context	14
Aboriginal and Torres Strait Islander history	14
Uluru Statement from the Heart.....	19
Australian position on UNDRIP	20
Committee comment.....	21
Implementation in Australia	23
Implementation of UNDRIP in Australia.....	23

UNDRIP principles in human rights mechanisms	25
Response to the Uluru Statement from the Heart.....	28
Partnership approaches to policy development.....	32
National Agreement on Closing the Gap	32
Industry or sector application of UNDRIP	35
International Assessments of Australia.....	37
UN Human Rights Committee	38
Special Rapporteur on the rights of Indigenous peoples.....	39
Universal Periodic Review.....	41
United Nations Expert Mechanism on the Rights of Indigenous Peoples	43
United Nations Permanent Forum on Indigenous Issues	44
Committee Comment.....	45
International experience of implementing UNDRIP	47
International implementation of UNDRIP.....	47
Aotearoa—New Zealand	48
Approach to implementation.....	48
Lessons for Australia	52
Canada	53
Federal Government of Canada.....	54
Province of British Columbia	59
Lessons for Australia	64
Finland	65
Approach to implementation.....	65
Lessons for Australia	67
Norway.....	68
Approach to implementation.....	68
Lessons for Australia	70
Committee comment.....	71
Ways forward for implementing UNDRIP in Australia	73
Uluru Statement from the Heart.....	73
Human rights considerations of Parliament	78
National Action Plan	81

Public awareness and education	84
Additional and complementary approaches.....	87
Compliance audit of legislation against UNDRIP Articles	87
Cultural heritage and traditional knowledge protection	89
Development of a Commonwealth Human Rights Act	91
Committee comment.....	93

Appendixes

Dissenting report from Coalition Members and Senator.....	97
Additional comments from Senator Dorinda Cox	101
Additional comments from Senator Lidia Thorpe	103
Appendix A. Submissions	171
Appendix B. Public hearings.....	179
Appendix C. United Nations human rights bodies and mechanisms structure.....	185
Appendix D. United Nations Declaration on the Rights of Indigenous Peoples.....	187



Acknowledgement

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs acknowledges the Aboriginal and Torres Strait Islander peoples as the Traditional Owners and Custodians of Country throughout the lands now known as Australia. The Committee pays respects to ancestors and Elders past, present, and future, and is committed to honouring Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships to lands, waters and seas.

Please be aware that this Report contains the names of people who have passed away.



Foreword

Indigenous rights are inherent to Aboriginal and Torres Strait Islander peoples by virtue of their unique and enduring status as the *First Peoples* of Australia. The rights recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) arose from the efforts of First Peoples around the world who worked within the United Nations structures over decades to formally articulate these rights.

Australia has been a signatory of UNDRIP since 2009. The United Nations calls upon all signatories to UNDRIP to uphold the inherent human rights of Indigenous peoples and to implement these within their political and institutional frameworks, while preserving the integrity and unity of the Nation State. Like many UN documents, the UNDRIP is non-binding, however signatories proclaim the UNDRIP to be a ‘standard of achievement to be pursued in a spirit of partnership and mutual respect’.

The UNDRIP articulates ‘the minimum standards of survival, dignity and well-being of Indigenous peoples of the world.’ Importantly, UNDRIP does not create any new or ‘special’ rights, which is a common misconception. Rather, it details and reflects existing rights from other international human rights instruments and applies them to the specific contexts and situations affecting Indigenous peoples.

During this inquiry, the Committee paid particular attention to the lessons, challenges, and opportunities associated with the application of UNDRIP in Australia. What became clear from the evidence is that UNDRIP does offer a potential blueprint for a renewed relationship between Aboriginal and Torres Strait Islander peoples and the broader Australian nation.

At the heart this Report is a call for Australian governments and civil society to meaningfully engage with the rights of Indigenous peoples through UNDRIP. The challenge for the Australian Parliament is to determine how these rights should be enjoyed and made meaningful for Aboriginal and Torres Strait Islander peoples within the political and legal systems of the Australian Nation State. Importantly, the participation of First Peoples is both necessary and integral to the way governments respond to the application of the rights articulated in UNDRIP.

This Report recommends that governments ensure their approach to developing policy and legislation affecting Aboriginal and Torres Strait Islander peoples be consistent with UNDRIP. It suggests mechanisms to realise that, such as incorporating UNDRIP in Australia’s human rights scrutiny legislation, and through a national action plan, developed in consultation with First Peoples, to guide coordinated efforts for implementing UNDRIP holistically in Australia. Such efforts should be complemented by greater education about Australian history and civics as well as Commonwealth support towards truth-telling and agreement-making, all of which are affirming of Indigenous rights.

The High Court of Australia's ruling in *Mabo v Queensland No 2* confirmed that the concept of Australia's being declared '*terra nullius*' (land of no one) was untrue. Aboriginal and Torres Strait Islander people were here before British arrival and colonisation. UNDRIP offers the international standard for legacy issues arising from colonisation to find accommodation in the present.

I want to thank the many experts, organisations, and community members who generously gave their time to contribute to this inquiry. I especially acknowledge the many international witnesses who endured challenges of different time zones to provide the Committee with rich perspectives on the rights of Indigenous people across the world. I give particular thanks to the Secretariat who supported the Committee's inquiry and me as Chair while we gathered evidence, and my fellow Committee members who engaged in this inquiry so thoroughly.

Finally, it should be acknowledged that this inquiry occurred during the debate on the referendum regarding constitutional recognition through a Voice. In the wake of the referendum result, Australia appears at a crossroad with respect to how to navigate Indigenous issues. I believe that the enhanced application of UNDRIP and the general acceptance of these rights as a fundamental component of our democracy is where we must start. I hope that this Report be considered in that light.

Senator Patrick Dodson
Chair

22 November 2023



Members

Chair

Senator Patrick Dodson, ALP

Deputy Chair

Hon Melissa Price MP, LP

Members

Mr Matt Burnell MP, ALP

Ms Kate Chaney MP, Ind

Ms Sharon Claydon MP, ALP

Senator Dorinda Cox, AG

Senator Kerryanne Liddle, LP

Mr Llew O'Brien MP, LNP

Mr Graham Perrett MP, ALP

Dr Gordon Reid MP, ALP

Ms Marion Scrymgour MP, ALP

Senator Jana Stewart, ALP

Senator Lidia Thorpe, Ind

This Committee is supported by staff of the Department of the House of Representatives.



Terms of reference

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquire and report into the following:

The application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, with particular reference to:

- i. the international experience of implementing the UNDRIP
- ii. options to improve adherence to the principles of UNDRIP in Australia
- iii. how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP
- iv. any other related matters.

Abbreviations

ACT	Australian Capital Territory
ACT Human Rights Act	<i>Human Rights Act 2004 (ACT)</i>
ACTU	Australian Council of Trade Unions
AHRC	Australian Human Rights Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALC	New South Wales Aboriginal Land Council
AM	Member of the Order of Australia
AO	Officer of the Order of Australia
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIEB Act	<i>Aboriginal and Torres Strait Islander Elected Body Act 2008</i>
BC	Province of British Columbia, Canada
BC Declaration Act	<i>Declaration on the Rights of Indigenous Peoples Act</i> (British Columbia)
Calder et al. v. Attorney-General of British Columbia	Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313
Coalition of Peaks	Coalition of Aboriginal and Torres Strait Islander Peak Organisations
Cth	Commonwealth of Australia
Declaration	United Nations Declaration on the Rights of Indigenous Peoples
ECOSOC	the Economic and Social Council
EMRIP	United Nations Expert Mechanism on the Rights of Indigenous Peoples

Expert Mechanism	United Nations Expert Mechanism on the Rights of Indigenous Peoples
FAIRA	Foundation for Aboriginal and Islander Research Action Aboriginal Corporation
FNP	First Nations Portfolio
FPIC	Free, Prior, and Informed Consent
FVTOC	Federation of Victorian Traditional Owners Corporation
Hon	Honourable
ICCPR	International Covenant on Civil and Political Rights
ICIP	Indigenous Cultural Intellectual Property
ILO	International Labour Organization
KALACC	Kimberley Aboriginal Law and Cultural Centre
KC	King's Counsel
KNZM	Knights Companion of The New Zealand Order of Merit
Ltd	Limited
<i>Mabo v Queensland</i>	<i>Mabo v Queensland</i> [No 2] (1992) 175 CLR 1, 26
MLA	Member of the Legislative Assembly
MP	Member of Parliament
NAAJA	North Australian Aboriginal Justice Agency
NAC	National Aboriginal Conference
NAC	Australian National Aboriginal Conference
NACCHO	National Aboriginal Community Controlled Health Organisation
National Agreement	National Agreement on Closing the Gap
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NGO	Non-Government Organisation

NIAA	National Indigenous Australians Agency
NSW	State of New South Wales, Australia
NT	Northern Territory
NTA	<i>Native Title Act 1993</i> (Cth)
NWAC	Native Women's Association of Canada
NZ	New Zealand (Aotearoa)
NZHRC	New Zealand Human Rights Commission
OAM	Medal of the Order of Australia
PC	Member of His Majesty's Privy Council for Canada
PJCHR	Parliamentary Joint Committee on Human Rights
Qld	State of Queensland, Australia
SA	State of South Australia, Australia
Sámediggi	Sámi Parliament of Norway
SC	Senior Counsel
Tas	State of Tasmania, Australia
the Committee	Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs
the Senate Committee	Senate Legal and Constitutional Affairs References Committee of the 46 th Parliament
the Special Rapporteur	Special Rapporteur on the Rights of Indigenous Peoples
the Statement	Queensland Government's Statement of Commitment
the Sub-Commission	the Sub-Commission on Prevention on Prevention of Discrimination and Protection of Minorities
TJC	Terri Janke and Company
TRC	Truth and Reconciliation Commission of Canada

Treaty Act	<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018</i> (Vic)
Uluru Statement	Uluru Statement from the Heart
UN	United Nations
UN Declaration Act	<i>United Nations Declaration on the Rights of Indigenous Peoples Act</i> (Canada)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEMRIP	United Nations Expert Mechanism on the Rights of Indigenous Peoples
UNHRC	United Nations Human Rights Council
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPR	Universal Periodic Review
UTAS	University of Tasmania
VCAT	Victorian Civil and Administrative Tribunal
Vic	State of Victoria, Australia
Victorian Charter	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
WA	State of Western Australia, Australia
WGIP	United Nations' Working Group on Indigenous Populations
<i>Wik Peoples v Queensland</i>	<i>The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors</i> [1996] HCA 40.

List of recommendations

Recommendation 1

- 4.100** The Committee recommends that the Commonwealth Government ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including, but not limited to, Closing the Gap initiatives) be consistent with the Articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation 2

- 4.101** The Committee recommends development of a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples, that outlines the approach to implementing the United Nations Declaration on the Rights of Indigenous Peoples in Australia.

Recommendation 3

- 4.102** The Committee recommends that any National Action Plan should consider the legislative, policy, and other approaches to implement, and assess compliance with, the United Nations Declaration on the Rights of Indigenous Peoples across all jurisdictions and should seek to include coordination agreements with all levels of government to maximise success.

Recommendation 4

- 4.103** The Committee recommends that the Commonwealth Government establish an independent process of truth-telling and agreement making, as requested by Aboriginal and Torres Strait Islander peoples, as a mechanism to support healing and assist implementation of the United Nations Declaration on the Rights of Indigenous Peoples (particularly Articles 3, 8, 11, 28, 32, and 37).

Recommendation 5

- 4.104** The Committee recommends that the Commonwealth Government work with State and Territory Governments and non-government education institutions to develop and adopt content for all levels of education, including for new citizens, in order to enhance awareness of:

- **Australia’s human rights framework, including the relationship between the United Nations Declaration on the Rights of Indigenous Peoples and human rights covenants,**
- **Australian history in respect to the relevance of the legal fiction of ‘terra nullius’ in facilitating the colonisation and settlement of Australia, and its impact on Aboriginal and Torres Strait Islander peoples, and**
- **General civics awareness, including the functions and operations of Australian political and legal institutions.**

Recommendation 6

- 4.105 The Committee recommends that the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the definition of ‘human rights’, so that it be formally considered by the Parliamentary Joint Committee on Human Rights when scrutinising legislation.**



1. Introduction and UNDRIP Background

- 1.1 This Chapter provides an overview of the scope and conduct of the inquiry, as well as background information on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration), Australia's historical engagement with the Declaration, and Aboriginal and Torres Strait Islander peoples' and communities' efforts to achieve the recognition of Indigenous rights in the development of UNDRIP.

Senate Standing Committees on Legal and Constitutional Affairs inquiry—46th Parliament

- 1.2 On 29 March 2022, the Senate referred an inquiry into the application of UNDRIP in Australia to the Senate Legal and Constitutional Affairs References Committee (the Senate Committee) for inquiry and report by 15 September 2022.
- 1.3 Due to the prorogation of the 46th Parliament on 11 April 2022, the Senate Committee was unable to progress its inquiry, presenting a progress report on 23 June 2022. It was the Senate Committee's advice that, owing to changes to the Senate's composition due to commence on 1 July 2022, the Senate in the 47th Parliament consider whether to re-refer the inquiry.¹

Referral of inquiry to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs—47th Parliament

- 1.4 On 2 August 2022, the Senate referred the inquiry into the application of UNDRIP in Australia to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (the Committee).
- 1.5 The Committee adopted the inquiry and its terms of reference, listed on page xiii, on 14 September 2022.

¹ Senate Legal and Constitutional Affairs References Committee 2022, *Application of the United Nations Declaration on the Rights of Indigenous Peoples: progress report*, p. 1.

Conduct of inquiry

- 1.6 The inquiry received 50 submissions and 11 supplementary submissions. These are listed at Appendix A.
- 1.7 Under paragraph (b) of the Senate's referral of the inquiry, submissions received by the Senate Committee were made available to this Committee. The Committee itself also resolved to receive these submissions as evidence.² The Senate Committee inquiry received 92 submissions. The Committee has listed the Senate Committee submissions at Appendix A.
- 1.8 The Senate Committee did not conduct any public hearings.
- 1.9 This Committee conducted seven public hearings in person and via videoconference. These are listed at Appendix B.
- 1.10 The evidence for this inquiry was received prior to the 14 October 2023 referendum.

UNDRIP background

Colonisation and dispossession

- 1.11 Indigenous peoples share in an international and universal experience which relates to colonisation and dispossession. Any consideration of UNDRIP must take place in the context of these historical realities.
- 1.12 The social, economic, cultural and political frameworks of Indigenous peoples were, at various points in world history, ruptured as a result of conquests and settlements. Many of these acts were under the approval of higher authorities such as the Catholic Church's Doctrine of Discovery, which was 'a 500-year-old Catholic decree that was used to justify the seizure of Indigenous lands by colonial powers'³. The Doctrine of Discovery and terms such as 'terra nullius' (Latin for the 'the land of no-one')⁴ were used in international law to acquire territory and legitimise the occupation and conquest of lands, including Australia.
- 1.13 Despite the historic role of international law in sanctioning many of these colonial and dispossessing practices, Indigenous peoples have sought to engage in international fora as one means of realising their rights and freedoms. Similarly, within the domestic context, policies and institutions were developed by settlers mostly without the consent or participation of Indigenous peoples.

² Senate 2022, *Senate Journals* no. 5, 2 August 2022, p. 157.

³ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'UN expert hails Vatican reject of 'Doctrine of Discovery', urges State to follow Suit', <https://www.ohchr.org/en/press-releases/2023/04/un-expert-hails-vatican-rejection-doctrine-discovery-urges-states-follow>, viewed 5 October 2023.

⁴ Britannica, *Terra nullius*, <https://www.britannica.com/topic/terra-nullius>, viewed 5 October 2023.

- 1.14 Cobbe Cobble woman and former Chair of the UN Expert Mechanism on the Rights of Indigenous peoples, Professor Megan Davis, considers this phenomenon a response by Indigenous peoples to ‘the exigencies of adversarial strategies with the state’⁵ and a response to ‘the limitations of domestic utilitarian politics’.⁶

International Labour Organisation Conventions 107 and 169

- 1.15 The first international instrument recognising Indigenous rights was the International Labour Organisation’s (ILO) *Indigenous and Tribal Populations Convention, 1957 (No. 107)* (ILO 107), which was adopted in 1957.⁷
- 1.16 Concerned with the suffering and plight of Indigenous peoples around the world, governments considered that the best way to protect the health and wellbeing of Indigenous communities was through greater assimilation into the normative society’s ‘status quo’, and its values and priorities—which were primarily a British societal model. Accordingly, ILO 107 made it a duty of governments to integrate or assimilate Indigenous peoples within their countries.⁸
- 1.17 Indigenous communities around the world unanimously rejected ILO 107 and called for the adoption of new standards—that recognise Indigenous peoples’ rights as distinct peoples. The failure of ILO 107 was later acknowledged by an expert committee, which found that the assimilationist approach was ‘obsolete’.⁹ In 1983, UN Special Rapporteur, José R Martínez Cobo, determined that ILO 107:
- ...[had] not proved very effective in protecting and developing the human rights and fundamental freedoms of Indigenous populations in countries which are [partied] to it...there is little difference between the countries which are and which are not bound by it.¹⁰
- 1.18 In response to the calls from Indigenous communities, a revised convention was developed, being the *Indigenous People and Tribal Peoples in Independent Countries Convention, 1989 (No. 169)* (ILO 169).

⁵ Davis, M, 2011, A reflection on the limitations of the right to self-determination and Aboriginal women, *Indigenous Law Bulletin*, p. 6.

⁶ Davis, M, 2011, A reflection on the limitations of the right to self-determination and Aboriginal women, *Indigenous Law Bulletin*, p. 6.

⁷ International Labor Organisation (ILO), *Indigenous and Tribal Populations Convention, 1957 (No. 107)*, 26 June 1957, Part 1 – General Policy.

⁸ ILO, *Indigenous and Tribal Populations Convention, 1957 (No. 107)*, 26 June 1957, Part 1 – General Policy.

⁹ ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, 19 February 2013, p. 4.

¹⁰ Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr José R Martínez Cobo*, UN Doc E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, p. 44.

- 1.19 ILO 169 acknowledged that in the time since the creation of ILO 107, developments in international law made it appropriate to remove ‘the assimilationist orientation of the earlier standards’.¹¹ In addition, ILO 169 introduced new standards on consultation and public participation of Indigenous peoples, some of which can be said to be reflected in UNDRIP.
- 1.20 For example, Article 6(a) of ILO 169 and Article 19 of UNDRIP bear similarities. Article 6(a) of ILO 169 states that governments shall:
- consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly¹²
- 1.21 Likewise, Article 19 of UNDRIP says:
- States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.¹³
- 1.22 But perhaps most significantly, ILO 169 provided an internationally recognised right to Indigenous self-determination for the first time.¹⁴ In the decades prior, a legal right to self-determination for Indigenous peoples proved a highly contested element of international law.
- 1.23 Subsequently, nation states feared that ratifying a right to self-determination for Indigenous peoples under ILO 169 would threaten the territorial integrity of states and provide a remedial possibility of secession through decolonisation of Indigenous peoples.
- 1.24 Therefore, many states made the decision to not sign ILO 169 into domestic law. ILO 169 remains the only legally binding international instrument specifically dealing with the rights of Indigenous peoples.¹⁵

¹¹ ILO, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 27 June 1989, Preamble.

¹² ILO, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 27 June 1989, Article 6.

¹³ UNDRIP, Article 19, p. 16.

¹⁴ ILO, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 27 June 1989, Part 1 – General Policy.

¹⁵ Rombouts, SJ 2017, ‘The Evolution of Indigenous Peoples’ Consultation Rights Under the ILO and UN Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments’, *Stanford Journal of International Law*, vol. 53, no. 2, p. 186, <https://ssrn.com/abstract=3010261>, viewed 18 April 2023.

- 1.25 Australia is not a signatory to either ILO 107,¹⁶ or 169.¹⁷ However, in the years between these instruments (1957–1989), there were major shifts for Indigenous rights in Australia that mirror the change from ‘assimilation’ towards ‘self-determination’. For example, the 1967 referendum repealed s127 and amended s 51 (xxvi) of the Constitution so that Aboriginal and Torres Strait Islander people could be counted in the census and the Commonwealth could make laws for Aboriginal and Torres Strait Islander peoples.
- 1.26 In 1972, the Whitlam Government instigated the new policy era of ‘self-determination’ for Indigenous peoples, reflecting the UN International Covenant on Civil and Political Rights,¹⁸ but occurring over a decade prior to ILO 169 which specifically identified self-determination as a right in international law.

UNDRIP development

- 1.27 With ILO 107 and ILO 169 providing little practical recourse and remedy, Indigenous peoples sought alternative strategies to advance their rights and freedoms.
- 1.28 Vice Chair and North American Member of Expert Mechanism on the rights of Indigenous peoples, Dr Sheryl Lightfoot, notes that there is a common misconception that UNDRIP evolved only within the halls of the United Nations.¹⁹
- 1.29 Dr Lightfoot says that UNDRIP had its genesis in a series of community-level meetings of Indigenous peoples from across the world in the late sixties up to the mid-seventies:

When I say community level, I mean grassroots, activists, advocates, elders, children and everyone sitting around describing, first in their own national context or their own provincial context: What are our rights as we know them? What have our ancestors told us? What are our treaty rights? What is our relationship to these lands and waters? They began to then connect with others and have more meetings, again, grassroots, very community based, and began to work transnationally at that time.²⁰

¹⁶ Countries that have not ratified this Convention, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312252:NO, viewed 9 October 2023.

¹⁷ Countries that have not ratified this Convention, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312252:NO, viewed 9 October 2023.

¹⁸ Hocking J, 2018, ‘A transforming sentiment in this country’: The Whitlam government and Indigenous self-determination, *Australian Journal of Public Administration*, <https://onlinelibrary.wiley.com/doi/full/10.1111/1467-8500.12353>, viewed 9 October 23.

¹⁹ Dr Sheryl Lightfoot, *Committee Hansard*, Canberra, 8 June 2023, p. 12.

²⁰ Dr Sheryl Lightfoot, *Committee Hansard*, Canberra, 8 June 2023, p. 12.

- 1.30 Where former attempts to codify the rights of Indigenous peoples had been conducted on behalf of communities or by institutional actors in isolation, the origins of UNDRIP were developed on the ground, by communities it concerned. In evidence to this Committee, Dr Lightfoot outlines the early history of UNDRIP in more detail:

There were two significant transnational movements of people that came together and began putting pen to paper and writing down principles. One was in Canada, and one took place at Standing Rock, South Dakota. Those two big meetings became organisations that then went to the United Nations in 1977 and brought their own documents, their documents of principles. Those documents of principles, which were written in community—grassroots meetings, the ones we love, where the kids are running around and everyone is talking and eating together for days and days—that's the origin of the Declaration.²¹

- 1.31 Dr Lightfoot continues:

Those two documents of principles came to Geneva. They were worked on and redrafted over 30 years of negotiation with the nation-states in the working group. That's the one that, by 2007, was passed looking like a human rights document. The reason it went to the human rights system was because the Indigenous peoples at the time in the seventies saw all of these treaties and conventions coming out, anti-racial-discrimination, decolonisation, national independence movements, and nowhere were there Indigenous peoples. So they needed to insert themselves and get recognition for the Indigenous context in all of this activity.²²

- 1.32 Importantly, these community-level discussions complemented the work of the United Nations' Working Group on Indigenous Populations (WGIP). Established in 1982, on the recommendation of Special Rapporteur Mr Martínez Cobo, the WGIP was created under the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission)²³ within the UN Commission on Human Rights.^{24,25}

²¹ Dr Sheryl Lightfoot, *Committee Hansard*, Canberra, 8 June 2023, p. 12.

²² Dr Sheryl Lightfoot, *Committee Hansard*, Canberra, 8 June 2023, p. 12.

²³ Lutz E, & Ledema N, 2004, 'Addressing Indigenous Rights at the United Nations', *Cultural Survival Quarterly Magazine*, September, vol 28, no. 3, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/addressing-indigenous-rights-united-nations>, viewed 18 April 2023. The Sub-Commission was established in 1947 as the main subsidiary body of the Commission on Human Rights (see below). Its title was changed in 1999 to the Sub-Commission on the Promotion and Protection of Human Rights, which was in turn disbanded in 2006 when the United Nations restricted its human rights structures.

²⁴ The Commission on Human Rights—a subsidiary body of the Economic and Social Council (ECOSOC)—was the principal forum within the UN mandated to promote and protect human rights. The Commission on Human Rights was replaced by the Human Rights Council in 2006. The WGIP was established through the Commission on Human Rights (resolution 1982/19 of 10 March 1982) and authorised by ECOSOC (resolution 1982/34 of on 7 May 1982).

²⁵ United Nations 1982, *Commission on Human Rights: report on the 38th session, 1 February–12 March 1982*, United Nations Digital Library, pages 1–2, 82, 84, 182, <https://digitallibrary.un.org/record/74618?ln=en>, viewed 18 May 2023; Office of the High Commissioner for Human Rights 1982, *Economic and Social Council Resolution 1982/34, Resolution 2*, <https://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1982-34.doc>, viewed 18 May 2023.

- 1.33 The Founding Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations, Madame Erica-Irene Daes (who served in this role for 20 years, including the period UNDRIP was drafted), describes the WGIP: 'For the first time, Indigenous peoples had access to their own UN forum, which became a world forum for Indigenous peoples' movements'.²⁶
- 1.34 The WGIP was mandated to meet annually to review developments related to the global promotion and protection of the human rights and fundamental freedoms of Indigenous populations in consultation with UN Member Countries and Indigenous representatives, and to develop standards on the rights of Indigenous peoples.²⁷
- 1.35 Indigenous Australians participated in this WGIP process and played a significant role in the consultation and drafting of UNDRIP. Across various meetings of the WGIP throughout the 1980s and 1990s, Aboriginal and Torres Strait Islander organisations made significant contributions to discussions and consultations leading to the draft declaration. This included:
- Aboriginal and Torres Strait Islander Commission
 - National Aboriginal and Torres Strait Islander Legal Services Secretariat
 - Anyinginyi Congress Aboriginal Corporation (Tennant Creek)
 - Central Land Council
 - FAIRA Aboriginal Corporation (FAIRA)
 - The National Federation of Land Councils
 - Kimberley Land Council
 - National Aboriginal Community Controlled Health Organisation
 - Northern Land Council
 - NSW Aboriginal Land Council
 - Secretariat of National Aboriginal Islander Child Care
 - Torres Strait Regional Authority.²⁸

²⁶ Erica-Irene A Daes, Making the declaration work.pdf (iwgia.org) p. 48, https://www.iwgia.org/images/publications/making_the_declaration_work.pdf, viewed 9 October 2023.

²⁷ United Nations Economic and Security Councils, *Study on the problem of discrimination against indigenous populations*, UN Doc E/RES/1982/34, 7 May 1982, pages 26–27.

²⁸ Economic and Social Council, *Discrimination Against Indigenous Peoples*, UN Doc: E/CN.4/Sub.2/1996/21 16 August 1996, pages 6–8.

- 1.36 In a report released in 1983, Special Rapporteur Martínez Cobo noted that whilst the rights of Indigenous peoples were enshrined in existing human rights instruments, those instruments had proven ‘not wholly adequate’ to uphold the specific rights of Indigenous populations.²⁹ The use of specific principles was recommended:

[S]pecific principles should be formulated for use as guidelines by Governments of all States in their activities concerning Indigenous populations, on a basis of respect for the ethnic identity of such populations and for the rights and freedoms to which they are entitled.³⁰

- 1.37 Mr Martínez Cobo, the Special Rapporteur, further recommended these principles be laid out in a declaration of the rights and freedoms of Indigenous peoples to be developed by the WGIP.³¹ In 1985, the WGIP began drafting articles on Indigenous peoples’ rights, working in close consultation with Indigenous communities from across the world through a structured forum located at the UN in Geneva.

- 1.38 The draft declaration emerged out of this involvement by Indigenous communities, bestowing UNDRIP with unprecedented legitimacy among the world’s Indigenous communities. Madame Daes, Chairperson of the WGIP, wrote:

It is the product of many years of work by many people including, in particular, many hundreds of Indigenous peoples from all parts of the world. Its text reflects an extraordinary liberal, transparent and democratic procedure before the WGIP that encouraged broad and unified Indigenous input. The members of the WGIP and I made every effort to incorporate Indigenous peoples’ primary aspirations in the final text. It should be noted that no other UN human rights instrument has ever been elaborated with so much direct involvement and active participation on the part of its intended beneficiaries.³²

²⁹ Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr José R Martínez Cobo*, UN Doc E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, p. 79.

³⁰ Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr José R Martínez Cobo*, UN Doc E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, p. 79.

³¹ Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr José R Martínez Cobo*, UN Doc E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, pages 79–80.

³² E Daes, ‘The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples’ in C Charters and R Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, Denmark, 2009, p. 74, https://www.iwgia.org/images/publications/making_the_declaration_work.pdf, viewed 28 June 2023.

- 1.39 The draft text was unanimously approved by the Sub-Commission nine years later on 26 August 1994, and subsequently submitted to the UN's Commission on Human Rights for consideration.³³
- 1.40 On 3 March 1995, the UN's Commission on Human Rights established a new nation state led open-ended intersessional working group to elaborate on the WGIP draft declaration for further consideration and adoption by the UN General Assembly.^{34,35} Agreement on the revised text was reached by the UN's Commission on Human Rights, 11 years later, in March 2006.³⁶
- 1.41 On 29 June 2006, the newly formed United Nations' Human Rights Council (successor to the UN's Commission on Human Rights) adopted the *Declaration on the Rights of Indigenous Peoples* during its inaugural session and recommended it be presented to the UN General Assembly for adoption.³⁷
- 1.42 The process leading up to the vote on the Declaration has been described as constituting 'more than 20 years of intense dialogue, discussions, negotiations, lobbying and advocacy'.³⁸
- 1.43 On 20 December 2006, the UN General Assembly voted to allow time for further consultations on the *Declaration on the Rights of Indigenous Peoples* and to conclude its consideration of the matter by the end of the 61st session, in September 2007.³⁹ Informal consultations were held throughout 2007, during which a series of revisions were made to the text.⁴⁰

³³ Commission on Human Rights, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/1995/2, 28 October 1994, pages 103–104. See also, UN Department of Economic and Social Affairs: Indigenous Peoples, *UN Declaration on the Rights of Indigenous Peoples*, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>, viewed 9 October 2023.

³⁴ The General Assembly is the principal deliberative, policymaking, and representative organ of the UN.

³⁵ United Nations General Assembly, *Report to the General Assembly on the First Session of the Human Rights Council*, UN Doc A/HRC/1/L.10, 30 June 2006, p. 56.

³⁶ Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of March 1995 on its eleventh session*, UN Doc E/CN.4/2006/79, 22 March 2006, p. 7.

³⁷ United Nations Human Rights Council, *Report of the Human Rights Council*, UN Doc A/61/53, 19–30 June 2006, pages 18–27.

³⁸ United Nations 2019, *4th Edition: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, Department of Economic and Social Affairs, <https://social.un.org/unpfii/sowip-vol4-web.pdf>, viewed 18 April 2023, p. ix.

³⁹ United Nations General Assembly, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214*, UN Doc A/RES/61/178, 20 December 2006.

⁴⁰ Joffe P, 2010, UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation, *National Journal of Constitutional Law*, vol. 26, no. 2, March, pages 121–229, p. 127, <https://www.afn.ca/uploads/files/education2/undripcanadiangovernments.pdf>, viewed 18 April 2023.

1.44 On 13 September 2007, the UN General Assembly adopted UNDRIP⁴¹ by 143 votes to four. Australia, Canada, Aotearoa (New Zealand), and the United States opposed the resolution.⁴² All four countries have since endorsed UNDRIP in 2009, 2010, 2010 and 2011 respectively.⁴³

1.45 On the day the Declaration was adopted, Victoria Tauli-Corpuz, Chair of the United Nations Permanent Forum on Indigenous Issues, stated that:

...This day will forever be etched in our memories as a significant gain in our peoples' long struggle for our rights as distinct peoples and cultures...I call on Governments, the UN system, Indigenous peoples and civil society at large to rise to the historic task before us and make the UN Declaration on the rights of Indigenous Peoples a living documents for the common future of humanity.⁴⁴

1.46 Mr Les Malezer, a descendent of the Gubbi Gubbi, Butchulla, and Gamilaroi peoples, and current Chairperson of the FAIRA, addressed the UN General Assembly following the successful vote on UNDRIP,⁴⁵ stating that:

...with the adoption of the Declaration, the United Nations and Indigenous people had found common ground ...a framework for States to protect and promote the rights of Indigenous people without exclusion or discrimination.⁴⁶

1.47 Mr Mick Dodson, Yawuru Elder and former member of the UN Permanent Forum on Indigenous Issues, assisted in the drafting of the UNDRIP. Following Australia's adoption of the declaration in 2009, Mr Dodson reflected that:

...The value of human rights is not in their existence; it is in their implementation. That is the challenge for the world and for Australia with this Declaration.⁴⁷

⁴¹ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007.

⁴² Eleven countries abstained from the vote. One country subsequently advised the secretariat that it had intended to support the resolution. See UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107, 13 September 2007, p. 19.

⁴³ United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview', <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>, viewed 17 April 2023.

⁴⁴ United Nations, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President', (Media Release GA/10612, 13 September 2007)

⁴⁵ Melbourne Law School, 'Visitors: 2023 – Les Malezer', The University of Melbourne, <https://law.unimelb.edu.au/iljh/our-people/visitors>, viewed 18 April 2023.

⁴⁶ United Nations, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward towards Human Rights for All, Says President', *Meetings Coverage and Press Release*, 13 September 2007, <https://press.un.org/en/2007/ga10612.doc.htm>, viewed 18 April 2023.

⁴⁷ Department of Local Government, Sport and Cultural Industries, 'Right Wrongs – '67 Referendum – WA 50 Years On', *right-wrongs-toolkit-part-5-human-rightsm-bringing-them-home-and-closing-the-gap*pdf1961ca31a84e769cdf551212573ccb.pdf (dlgsc.wa.gov.au), viewed 27 October 2023, p. 111.

UNDRIP enforceability and relationship with human rights covenants

- 1.48 UNDRIP is a non-binding declaration of the UN General Assembly, meaning that it is not legally enforceable on UN Member Countries. UNDRIP does, however, reflect an international consensus on the rights of Indigenous peoples for nation states to adopt in response to legacy issues of their relationship with their First Peoples.
- 1.49 As outlined, UNDRIP came into existence because Indigenous people across the world were not benefitting from the universal human rights guaranteed through the UN Human Rights Covenants.
- 1.50 Therefore, by design, UNDRIP is consistent with, and reinforcing of, existing, universal human rights instruments. The Australian Attorney-General's Department states that 'the Declaration reflects how a number of existing human rights standards under international law apply to the particular situation of Indigenous peoples'.⁴⁸
- 1.51 The Australian Human Rights Commission (AHRC) notes that UNDRIP does not create new rights for Indigenous peoples, but it 'brings together the pre-existing rights that are relevant to Indigenous peoples into one coherent document'.⁴⁹
- 1.52 However, UNDRIP does depart from the orthodoxy of international human rights in one important way. UNDRIP conceptualises Indigenous rights belonging to Indigenous peoples 'collectively' as opposed to rights belonging exclusively to individuals. Mattais Åhrén, Associate Professor and Former President of Sámi Council writes that 'the Declaration has settled the debate that international law recognizes collective human rights proper'.⁵⁰
- 1.53 As such, UNDRIP is internationally considered to be a normative framework, which:
- Contains a set of principles and norms that recognise and establish, within the international normative system, the fundamental rights of Indigenous peoples, and these must now form the basis of a new relationship between Indigenous peoples, states and societies the world over.⁵¹

⁴⁸ Attorney-General's Department, 'Right to self-determination: Public sector guidance sheet', <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>, viewed 18 April 2023.

⁴⁹ Australian Human Rights Commission, 2009, *Questions and answers on the UN Declaration on the Rights of Indigenous Peoples*, April, , <https://humanrights.gov.au/our-work/questions-and-answers-un-declaration-rights-indigenous-peoples-2009>, viewed 18 April 2023, p. 2.

⁵⁰ Åhrén M, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in C Charters and R Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, Denmark, 2009, https://www.iwgia.org/images/publications/making_the_declaration_work.pdf, viewed 29 June 2023, p. 202.

⁵¹ Montes A and Cisneros G, 'The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies' in Charters C and Stavenhagen R, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, Denmark, 2009, https://www.iwgia.org/images/publications/making_the_declaration_work.pdf, viewed 29 June 2023, p. 162.

- 1.54 Reaffirming earlier safeguards at international law on the territorial integrity of nation states, the normative nature of UNDRIP excludes the remedial possibility of secession or separate statehood. Article 46 (1) of UNDRIP specifies:
- Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.⁵²
- 1.55 Official records of the WGIP reveal that in the drafting of UNDRIP, Indigenous representatives reflected on the experience of many nation states in not ratifying ILO 169 domestically due to concerns about the legal right of self-determination.⁵³ Therefore, the decision to ensure that a right of self-determination under Article 3 of UNDRIP be interpreted in light of Article 46, was intentional with the hope that a much greater uptake of UNDRIP would result compared with ILO 169. This was realised with a majority of member states supporting its adoption (144 votes to four).⁵⁴
- 1.56 A 2008 report of the former UN Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples, Professor James Anaya, described the Declaration as follows:
- [UNDRIP] represents an authoritative common understanding, at the global level, of the minimum content of the rights of Indigenous peoples, upon a foundation of various sources of international human rights law.⁵⁵
- 1.57 Further, it is important to note that a human rights framework needs to be developed and implemented if rights and obligations within UNDRIP are to be applicable within the legal landscape of the Commonwealth, State and Territory jurisdictions.⁵⁶

⁵² UNDRIP, Article 46, pages 28–29.

⁵³ Nathan Yaffe, 'Indigenous consent: a self-determination perspective' (2018) 2(19) *Melbourne Journal of International Law* 1, p. 18.

⁵⁴ United Nations Declaration on the Rights of Indigenous peoples, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

⁵⁵ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, UN Doc A/HRC/9/9, 11 August 2008, p. 24.

⁵⁶ UNSW Law Society, *Senate Committee Submission 4*; Castan Centre for Human Rights Law, *Senate Committee Submission 33*; North Australian Aboriginal Justice Agency, *Senate Committee Submission 47*; Australian Human Rights Commission, *Senate Committee Submission 53*.

- 1.58 Professor Anaya's report pointed to UNDRIP Article 38 to highlight the central role of UN Member Countries in promoting the substance of the Declaration, and emphasised its connection to existing obligations to which they have already committed to under other human rights instruments.⁵⁷ Specifically, he states:

Accordingly, the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.⁵⁸

- 1.59 The UN High Commissioner for Human Rights from 2008–2014, Ms Navanethem Pillay, described UNDRIP as 'the United Nations' key tool in advancing the rights of Indigenous peoples' in her 2009–10 annual report to UN Human Rights Council.⁵⁹

- 1.60 The 2014 Inter-Parliamentary Union and UN handbook on implementing UNDRIP also noted the important role of parliaments in implementing the Declaration:

Experience has shown that it may be necessary to revise some or all legislation that directly or indirectly affects Indigenous peoples' rights, in order to achieve greater coherence in laws and alignment with international standards.⁶⁰

- 1.61 Together, the Articles of UNDRIP reflect an enduring Indigenous consensus on the rights and freedoms of Indigenous peoples. It remains an important touchstone, albeit a normative one, for an evolving set of legal and political demands for Indigenous communities in their ongoing struggle for greater recognition.

⁵⁷ Human Rights Council 2008, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, UN Doc A/HRC/9/9, 11 August 2008, pages 14–15, 24.

⁵⁸ Human Rights Council 2008, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, UN Doc A/HRC/9/9, 11 August 2008, p. 24.

⁵⁹ United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the rights of Indigenous peoples 2010*, UN Doc A/HRC/15/34, 8 July 2010, p. 17; United Nations n.d. 'Navanethem Pillay', <https://www.ohchr.org/en/about-us/high-commissioner/past/navi-pillay>, viewed 16 May 2023.

⁶⁰ Inter-Parliamentary Union and UN 2014, *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians no. 23*, p. 38.

UNDRIP Articles

1.62 UNDRIP has 46 Articles, which the Australian Human Rights Commission categorises into the following thematic areas:

- Articles 1–6: foundational rights
- Articles 7–10: life and security
- Articles 11–13: language, culture and spiritual identity
- Articles 14–17: education, information and employment rights
- Articles 18–24: participatory, development and social rights
- Articles 25–32: rights of country, resources and knowledge
- Articles 33–37: self-governance
- Articles 38–42: implementation of UNDRIP, and
- Articles 43–46: interpretation of UNDRIP.⁶¹

Australian context

1.63 Implementing an international instrument such as UNDRIP has inherent challenges when applying it domestically. One is ensuring that it has the capacity to respond to, or at the very least understand, the unique contexts and histories of the domestic jurisdiction. Another is recognising, respecting, and upholding the nation state's integrity of its legal systems and fundamental reality as the status quo. The third goes to the core of this Report: the way in which those rights contained in UNDRIP are applied and enjoyed by Indigenous peoples, when factoring in the first two points.

1.64 Therefore, international developments in the drafting and adoption of UNDRIP, must be read in light of broader advancements and advocacy of Aboriginal and Torres Strait Islander peoples in Australia.

Aboriginal and Torres Strait Islander history

1.65 Australia is one of the few western liberal democracies to have no formal constitutional recognition of, or legal settlement with, its First Peoples.

1.66 Since 11 British ships sailed into Port Jackson, Sydney, in 1788, Aboriginal and Torres Strait Islander peoples have endured an almost 250-year long struggle for recognition and improvement to their lives.

⁶¹ Australian Human Rights Commission 2011, *2010 Social Justice Report*, Aboriginal and Torres Strait Islander Social Justice Commissioner, p. 8, <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-0>, viewed 18 April 2023.

- 1.67 Prior to colonisation, the Australian continent had long been occupied by hundreds of distinct Aboriginal nations and language groups, each bound by its own domains, laws, customs, language, and song. However, colonisation in Australia occurred under the legal fiction of ‘terra nullius’ which was later rejected by the High Court’s decision in *Mabo v Queensland (No. 2)*.
- 1.68 On this, the High Court decision in the *Mabo v Queensland (No. 2)* case stated:
- The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this county...
- Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.⁶²
- 1.69 Internationally, the legal falsehoods underpinning colonial powers across the world have continued to be discredited, including most recently by the Vatican repudiating the Doctrine of Discovery, noting in a statement:
- In no uncertain terms, the Church’s magisterium upholds the respect due to every human being. The Catholic Church therefore repudiates those concepts that fail to recognize the inherent human rights of Indigenous peoples, including what became known as the legal and political ‘doctrine of discovery’.
- 1.70 Colonisation has done much to undermine Aboriginal and Torres Strait Islander peoples and has radically impacted on their rights to survive as unique peoples with respect to their own inherent values and priorities.
- 1.71 In Australia, there have been many Aboriginal and Torres Strait Islander led movements to respond to the consequences of the occupation, disruption, and impact of colonial settlement on First Peoples. It was evident that change was needed, and advocates initially sought recognition and political representation at the Commonwealth level. The next paragraphs in this Chapter outline some, but not all, of these efforts.
- 1.72 In 1937, Yorta Yorta man William Cooper petitioned the King to intervene in Australia ‘to prevent the extinction of the Aboriginal race; to secure better living conditions for all; and to afford Aboriginal representation in Parliament’.⁶³
- 1.73 A year later, in 1938 the Day of Mourning was held at La Perouse to protest the sesquicentenary of the foundation of Sydney where First Nations-leaders called for greater rights in order to improve outcomes for their people.⁶⁴ These were movements of First Peoples to reposition their relationship with the Crown.

⁶² *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 [42].

⁶³ National Archives of Australia, *William Cooper Petition*, William Cooper Petition (Cabinet Paper) 1938 | naa.gov.au, viewed 5 October 2023.

⁶⁴ National Library of Australia, *01 Apr 1938 – OUR HISTORIC DAY OF MOURNING & PROTEST*, <https://trove.nla.gov.au/newspaper/article/36848523>, viewed 5 October 2023.

- 1.74 In 1963, the Yolngu Nation sent the Yirrkala Bark Petitions to Parliament objecting to the mining of traditional homelands and the need for recognition of their cultural connection to lands from ‘time immemorial’.⁶⁵
- 1.75 In 1973, in response to this period of advocacy and as part of the self-determination policy era, the Australian Government established an Indigenous advisory body, the National Aboriginal Consultative Committee, which it later abolished in favour of the National Aboriginal Conference (NAC) in 1977.⁶⁶ This led to a call by the NAC in 1979, for a treaty—a Makarrata (a coming together after a struggle); between Indigenous peoples and the Government.⁶⁷
- 1.76 In 1988, Yunupingu and Wenten Rubuntja, representing thousands of their constituents from the Northern and Central Land Councils, presented the Hon Prime Minister Bob Hawke MP with the Barunga Statement.⁶⁸ The Statement called for self-determination, national land rights, compensation for the loss of traditional lands, and the repatriation of ancestors. In accordance with the Universal Declaration of Human Rights and other international rights covenants, the Barunga Statement also called for action against discrimination and the protection of human rights.⁶⁹
- 1.77 In 1992 the High Court rejected the doctrine of ‘terra nullius’ and recognised the rights of Aboriginal and Torres Strait Islander peoples to native title in the *Mabo v Queensland (No. 2)* case.⁷⁰ This legal ruling was pivotal in understanding and acknowledging the legal fiction of ‘terra nullius’ and its consequences on Australian history. The finding of native title in common law was subsequently expressed through the *Native Title Act 1993* (Cth) (NTA).

⁶⁵ National Museum of Australia, *Yirrkala Bark Petitions*, Yirrkala bark petitions | National Museum of Australia (nma.gov.au), viewed 5 October 2023.

⁶⁶ Houghton, J & Kohen, A 2022, ‘Aboriginal and Torres Strait Islander treaties, constitutional and legal recognition and representation in Australia: a chronology’, Parliamentary Library, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Chronologies/IndigenousChronology#_Toc97633263, viewed 17 April 2023.

⁶⁷ Houghton, J & Kohen, A 2022, ‘Aboriginal and Torres Strait Islander treaties, constitutional and legal recognition and representation in Australia: a chronology’, Parliamentary Library, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Chronologies/IndigenousChronology#_Toc97633263, viewed 17 April 2023.

⁶⁸ Houghton, J & Kohen, A 2022, ‘Aboriginal and Torres Strait Islander treaties, constitutional and legal recognition and representation in Australia: a chronology’, Parliamentary Library, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Chronologies/IndigenousChronology#_Toc97633263, viewed 17 April 2023.

⁶⁹ *The Barunga Statement*, <https://aiatsis.gov.au/explore/barunga-statement>, viewed 18 April 2023; Houghton, J & Kohen, A 2022, ‘Aboriginal and Torres Strait Islander treaties, constitutional and legal recognition and representation in Australia: a chronology’, Parliamentary Library, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Chronologies/IndigenousChronology#_Toc97633263, viewed 17 April 2023.

⁷⁰ Houghton, J & Kohen, A 2022, ‘Aboriginal and Torres Strait Islander treaties, constitutional and legal recognition and representation in Australia: a chronology’, Parliamentary Library, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Chronologies/IndigenousChronology#_Toc97633263, viewed 17 April 2023.

- 1.78 In 1996, native title claims over areas of Queensland that included pastoral leases were considered by the High Court in *Wik Peoples v Queensland*.⁷¹ The High Court held that native title rights could coexist with the rights of pastoral leaseholders but that ultimately the native title rights yield to those leaseholders.⁷² This decision was significant given that approximately 42 per cent of the Australian land mass was under pastoral leases.⁷³
- 1.79 Further to the significant land rights movements, there were also growing movements about social equality, led in many parts by Aboriginal organisations. In 1994 and 2005, Aboriginal and Torres Strait Islander Social Justice Commissioners reported on health disparity between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians. Subsequently, the National Indigenous Health Equality Campaign was established in March 2006, representing peak health bodies, non-governmental organisations and human rights groups seeking to achieve health equality for Aboriginal and Torres Strait Islander peoples.⁷⁴
- 1.80 In April 2007, the National Indigenous Health Equality Campaign launched its Closing the Gap Campaign calling for Australian Governments to commit to timebound health equality targets.⁷⁵
- 1.81 In February 2008, then Prime Minister the Hon Kevin Rudd MP issued a National Apology to the members of the Stolen Generations ‘whose lives had been blighted by past government policies of forced child removal and assimilation’.⁷⁶

⁷¹ Stevenson, B 1997, ‘The Wik Decision and After: Research Bulletin No. 4/97’, *Queensland Parliamentary Library*, <https://documents.parliament.qld.gov.au/explore/ResearchPublications/researchBulletins/rb0497bs.pdf>, viewed 18 April 2023, p. 5; *The Wik Peoples v The State of Queensland & Ors*; *The Thayorre People v The State of Queensland & Ors* [1996] HCA 40.

⁷² Native Title Research Unit n.d., ‘Wik: Coexistence, pastoral leases, mining, native title and the then point plan’, *Australian Institute of Aboriginal and Torres Strait Islander Studies*, p. 1, https://aiatsis.gov.au/sites/default/files/research_pub/wik-coexistence-pastrol-leases-mining-nati-vetitle-ten-point-plan_0_3.pdf, viewed 18 April 2023.

⁷³ Stevenson, B 1997, ‘The Wik Decision and After: Research Bulletin No. 4/97’, *Queensland Parliamentary Library*, p. 1, <https://documents.parliament.qld.gov.au/explore/ResearchPublications/researchBulletins/rb0497bs.pdf>, viewed 18 April 2023.

⁷⁴ Australian Indigenous HealthInfoNet n.d., ‘History of Closing the Gap’, <https://healthinonet.ecu.edu.au/learn/health-system/closing-the-gap/history-of-closing-the-gap/#:~:text=In%20March%202006%2C%20the%20National,organisations%2C%20and%20human%20rights%20organisations>, viewed 18 April 2023.

⁷⁵ Australian Human Rights Commission 2022, *Close the Gap: Indigenous Health Campaign*, <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>, viewed 18 April 2023.

⁷⁶ National Apology, National Museum of Australia (nma.gov.au), <https://www.nma.gov.au/defining-moments/resources/national-apology#:~:text=On%2013%20February%202008%20Prime,forced%20child%20removal%20and%20assimilation>, viewed 29 June 2023.

- 1.82 Following this, the National Indigenous Reform Agreement (2008) was signed up to by the Commonwealth, States and Territories, to ‘implement intergovernmental reform to close the gap in Indigenous disadvantage’⁷⁷ and close the gap in life outcomes, as the practical component of the response to the National Apology.
- 1.83 This set what is more commonly known as the Closing the Gap framework which set funding allocations and priorities for Indigenous affairs in a bid to make progress across eight outcome areas. It also required annual reports to be tabled in the Commonwealth Parliament between 2009 and 2020,⁷⁸ to provide a layer of accountability to demonstrate the progress (or lack thereof) against the targets across health, education and economic outcomes.
- 1.84 In July 2020, the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (Coalition of Peaks)⁷⁹ and Australian Governments revised the reform agenda through the new National Agreement on Closing the Gap (National Agreement). The National Agreement, based on consultations with Aboriginal and Torres Strait Islander peoples, identifies four priority reforms requiring action in order to improve outcomes, which relate to:
- 1 strengthening partnerships and shared decision-making
 - 2 building community-controlled services
 - 3 transforming government systems, and
 - 4 improving access to information and data.
- The National Agreement also sets 17 socio-economic targets for improvement following action taken under the priority reforms.⁸⁰
- 1.85 Since 2020, there has been one annual report and two Commonwealth Implementation Plans. The National Agreement also requires all States and Territories to create implementation plans and table annual reports in their Legislatures. The annual reports show that improved socio-economic outcomes are yet to be realised, and more structural change is required.

⁷⁷ SCRGSP (Steering Committee for the Review of Government Service Provision) 2013, *National Agreement performance information 2012-13: National Indigenous Reform Agreement*, Productivity Commission, Canberra, p. 8, National Indigenous Reform Agreement - National Agreement Performance Information 2012-13 (pc.gov.au), viewed 29 June 2023.

⁷⁸ Closing the Gap n.d., *Closing the Gap reports*, www.closingthegap.gov.au/resources/reports, viewed 3 May 2023; National Indigenous Australians Agency [NIAA] 2022, *Commonwealth Closing the Gap Annual Report 2022*, <https://www.niaa.gov.au/resource-centre/indigenous-affairs/commonwealth-closing-gap-annual-report-2022> viewed 3 May 2023.

⁷⁹ The Coalition of Aboriginal and Torres Strait Islander Peak Organisations (Coalition of Peaks) represents more than 80 Aboriginal and Torres Strait Islander community-controlled organisations and members.

⁸⁰ Coalition of the Peaks and Australian governments 2020, *National Agreement on Closing the Gap*, July, www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf, viewed 3 May 2023; Closing the Gap n.d., ‘Closing the Gap Targets and Outcomes’, <https://www.closingthegap.gov.au/national-agreement/targets>, viewed 4 May 2023.

Uluru Statement from the Heart

- 1.86 The *Uluru Statement from the Heart* (the Uluru Statement) is perhaps the most significant recent development in Aboriginal and Torres Strait Islander rights and advocacy. On the morning of 26 May 2017, at Muṯitjulu, a community near Uluru-Kata Tjuta Aṅangu National Park in the Northern Territory, the Uluru Statement was delivered to the Australian people.⁸¹
- 1.87 The culmination of an unprecedented process of deliberation by First Nations on constitutional recognition, the Uluru Statement provided a blueprint to progress the rights and freedoms of Aboriginal and Torres Strait Islander peoples in Australia.
- 1.88 Conducted between 2016 and 2017 under the auspices of the Referendum Council, appointed by then the Hon Prime Minister Malcolm Turnbull MP and Opposition Leader the Hon Bill Shorten MP, the process involved 1,200 Aboriginal and Torres Strait Islander people from across 12 Regional Dialogues and leading to a National Constitutional Convention at Uluru.⁸²
- 1.89 The Uluru Statement called for the establishment of a First Nations Voice enshrined in the Constitution and the establishment of a Makarrata Commission to oversee a process of agreement-making and truth-telling between governments and First Peoples.⁸³
- 1.90 A report by the Expert Mechanism on the Rights of Indigenous Peoples notes that the process resulting in the Uluru Statement and the call to establish a constitutionally enshrined Indigenous ‘Voice’ are a significant means of securing self-determination consistent with UNDRIP.⁸⁴

⁸¹ Referendum Council 2017, *Final Report of the Referendum Council*, p. i, [Referendum_Council_Final_Report.pdf](#) ([referendumcouncil.org.au](#)), viewed 29 June 2023.

⁸² Referendum Council 2017, *Final Report of the Referendum Council*, p. 109, [Referendum_Council_Final_Report.pdf](#) ([referendumcouncil.org.au](#)), viewed 29 June 2023.

⁸³ Referendum Council 2017, *Final Report of the Referendum Council*, p. i, [Referendum_Council_Final_Report.pdf](#) ([referendumcouncil.org.au](#)), viewed 29 June 2023.

⁸⁴ Report of the Expert Mechanism on the Rights of Indigenous Peoples: Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples, pages 13, [43]–[44], [G2121548.pdf](#) ([un.org](#)), viewed 28 June 2023.

- 1.91 On 19 June 2023, the Australian Parliament passed a Constitution Alteration Bill which outlined a proposed amendment to the Constitution:

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- i. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- ii. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- iii. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

- 1.92 On 14 October 2023, the referendum question was put to the Australian people: “A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.”

- 1.93 A majority of Australian electors (60.06%) voted against the proposed change to the Constitution.⁸⁵

Australian position on UNDRIP

- 1.94 Australia endorsed UNDRIP in 2009, after initial opposition in 2007.

- 1.95 In March 2022, Senator for Victoria, Lidia Thorpe, introduced a private Senator’s Bill entitled United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 to establish a framework for the implementation of UNDRIP in Australia.

- 1.96 The purpose of the Bill is ‘to recognise and ensure that Indigenous peoples are entitled without discrimination to all human rights recognised in international law, and that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples’.⁸⁶

⁸⁵ Australian Electoral Commission, ‘National Results’, <https://tallyroom.aec.gov.au/ReferendumNationalResults-29581.htm>, viewed 3 November 2023.

⁸⁶ Explanatory Memorandum, United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth), p. [2].

- 1.97 The Bill also provides for the development and implementation of an action plan to achieve UNDRIP objectives within Commonwealth laws, policies and practices, in consultation and cooperation with Indigenous peoples, including free, prior and informed consent.⁸⁷ The Bill is currently before the Senate.⁸⁸
- 1.98 Later Chapters in this Report will outline the extent to which UNDRIP principles or Articles are currently being implemented across Australia by governments and the private sector and international assessments of Australia's progress (Chapter 2).

Committee comment

- 1.99 The Committee notes the impacts on Aboriginal and Torres Strait Islander peoples in Australia due to colonisation and dispossession from their lands. These impacts arose from the legal fiction of 'terra nullius', the adoption of assimilation policies, and various political and legislative strategies that have led to Indigenous peoples being adversely impacted in terms of social and economic life outcomes.
- 1.100 The Committee acknowledges the leadership and advocacy of Indigenous peoples across the world, including Australia, who have led advocacy movements and the creation of international human rights standards for all First Nations peoples. In Australia, this has included advocacy for land rights and improvements to social and economic equality with non-Indigenous Australians.
- 1.101 The Committee particularly acknowledges the moments in Australian history which have resulted from advocacy of First Nations people covered in this Chapter.
- 1.102 The Committee notes that the Uluru Statement from the Heart offers a vision and an invitation to all Australians as to how we might progress the basis for a future relationship.
- 1.103 The Uluru Statement invited the Australian public to walk with the Aboriginal and Torres Strait Islander peoples by supporting a constitutionally enshrined Voice to have a say on policies and laws that affect them, and to set up a Makarrata Commission to oversee a process of truth-telling and agreement-making.
- 1.104 The Committee acknowledges that the outcome of the referendum held on 14 October 2023 did not support the proposed constitutional provision, but notes that the requests from the Uluru Statement remain open to the Australian public.

⁸⁷ Explanatory Memorandum, United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth), pages [4–5].

⁸⁸ Parliament of Australia, 'Bills of the current Parliament: United Nations Declaration on the Rights of Indigenous Peoples Bill 2022', <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs1341%22>, viewed 17 April 2023.



2. Implementation in Australia

- 2.1 This Chapter outlines how the United Nations Declaration of the Rights of Indigenous People (UNDRIP or the Declaration) is being implemented in Australia, and where principles are being applied within each State and Territory jurisdiction in Australia.

Implementation of UNDRIP in Australia

- 2.2 Australia is not legally bound by UNDRIP. According to the Attorney-General's Department, 'as a matter of policy, though, Australia supports the Declaration and shares the declaration's underlying commitment to delivering real and lasting improvements for First Nations people[s] and their communities'.¹
- 2.3 There are many ways that UNDRIP can be implemented, and this is demonstrated in the different approaches taken internationally, which have had varying levels of success. Associate Professor Hannah McGlade told the Committee, that she is not sure she 'can point to any country that is doing a great job of implementing the Declaration'.²
- 2.4 In Australia, there is currently no single or centralised mechanism for implementing UNDRIP. However, there are examples of policies or programs governments, parliaments and broader civil society assert as ways in which they seek to apply UNDRIP Articles.
- 2.5 The implementation of the Uluru Statement from the Heart is one mechanism that aligns with the principles of UNDRIP. This is explored in relation to States and Territories in this Chapter, and in the Commonwealth context in Chapter 4.
- 2.6 Throughout the inquiry, government departments that appeared before the Committee³ pointed to the following initiatives, as how they were undertaking to give practical effect to UNDRIP Articles, for example:
- The National Agreement on Closing the Gap, specifically Priority Reform 2 which requires government departments to engage in shared decision-making⁴ (see further in this Chapter)

¹ Ms Anne Sheehan, *Committee Hansard*, Canberra, 8 June 2023, p. 1.

² Dr Hannah McGlade, *Committee Hansard*, Canberra, 31 March 2023, p. 31.

³ Please see Appendix B for a list of witnesses that appeared before the Committee at public hearings.

⁴ National Indigenous Australians Agency (NIAA), *Joint Committee Submission 9*, p. 3–4; Ms Anne Sheehan, *Committee Hansard*, Canberra, 8 June 2023, p. 2

- The Empowered Communities program, a mechanism for Aboriginal and Torres Strait Islander people in these communities to ‘make decisions in the development, delivery and evaluation of programs and services that affect them’⁵
- Seeking to increasing the presence of Indigenous business in international trade, including by delivering a pilot project to build capacity through the ‘Growing Indigenous Businesses through the Trade for Indigenous Entrepreneurs’ program⁶
- The establishment and appointment of the Ambassador for First Nations People position to ‘lead Australia’s international engagement on Indigenous issues at various UN meetings and forums’⁷
- The National Justice Reinvestment Program to support ‘up to 30 place based and community led justice reinvestment initiatives across Australia to address the drivers of incarceration and contact with the justice system’.⁸

2.7 In her evidence to the Committee, Associate Professor McGlade noted that Australia does not have an appropriate robust system of engaging forward, and the federation is often used as the reason that we can’t do this or that.⁹

2.8 This is not a unique experience, and the Hon Murray Rankin KC MLA, the Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada also noted the complexity of this context:

The complexity of Canada is not dissimilar to what I understand is the case in Australia—namely, we are a federation. Responsibility for Indigenous peoples primarily lies in the Federal Court, so we are working in what are called coordination agreements amongst the federal, provincial and the First Nation involved to make sure that we get it right to meet their specific needs.¹⁰

2.9 Throughout the inquiry, witnesses and submissions provided information about the implementation of UNDRIP in Australian States and Territories and across civil society. At a high-level, the evidence shows there are four ways in which UNDRIP is being implemented in Australia. While not necessarily as a holistic implementation of the UNDRIP Articles, the following four areas are explored in this Chapter:

- application of UNDRIP in relation to jurisdiction’s human rights mechanisms
- implementation of the Uluru Statement from the Heart
- commitments to partnership-based approaches with First Nations peoples to develop policy', and
- industry or sector specific approaches to applying UNDRIP.

⁵ NIAA, *Joint Committee Submission 9*, p. 4.

⁶ Department of Foreign Affairs and Trade (DFAT), *Joint Committee Submission 7*, pages 4–5.

⁷ DFAT, *Joint Committee Supplementary Submission 7.1*, p. 4.

⁸ Ms Anne Sheehan, *Committee Hansard*, Canberra, 8 June 2023, p. 2.

⁹ Dr Hannah McGlade, *Committee Hansard*, Canberra, 31 March 2023, p. 35.

¹⁰ Hon Murray Rankin KC MLA, *Committee Hansard*, Canberra, 31 March 2023, p. 4.

UNDRIP principles in human rights mechanisms

- 2.10 Some jurisdictions in Australia have human rights Charters, Acts, or mechanisms that expressly incorporate, or align closely with, UNDRIP principles. This includes the Australian Capital Territory (ACT), Victoria (Vic), and Queensland (Qld).
- 2.11 Section 27 of the ACT's *Human Rights Act 2004* (ACT) (ACT Human Rights Act) codifies cultural and other rights of Aboriginal and Torres Strait Islander peoples in the Territory (as well as other minorities)¹¹, including the rights:
- a. to maintain, control, protect and develop their—
 - i. cultural heritage and distinctive spiritual practices, observances, beliefs and teachings
 - ii. languages and knowledge
 - iii. kinship ties, and
 - a. to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.¹²
- 2.12 The ACT Human Rights Act identifies UNDRIP, Articles 25 and 31, as the primary source of these rights, being the recognition and protection of 'spiritual, material and economic relationships with land, waters and...cultural expressions of these relationships.'¹³
- 2.13 Queensland's *Human Rights Act 2019* (Qld) recognises the 'special importance' of human rights for Aboriginal and Torres Strait Islander peoples in the State and notes their pre-existing right to self-determination.¹⁴ Section 28 specifies the cultural rights of Aboriginal and Torres Strait Islander peoples in the State.

¹¹ Australian Capital Territory Human Rights Commission (ACT HRC), *Senate Committee Submission 5*, p. [2].

¹² Section 27(2), *Human Rights Act 2004* (ACT), Act 2004-5, Republication no. 14, p. 13, <https://www.legislation.act.gov.au/a/2004-5>, viewed 20 April 2023.

¹³ *Human Rights Act 2004* (ACT), Act 2004-5 Republication no. 14, note, p. 13, <https://www.legislation.act.gov.au/a/2004-5>, viewed 20 April 2023; ACT HRC, *Senate Committee Submission 5*, p. [3].

¹⁴ *Human Rights Act 2019* (Qld), Act no. 5 of 2019, Preamble, p. 9, <https://www.legislation.qld.gov.au/view/html/asmade/act-2019-005>, viewed 19 April 2023.

2.14 Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) predates the UN General Assembly's 2007 resolution on UNDRIP, but mirrors some of the Declaration's principles by recognising specific rights of Aboriginal peoples in Victoria within its preamble.¹⁵ The Victorian Charter recognises Aboriginal peoples' distinct cultural rights, including:

- to enjoy their identity and culture
- to maintain and use their language
- to maintain their kinship ties, and
- to maintain their distinctive spiritual, material and economic relationships with the land and waters and other resources with which they have connections under traditional laws and customs.¹⁶

2.15 Interestingly, most of these human rights documents incorporate UNDRIP-related rights in a preambular sense. Despite a preambular framing not necessarily giving the same legal force as a substantive principle, the political ethos has led to governments and courts responding to the moral underpinnings of these concepts, translating to substantive actions. For example, when asked about the practical benefits from activating the relevant UNDRIP principles that are reflected in their human rights structures, the ACT Human Rights Commission President and Commissioner, Dr Watchirs OAM, stated 'in terms of on the ground, it has influenced legislation, policies and practices and litigations'.¹⁷ Further, Dr Watchirs OAM noted:

In other jurisdictions, such as Victoria, there was a case in VCAT about a woman who was evicted because she had not received eviction notices when she was on sorry business in the region. Not only was it overturned but there was also actually a positive duty for the housing authorities to have an NGO supporting her in her tenancy. So that was a complete turnaround. There was a similar case in Queensland of traditional owners protesting about pastoral leases and police moved them on. Because of the complaint mechanism in Queensland that was reversed and police issued a statement of regret saying that that wouldn't happen in the future.¹⁸

¹⁵ Charter of Human Rights and Responsibilities Act 2006 (Vic), Act no. 43/2006, Preamble, p. 1, <https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/015>, viewed 19 April 2023.

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic), Act no. 43/2006, section 19 (2), p. 15, <https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/015>, viewed 19 April 2023.

¹⁷ Dr Helen Watchirs OAM, *Committee Hansard*, Canberra, 31 March 2023, p. 10.

¹⁸ Dr Helen Watchirs OAM, *Committee Hansard*, Canberra, 31 March 2023, p. 10.

- 2.16 It is important to note that these sub-national references to UNDRIP are specific and in practice recognise only certain rights of Indigenous peoples. Furthermore, Australian governments have also enacted policies and legislation in direct contravention of UNDRIP, revealing a general lack of protection for the rights of Aboriginal and Torres Strait Islander people across all domestic jurisdictions.¹⁹
- 2.17 In addition, all States have incorporated recognition of First Peoples in their legislated Constitutions.²⁰ For example, in 2015, Western Australia amended its Constitution to include in the preamble recognition of 'Aboriginal people as the First People of Western Australia [and that the] Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia'.²¹
- 2.18 The South Australian Constitution is also worth noting in part for its detailed acknowledgement of Aboriginal and Torres Strait Islander rights and a history of past injustices and dispossession. The South Australian Constitution acknowledges the role of the 'Parliament of the United Kingdom in erecting South Australia into a British Province' and providing for the 'Colonisation and Government of South Australia' without the 'proper and effective recognition, consultation or authorisation of Aboriginal peoples of South Australia'.²² This is followed by an extensive acknowledgment of 'Aboriginal peoples as traditional owners and occupants of lands and waters' who 'maintain cultural and heritage beliefs, languages and laws which are of ongoing importance'.²³
- 2.19 The South Australian Constitution more recently includes a distinct provision for the 'Recognition of importance of First Nations Voices' following the successful passage of the *First Nations Voice Act 2023* (SA).²⁴ This intends to reflect 'the importance of listening to the Voices of First Nations people if there is to be a fair and truthful relationship between First Nations and non-First Nations people of South Australia'.²⁵
- 2.20 It is important to observe that where constitutional recognition is provided at a sub-national level, such provisions contain a non-legal effect clause to indemnify the State of any wrongdoing or future claims. It means that while these clauses may provide a positive requirement for the State to take certain steps to achieve reconciliation, or recognise the impacts of colonisation, they are essentially non-justiciable, and therefore rely only on moral effect.

¹⁹ C Wood, 2020, 'Protecting Indigenous rights at home: A comparative analysis of the way forward for domestic implementation of the United Nations Declaration on the Rights of Indigenous Peoples', *Australian International Law Journal*, vol. 27, pages 77–101.

²⁰ Part 1 (2), *Constitution Act 1902* (NSW); Preamble, *Constitution of Queensland 2001* (Qld); Part 1(2)–(3), *Constitution Act 1934* (SA) ; Section 1A, *Constitution Act 1975* (Vic); Preamble, *Constitution Act 1889* (WA).

²¹ Preamble, *Constitution Act 1989* (WA).

²² *Constitution Act 1934* (SA) p. 3.

²³ *Constitution Act 1934* (SA) p. 4.

²⁴ *Constitution Act 1934* (SA) p. 4.

²⁵ *Constitution Act 1934* (SA) p. 4.

Response to the Uluru Statement from the Heart

2.21 The following paragraphs outline how the States and Territories have sought to give effect to calls for Voice, Treaty, and Truth over recent years. Australian States and Territories are at various stages of responding to and implementing the requests called for in the Uluru Statement from the Heart, including its intersection with UNDRIP. At the referendum on 14 October 2023, a majority of voters in all jurisdictions, except the Australian Capital Territory, opposed the proposed constitutional provision. After the referendum, opposition parties in at least two jurisdictions (Queensland and Northern Territory) have withdrawn support for treaty and truth-telling processes already under way; in New South Wales, the premier has said, post-referendum, that a state treaty would now not progress past consultation and planning until after the next election.

2.22 On 8 June 2018, the Northern Territory (NT) Government signed a memorandum of understanding called the Barunga Agreement, with the Northern, Central, Anindilyakwa and Tiwi Land Councils, pledging to work towards a treaty or treaties with Aboriginal peoples.²⁶ The Barunga Agreement calls on the NT Government to recognise Aboriginal peoples' rights in accordance with UNDRIP.²⁷ The Agreement includes the statement that:

[T]he Treaty must provide for substantive outcomes and honour the Articles of the United Nations Declaration on the Rights of Indigenous Peoples.²⁸

2.23 In its submission to the inquiry the NT Government states that:

The NT Government is committed to continuing the journey towards treaty and is working with Northern Territory land councils in order to continue to develop a path towards a treaty or treaties. This includes working in partnership to ensure a treaty making framework that builds stronger, safer, more resilient communities, clan groups and families.

...

At the heart of a treaty is self-determination. A treaty will provide a path to lasting reconciliation and a path to achieving equity and equality.²⁹

²⁶ Northern Territory Treaty Commission 2022, *Final Report*, p. 6; Northern Land Council, Central Land Council, Anindilyakwa Land Council, Tiwi Land Council, NT Government 2018, *The Barunga Agreement: A memorandum of understanding to provide for the development of a framework for negotiating a treaty with the First Nations of the Northern Territory of Australia*, p. 6, https://dcm.nt.gov.au/__data/assets/pdf_file/0003/514272/barunga-muo-treaty.pdf, viewed 8 May 2023.

²⁷ Castan Centre for Human Rights Law, *Senate Committee Submission 33*, p. 15.

²⁸ *The Barunga Agreement: A memorandum of understanding to provide for the development of a framework for negotiating a treaty with the First Nations of the Northern Territory of Australia*, p. 6, https://dcm.nt.gov.au/__data/assets/pdf_file/0003/514272/barunga-muo-treaty.pdf, viewed 8 May 2023.

²⁹ NT Government, *Joint Committee Submission 48*, p. 8.

- 2.24 In addition to its working towards treaty with Aboriginal peoples, the NT Government has expressed its support for a federal Voice to Parliament.³⁰ On 16 February 2023 the Legislative Assembly of the Northern Territory unanimously passed a motion in support of the Voice to the Commonwealth Parliament.³¹
- 2.25 Queensland's 'Path to Treaty' began in 2019 with the release of the Queensland Government's Statement of Commitment (the Statement) and the aim of achieving a treaty, or treaties, between the Aboriginal and Torres Strait Islander Nations, peoples of Queensland, and the Queensland Government.³² The Statement acknowledges past wrongs and expresses hope for the future in working collaboratively with Aboriginal and Torres Strait Islander peoples to achieve treaty:
- ...the past acts of dispossession, settlement and discriminatory policies, and the cumulative acts of colonial and State governments since the commencement of colonisation which have left an enduring legacy of economic and social disadvantage that many Aboriginal and Torres Strait Islander peoples have experienced and continue to experience.
- ...
- We will move forward together with a mutual respect, recognition and a willingness to speak the truth about our shared history.³³
- 2.26 In February 2023, the Queensland Government introduced its Path to Treaty Bill 2023, providing for a five-phase treaty negotiation process, including the establishment of a First Nations Treaty Institute and Truth-telling and Healing Inquiry. The final phase, to commence in 2024, will be the development of a treaty negotiation framework by the First Nations Treaty Institute, and the establishment of a Treaty Authority and Tribunal to deal with disputes, with treaty negotiations to begin subsequently.³⁴
- 2.27 The bill was passed with amendments by the Queensland Parliament on 10 May 2023—*Path to Treaty Act 2023* (Qld).³⁵

³⁰ NT Government, *Joint Committee Submission 48*, p. 8.

³¹ NT Legislative Assembly, *Minutes of Proceedings*, 16 February 2023, p. 435.

³² Queensland Government, *Joint Committee Submission 28*, p. 3; Dr Harry Hobbs, *Senate Committee Submission 22*, p. 3.

³³ Queensland Government 2019, *Statement of Commitment*, p. 1, <https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-statement-commitment-july-2019.pdf>, viewed 20 April 2023.

³⁴ Community Support and Services Committee (CSSC) 2023, 'Report No. 30, 57th Parliament – Path to Treaty Bill 2023', Queensland Parliament, <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=165&id=4236>, viewed 23 May 2023.

³⁵ Queensland Parliament 2023, *Hansard*, 10 May, pages 1335–1341, https://documents.parliament.qld.gov.au/events/han/2023/2023_05_10_WEEKLY.pdf, viewed 16 June 2023.

- 2.28 On 9 February 2023, the First Nations Voice Bill 2023 was introduced to the SA Parliament, with the *First Nations Voice Act 2023* (SA) being passed into law on 26 March 2023.³⁶ The First Nations Voice will be a direct and independent line of communication for First Nations people to South Australia's Parliament and the government'.³⁷ It will have six electorates, and elections will be held on 16 March 2024.³⁸
- 2.29 While the *First Nations Voice Act 2023* (SA) does not specifically reference UNDRIP, the Act is consistent with articles within UNDRIP. These include the right to self-determination, autonomy and self-government (Article 4), and the right to participate in decision-making through representatives chosen by themselves (Article 18).
- 2.30 The Tasmanian Government is pursuing treaty and truth-telling in partnership with Aboriginal peoples in Tasmania. In 2022, the Premier, the Hon Jeremy Rockliff MP, and the Minister for Aboriginal Affairs, the Hon Roger Jaensch MP, met with Aboriginal community representatives to begin discussions on how a treaty and truth-telling process should proceed. Following these initial discussions, nominations were invited from Aboriginal peoples to join an advisory group to lead the design of a treaty and truth-telling process with the Tasmanian Government.³⁹
- 2.31 In June 2018, the Victorian Parliament passed the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (Treaty Act) as the basis for negotiating a treaty with Aboriginal Victorians. The Treaty Act aims to progress efforts towards reconciliation and self-determination for Aboriginal peoples in the State.⁴⁰ The preamble text identifies the significance of UNDRIP to the treaty making process:

...the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent.⁴¹

³⁶ SA Attorney-General's Department 2023, 'First Nations Voice Bill', <https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/first-nations-voice-to-the-south-australian-parliament/first-nations-voice-model>, viewed 8 May 2023; SA Attorney-General's Department 2023, 'First Nations Voice to the South Australian Parliament', <https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/first-nations-voice-to-the-south-australian-parliament>, viewed 8 May 2023.

³⁷ South Australia's First Nations Voice to Parliament | Attorney-General's Department (agd.sa.gov.au), viewed 28 September 2023.

³⁸ South Australia's First Nations Voice to Parliament, <https://savoicerelection.sa.gov.au/index.php>, viewed 28 September 2023.

³⁹ Dr Harry Hobbs, *Senate Committee Submission 22*, p. 3; Indigenous Peoples' Organization – Oxfam Australia, *Senate Committee Submission 92*, p. 8; Jaensch, R 2022, 'Media release: Advisory group to guide process for Truth-telling and Treaty', Tasmanian Government, https://www.premier.tas.gov.au/site_resources_2015/additional_releases/advisory-group-to-guide-process-for-truth-telling-and-treaty, viewed 20 April 2023.

⁴⁰ *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Act no. 28 of 2018, preamble, p. 1, https://content.legislation.vic.gov.au/sites/default/files/50f587e2-f753-3e01-b2ca-2f86930eef93_18-28aa001%20authorised.pdf, viewed 19 April 2023.

⁴¹ *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Act no. 28 of 2018, preamble, p. 2, https://content.legislation.vic.gov.au/sites/default/files/50f587e2-f753-3e01-b2ca-2f86930eef93_18-28aa001%20authorised.pdf, viewed 19 April 2023.

- 2.32 Emerging from this process, the Victorian Government, in agreement with the First Peoples' Assembly of Victoria, established the Yoorrook Justice Commission in March 2021. The Yoorrook Justice Commission—Yoorrook being the Wemba Wemba word for truth—is a formal truth-telling royal commission investigating historical and ongoing injustices experienced by First Peoples in Victoria. The Commission's ceremonial first hearing was held on 24 March 2022, and further hearings focusing on Elders' truths, and the child protection and criminal justice systems have occurred.⁴² To date, the Commission has produced two reports and one interim report.⁴³
- 2.33 In June 2022, the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) passed the Victorian Parliament, establishing a Treaty Authority and its ongoing operation to act as an independent 'umpire' to oversee Treaty negotiations between the State and Aboriginal negotiating partners.⁴⁴ It also establishes the Self-Determination Fund, which the State will provide 'not less than \$65 million as partial funding to support First Peoples to have equal standing with the State in Traditional Owner Treaty negotiations'.⁴⁵
- 2.34 While UNDRIP has not been adopted into Victorian law, the Victorian Government's consultation and cooperation with the First Peoples' Assembly of Victoria, the Treaty Act and the establishment of the Yoorrook Justice Commission uphold UNDRIP principles related to self-determination, consultation and cooperation, representation and participation in decision making, as stated in the Treaty Act's preamble.⁴⁶
- 2.35 In 2008 the Australian Capital Territory (ACT) passed the *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT) (the ATSIEB Act). While the body predates the call for a Voice to Parliament under the Uluru Statement from the Heart in 2017, it provides a formal and legislated mechanism for the ACT's Aboriginal and Torres Strait Islander community to vote for representatives and for their representatives to have the authority to enter into formal agreements, policy development, and to effect accountability of the ACT Government.⁴⁷

⁴² Dr Harry Hobbs, *Senate Committee Submission 22*, p. 4; Victorian Government and the First Peoples Assembly of Victoria 2022, 'Joint Statement On Victoria's Truth And Justice Process', 9 March, <https://www.premier.vic.gov.au/joint-statement-victorias-truth-and-justice-process>, viewed 11 May 2023; Yoorrook Justice Commission 2023, 'About Yoorrook', <https://yoorrookjusticecommission.org.au/overview/>, viewed 11 May 2023; Yoorrook Justice Commission 2023, 'Frequently asked questions', <https://yoorrookjusticecommission.org.au/faqs/>, viewed 11 May 2023; Yoorrook Justice Commission 2023, 'Hearings', <https://yoorrookjusticecommission.org.au/public-hearing/>, viewed 11 May 2023.

⁴³ Yoorrook Justice Commission 2023, 'Key Documents', https://yoorrookjusticecommission.org.au/key-documents/?document_type=reports, viewed 31 October 2023.

⁴⁴ Victorian Government 2022, *Advancing the Victorian Treaty Process: Annual Report 2021–22*, pages 4–5.

⁴⁵ First Peoples' Assembly of Victoria and The State of Victoria 2022, *Self-Determination Fund Agreement*, p. 7.

⁴⁶ Dr Harry Hobbs, *Senate Committee Submission 22*, pages 4–5; Yoorrook Justice Commission 2022, *Yoorrook With Purpose: Interim Report*, p. 9, <https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/06/Yoorrook-Justice-Commission-Interim-Report.pdf>, viewed 11 May 2023; *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), preamble.

⁴⁷ ACT Government, *Joint Committee Submission 47*, p. 5.

2.36 In its submission to the inquiry the ACT Government states that:

The ATSIEB Act also includes provisions for the Elected Body to hold public hearings about government service provision. This strengthens the accountability of the ACT Government within this formal partnership model and aligns to the overarching National Agreement requirement of establishing an independent mechanism that will support, monitor and report on the transformation of mainstream agencies and institutions.⁴⁸

2.37 The ACT Government continues to pursue a treaty in the Territory, stating in its submission to the inquiry that:

In accordance with Article 37, the ACT Government has committed to negotiating a treaty with Aboriginal and Torres Strait Islander people. Initial consultations were held with the United Ngunnawal Elders Council, with further work still to occur across the varying Traditional Custodian groups and broader Aboriginal and Torres Strait Islander community.⁴⁹

2.38 On 8 February 2023 the Legislative Assembly for the ACT unanimously passed a motion supporting the Uluru Statement from the Heart and the establishment of a Voice to Parliament.⁵⁰

Partnership approaches to policy development

National Agreement on Closing the Gap

2.39 According to the National Indigenous Australians Agency (NIAA), the National Agreement on Closing the Gap ‘provides a practical and effective example of the principles of UNDRIP in action’.⁵¹

2.40 The National Agreement on Closing the Gap is between the Commonwealth, State and Territory Governments, the Australian Local Government Association and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (Coalition of Peaks). It was negotiated under the Partnership Agreement of Closing the Gap. The National Agreement identifies four priority reforms which go to the structural changes required by governments in order to improve outcomes for First Peoples:

- 1 Formal partnerships and shared decision making
- 2 Building the community-controlled sector

⁴⁸ ACT Government, *Joint Committee Submission 47*, p. 5.

⁴⁹ ACT Government, *Joint Committee Submission 47*, p. 10.

⁵⁰ Legislative Assembly for the ACT, *Minutes of Proceedings*, 8 February 2023, p. 1012.

⁵¹ National Indigenous Australians Agency (NIAA), *Joint Committee Supplementary Submission 9.1*, p. 1.

3 Transforming government organisations

4 Shared access to data and information at a regional level

- 2.41 NIAA further advised that the Closing the Gap strategy embodies key principles of UNDRIP, such as self-determination, decision-making, consent and partnership.⁵² However, it is important to note that the totality of UNDRIP in its fullness is not necessarily realised through the National Agreement. Specifically, the Declaration is not cited or mentioned in either the National Agreement or Partnership Agreement, despite some of its common principles being embodied throughout.
- 2.42 In its submission to the inquiry the ACT Government describes the relationship between the policy elements of Closing the Gap and UNDRIP, including how they are mutually reinforcing:
- ...the application of commitments under the National Agreement on Closing the Gap provides opportunity to strengthen the alignment of jurisdictional Implementation Plans with the UNDRIP. ... While the delivery of the socio-economic outcomes will respond to specific needs of Aboriginal and Torres Strait Islander peoples and will align to articles under the UNDRIP, it is the Priority Reforms that will enable this. ... These socio-economic targets align to the articles and rights of Indigenous peoples under the UNDRIP and ensure that Aboriginal and Torres Strait Islander peoples have a genuine say in the design and delivery of services that affect them, so that they can achieve better life outcomes. ... Embedding the Priority Reforms and delivery against the socio-economic outcomes under the National Agreement will significantly improve adherence to the principles of the UNDRIP.⁵³
- 2.43 The Australian Human Rights Commission (AHRC) stated that while Closing the Gap is considered Australia's 'key policy platform to give effect to [UNDRIP]', its consistency with UNDRIP could be enhanced.⁵⁴ The AHRC recommended that the Partnership Agreement and the National Agreement include a human rights-based approach centring on UNDRIP and that the required implementation plans, and annual reports also incorporate the Declaration.⁵⁵
- 2.44 Other submitters also suggested the National Agreement should align with UNDRIP. For example, Dr Adam Heaton submitted that the Commonwealth, State and Territory Governments need to align their efforts to achieve the four priority reforms of the National Agreement on Closing the Gap with UNDRIP.⁵⁶

⁵² Ms Jody Broun, Chief Executive Officer, NIAA, *Committee Hansard*, Canberra, 26 October 2022, p. 7

⁵³ ACT Government, *Joint Committee Submission 47*, pages. 2–3.

⁵⁴ Australian Human Rights Commission (AHRC), *Senate Committee Submission 53*, p. 19.

⁵⁵ AHRC, *Senate Committee Submission 53*, p. 27.

⁵⁶ Dr Adam Heaton, *Senate Committee Submission 12*, p. 1.

- 2.45 Dr Heaton further submitted that by ‘genuinely implementing the four priority reforms’,⁵⁷ governments will achieve the Closing the Gap targets and enable self-determination as provided for by UNDRIP Articles 3 and 4.⁵⁸ This, Dr Heaton advises, will ‘ensure human rights and achieve better outcomes for Aboriginal and Torres Strait Islander people’.⁵⁹
- 2.46 The South Australian Government also provided evidence to the Committee supporting the idea that the principles of UNDRIP can be implemented through action taken against the priority reforms, stating:

The principles underpinning the Priority Reforms are enablers for the change required to improve outcomes for Aboriginal and Torres Strait Islander people and align with many of the rights and fundamental freedoms set out in the UNDRIP. These include protection and support of culture, the right to self-determination, freedom from discrimination and racism, participation in decision-making, the right to maintain and develop political, economic and social systems or institutions, and the right to the improvement of economic and social conditions.⁶⁰

- 2.47 The Lowitja Institute stated that if Commonwealth, State, and Territory governments are committed to the National Agreement on Closing the Gap, ‘alignment with UNDRIP and achievement of the many goals within it must be a core objective’.⁶¹ Change the Record suggested that UNDRIP should be incorporated into Closing the Gap implementation plans which are prepared by each jurisdiction.⁶² However, careful consideration as to whether this would be in addition to, or instead of holistic and national implementation of UNDRIP is important.
- 2.48 The Northern Territory Government recognised the relationship between UNDRIP and the National Agreement in its submission to the inquiry, stating that:

The NT Government, in partnership with Aboriginal organisational representatives and the other tiers of government, is implementing the National Agreement on Closing the Gap and this implementation indirectly ensures the rights contained in UNDRIP are realised within the Northern Territory.

Through the National Agreement, the NT Government is focusing our reform on two of the key themes of UNDRIP; self-determination and equality.⁶³

⁵⁷ Dr Adam Heaton, *Senate Committee Submission 12*, p. 2.

⁵⁸ Dr Adam Heaton, *Senate Committee Submission 12*, p. 2.

⁵⁹ Dr Adam Heaton, *Senate Committee Submission 12*, p. 1.

⁶⁰ SA Government, *Joint Committee Submission 49*, pages. 3–4.

⁶¹ Lowitja Institute, *Senate Committee Submission 71*, p. 5.

⁶² Change the Record, *Senate Committee Submission 16*, p. 7.

⁶³ NT Government, *Joint Committee Submission 48*, p. 3.

- 2.49 In its submission to the inquiry, the Western Australian (WA) Government highlighted its efforts to work with a broad range of partners on meeting its obligations under the National Agreement, stating:

The WA Government is focused on the development of partnerships, shared decision making and genuine engagement with Aboriginal people at the state, regional and local levels.

The WA Government is working closely with Aboriginal stakeholders at the national level, including through Policy Partnerships under the National Agreement. These involve a collaborative process, incorporating all government jurisdictions and representatives of the Coalition of Peaks, to ensure a joined-up approach.⁶⁴

- 2.50 There is evidence that UNDRIP Articles are being incorporated into certain policies and programs. However, this should not be considered a fulfilment of the rights outlined in UNDRIP. Ultimately, efforts to apply UNDRIP Articles in Australia are occurring at different paces and with various focuses. Certain principles are prioritised over others and typically efforts occur in the absence of a coordinated guiding framework. This is an important pattern to observe in terms of the ongoing success of implementation. Professor Castan told the Committee that internationally the shortcomings of Nation States' efforts come down to coordinated implementation:

At their core the shortcomings are a failure of implementation. In Australia already there is some evidence of the implementation of UNDRIP principles. It's patchwork and ad hoc, and implementation will be complex, requiring thoughtful attention to the myriad contexts in which First Nations peoples interact with the state.⁶⁵

Industry or sector application of UNDRIP

- 2.51 Industry and non-government organisations are taking increased interest in UNDRIP as a means of improving their sector practices and community engagement. As such, various submissions and witness evidence to this Committee outlined the application of UNDRIP in guiding the work of their organisations.
- 2.52 The Fred Hollows Foundation provided evidence of how UNDRIP has come to shape the organisation's *Indigenous Australia Program Strategy 2020–2024*:

In 2021 the Foundation accepted the call of Reconciliation Australia to move from safe to brave and in doing so identified assessing itself against the UNDRIP as a way of promoting this shift and ensuring continuing action and accountability to Aboriginal and Torres Strait Islander Communities.⁶⁶

⁶⁴ WA Government, *Joint Committee Submission 50*, p. [2].

⁶⁵ Professor Melissa Castan, Director, Monash University, *Committee Hansard*, Canberra, 10 March 2023, p. 24

⁶⁶ Ms Jacqueline Adams, *Committee Hansard*, Canberra, 10 March 2023, p. 16.

- 2.53 As part of this strategy, the Fred Hollows Foundation is also developing a practical tool to support the organisation to take the necessary steps and assess its actions relative to UNDRIP principles as part of any engagement work.⁶⁷
- 2.54 Terri Janke and Company, an Indigenous owned and operated law firm, has come to 'extensively advocate for and rely directly upon' Articles of UNDRIP in 'day-to-day practice'. The firm has developed a licensed product *True Tracks* based on the principles of UNDRIP, that provides guidance to private and public sector organisations on best-practice engagement with Indigenous peoples.⁶⁸
- 2.55 Supply Nation, Australia's largest national procurement directory of Aboriginal and Torres Strait Islander businesses, provided evidence that a strong, vibrant and sustainable Indigenous business sector can underpin Indigenous economic self-determination and development that forms a central concern of UNDRIP.⁶⁹
- 2.56 Indigenous Business Australia, a statutory body with the objective of greater economic independence and self-sufficiency for Aboriginal and Torres Strait Islander peoples, 'seeks to adhere to the declaration, within the limits of its own remit and legal and governance framework'.⁷⁰
- 2.57 Woodside Energy Group Ltd, Australia's largest natural gas producer, has developed an 'Indigenous Communities Policy' that makes specific mention of 'being guided by UNDRIP' as essential to ensuring improved relationship and dealings with Aboriginal and Torres Strait Islander peoples.⁷¹
- 2.58 The University of Tasmania (UTAS) details in its submission how UNDRIP principles can be applied through policies and programs at universities. UTAS provides examples such as its Strategic Plan for Aboriginal Engagement and its implementation of the Australian Government's Indigenous Student Success Program.⁷² Further, UTAS suggests advocating for the consideration of Indigenous outcomes in global university rankings.⁷³
- 2.59 Finally, the Australian Council of Trade Unions (ACTU) recommends that the Australian Government ratify ILO Convention 169.⁷⁴ ILO Convention 169 is particularly relevant to industry as it establishes rights and obligations around Indigenous recruitment and conditions of employment; vocational training, handicrafts and rural industries; and social security and health.⁷⁵

⁶⁷ Ms Jacqueline Adams, *Committee Hansard*, Canberra, 10 March 2023, p. 20.

⁶⁸ Terri Janke and Company, *Joint Committee Submission 10*, p. 3.

⁶⁹ Supply Nation, *Joint Committee Submission 16*, p. 4.

⁷⁰ IBA, *Joint Committee Submission 27*, p. 2.

⁷¹ Woodside Energy, *Joint Committee Submission 23*, pages 1–2.

⁷² University of Tasmania, *Joint Committee Submission 46*, pages. [1]–[5].

⁷³ University of Tasmania, *Joint Committee Submission 46*, pages. [3]–[4].

⁷⁴ Australian Council of Trade Unions, *Joint Committee Submission 45*, pages. 2–3.

⁷⁵ International Labour Organization, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, 7 June 1989, Part 3—Recruitment and Conditions of Employment.

2.60 Across Australian society, UNDRIP appears to have a growing salience in how sectors understand and articulate their responsibilities to Aboriginal and Torres Strait Islander communities. The Committee heard about the responses from civil society in their proactive efforts to apply UNDRIP to their operating practices. However, the effectiveness or monitoring of such commitments, and the extent to which these efforts were benefiting or are accountable to, Aboriginal and Torres Strait Islander peoples, need to be explored further. Mr Peter Morris, General Manager, Reconciliation Australia, observed that there is an opportunity for the government to consider organisational accountability in respect to UNDRIP:

...we do think there is a place for further reflection on the government's role on guidance and accountability with respect to UNDRIP. We've seen a change in the prioritisation of leading Australian corporates with respect to the Modern Slavery Act.

...

It is worth reflecting on what accountability mechanisms make the most sense in the Australian context to ensure that organisations that may be in 2006 or 2010 were thinking only about reconciliation are now thinking about climate, human rights and modern slavery.⁷⁶

International Assessments of Australia

- 2.61 As an international instrument, there are various mechanisms of accountability in place. This section of the report outlines the international assessments of Australia's application of UNDRIP. However, there is a need to further consider how both government and industry efforts to implement UNDRIP are accountable to its intended beneficiaries, Aboriginal and Torres Strait Islander peoples.
- 2.62 Australia's implementation of UNDRIP and its adherence to agreements relating to the rights of Indigenous peoples more broadly have been the subject of numerous assessments by United Nations (UN) mechanisms concerned with monitoring and promoting human rights.
- 2.63 A visual representation of how relevant UN mechanisms relate to each other is included at Appendix C.

⁷⁶ Mr Peter Morris, General Manager, Reconciliation Australia, *Committee Hansard*, Canberra, 19 May 2023, p. 6.

UN Human Rights Committee

- 2.64 The UN Human Rights Committee comprising 18 independent experts ‘promotes the enjoyment of civil and political rights’ enshrined in the International Covenant on Civil and Political Rights (ICCPR), and monitors the implementation of and adherence to this covenant by UN member countries.⁷⁷ As previously discussed, UNDRIP Articles are primarily drawn from existing UN Covenants, such as the ICCPR.
- 2.65 In 2019, eight Torres Strait Islander adults and six children submitted to the UN Human Rights Committee that the Australian Government had violated their rights under ICCPR through its inaction on climate change; damaging ‘their livelihood, culture and traditional way of life’.⁷⁸
- 2.66 In September 2022, the UN Human Rights Committee concluded that ‘Australia’s failure to adequately address the impacts of climate change’ breached the rights of Torres Strait Islander peoples ‘to enjoy their culture, and be free from arbitrary interferences with their private life, family and home under...Articles 27 and 17 of the [ICCPR]’.⁷⁹
- 2.67 The UN Human Rights Committee noted that the ‘ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts.’⁸⁰ The UN Human Rights Committee recommended the Government compensate Torres Strait Islander peoples:
- ...for the harm suffered, engage in meaningful consultations with their communities to assess their needs, and take measures to continue to secure the communities’ safe existence on their respective islands.⁸¹

⁷⁷ United Nations (UN) 2023, ‘Human Rights Committee’, <https://www.ohchr.org/en/treaty-bodies/ccpr>, viewed 12 June 2023; UN 2023, ‘Introduction to the Committee: Human Rights Committee’, <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee>, viewed 12 June 2023.

⁷⁸ Human Rights Law Centre 2022, ‘UN Human Rights Committee finds Australia violated Torres Strait Islanders’ human rights over climate inaction’, <https://www.hrlc.org.au/human-rights-case-summaries/un-human-rights-committee-finds-australia-violated-torres-strait-islanders-human-rights-over-climate-inaction>, viewed 16 June 2023.

⁷⁹ Human Rights Law Centre 2022, ‘UN Human Rights Committee finds Australia violated Torres Strait Islanders’ human rights over climate inaction’, <https://www.hrlc.org.au/human-rights-case-summaries/un-human-rights-committee-finds-australia-violated-torres-strait-islanders-human-rights-over-climate-inaction>, viewed 23 May 2023; United Nations Human Rights Committee (UNHRC) 2022, ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’, UN Doc CCPR/C/135/D/3624/2019, p.16, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fd%2f3624%2f2019&Lang=en, viewed 23 May 2023.

⁸⁰ UNHRC 2022, ‘Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019’, UN Doc CCPR/C/135/D/3624/2019, p. 16, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fd%2f3624%2f2019&Lang=en, viewed 23 May 2023.

⁸¹ United Nations, ‘Australia violated Torres Strait Islanders’ rights to enjoy culture and family life, UN Committee finds’, Press release, 23 September 2022, <https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>, viewed 12 June 2023.

2.68 As UNDRIP is a non-binding legal instrument, neither the complainants nor the UN Human Rights Committee point to UNDRIP Articles being violated. However, there is a growing moral and political force for UNDRIP. This was highlighted by researchers who made a submission to this Committee, noting that UNDRIP principles, particularly self-determination, participation in decision-making, and maintaining and strengthening cultural and spiritual relationships with traditional lands, territories, waters and resources, are significant in the context of changing climate conditions.⁸²

Special Rapporteur on the rights of Indigenous peoples

2.69 The United Nations Human Rights Council (UNHRC) is an intergovernmental group within the UN, consisting of 47 UN member countries, and is responsible for promoting and protecting human rights globally.⁸³ In 2001, the UNHRC appointed a Special Rapporteur on the Rights of Indigenous Peoples (the Special Rapporteur).⁸⁴ The Special Rapporteur is mandated to:

- promote best practices for government programs, legislation, agreement making and the implementation of international standards concerning the rights of Indigenous peoples
- make recommendations on measures to prevent and resolve violations of rights of Indigenous peoples
- report on human rights conditions of Indigenous peoples globally, and
- address specific instances of alleged violations of Indigenous peoples' rights.⁸⁵

2.70 Between March and April 2017, Ms Victoria Tauli-Corpuz, the then-Special Rapporteur, visited Australia and reported back to the UNHRC. The UNHRC summarised Ms Tauli-Corpuz's report as follows:

[T]he Special Rapporteur observes that the policies of the [Australian] Government do not duly respect the rights to self-determination and effective participation; contribute to the failure to deliver on the targets in the areas of health, education and employment; and fuel the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islanders. A comprehensive revision of those policies needs to be a national priority, and the

⁸² Lillian Ireland, Dr Nina Lansbury, Adjunct Professor Sandra Creamer AM and Dr Vinnitta Mosby, *Joint Committee Submission 39*, p. 2.

⁸³ United Nations Human Rights Council (UN HRC) 2023, 'Human Rights Council', <https://www.ohchr.org/en/hrbodies/hrc/home>, viewed 12 June 2023.

⁸⁴ UN HRC, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/HRC/RES/42/20, 8 October 2019.

⁸⁵ United Nations [UN] 2023, 'Special Rapporteur on the rights of Indigenous Peoples', <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>, viewed 2 May 2023; UN Human Rights Council, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/HRC/RES/42/20, 8 October 2019.

consequences and prevalence of intergenerational trauma and racism must be acknowledged and addressed.⁸⁶

2.71 Ms Tauli-Corpuz concluded that, while the Government had adopted policies addressing socioeconomic disadvantage, those policies did not respect the rights to self-determination or full and effective participation. Ms Tauli-Corpuz further noted that the compounding effect of these policies:

...contributed to the failure to deliver on the targets in the areas of health, education and employment in the 'Closing the Gap' strategy and fuels the escalating and critical incarceration and child removal rates.⁸⁷

2.72 Ms Tauli-Corpuz recommended:

- [c]omprehensive revision of the policies needs to be a national priority and the consequences and prevalence of intergenerational trauma and racism must be acknowledged and addressed. Aboriginal and Torres Strait Islanders require better recognition and active participation in Australian society.⁸⁸
- [i]ncluding [UNDRIP] in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* [(Cth), and]
- [elaborating] a comprehensive bill of human rights within the federal Constitution and a human rights act that include[s] due recognition of the provisions in [UNDRIP].⁸⁹

2.73 The Australian Government's response at the time was not entirely clear, however in public reporting on the Attorney-General's website, it has acknowledged that it has received these recommendations and that it is:

Confident that the government's reform agenda for Indigenous Affairs is making strong progress against many of the concerns that were raised in M Tauli-Corpuz's report. 'Significant reform takes time and through the Council of Australian Governments, all governments have reaffirmed that improving the lives of Indigenous Australians is a strategic priority for the nation, and have agreed to consider a refreshed framework, targets and implementation principles for the Closing the Gap agenda.'⁹⁰

⁸⁶ UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, para 1, UN Doc A/HRC/36/46/Add.2, 8 August 2017, pages. 1–3.

⁸⁷ UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, UN Doc A/HRC/36/46/Add.2, 8 August 2017, p. 18.

⁸⁸ UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, UN Doc A/HRC/36/46/Add.2, 8 August 2017, p. 18.

⁸⁹ UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, UN Doc A/HRC/36/46/Add.2, 8 August 2017, pages 18–19.

⁹⁰ Attorney-General's Department, 'Recommendation 77 Attorney-General's Department', <https://www.ag.gov.au/recommendations/recommendation-77>, viewed 9 October 2023.

Universal Periodic Review

- 2.74 Established in 2006, the Universal Periodic Review (UPR) is a peer-review process of the human rights records of UN member countries under the UNHRC. Reviews are based on three criteria:
- 1 information provided by the UN member country under review, in the form of a 'national report' prepared by the Government
 - 2 information contained in reports from independent human rights experts and groups (UN Special Procedures, human right treaty bodies and other UN groups), and
 - 3 information provided by other stakeholders, including other human rights bodies and non-governmental organisations.⁹¹
- 2.75 There have been three UPRs of Australia's human rights record, and these have included consideration about the implementation of UNDRIP.
- 2.76 The first was in January 2010, where recommendations related to the implementation of UNDRIP and the rights of Indigenous peoples were made, including, but not limited to:
- that the Government conduct an audit of its federal legislation for compliance with UNDRIP, specifically mentioning the *Racial Discrimination Act 1975* (Cth) (recommended by Norway)
 - progress efforts to attain constitutional recognition (recommended by France, Colombia, Guatemala) and more broadly that the Government undertake reforms to enshrine the principles of UNDRIP in the Constitution, and
 - general recommendations about enhancing consultation with Aboriginal and Torres Strait Islander peoples, particularly on efforts to close the gap in opportunities and life outcomes (recommended by Bolivia, France, Singapore, Thailand, Belgium).⁹²

⁹¹ UN HRC 2023, 'Universal Periodic Review', <https://www.ohchr.org/en/hr-bodies/upr/upr-main>, viewed 12 June 2023; HRC 2023, 'Basic facts about the UPR', <https://www.ohchr.org/en/hr-bodies/upr/basic-facts>, viewed 12 June 2023.

⁹² These included Norway, Bolivia, Ghana, Hungary, Denmark, and Guatemala. See, United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/17/10, 24 March 2011, pages 14, 20.

- 2.77 At the time, the Government accepted these recommendations in full or in part pointing to the ongoing work of the Expert Panel for Constitutional Recognition of Indigenous Australians, and reiterating a commitment to work with the (now-defunct) National Congress of Australia's First Peoples on relevant reform initiatives.⁹³
- 2.78 The second UPR reported in November 2015, and three countries made recommendations specifically related to the implementation of UNDRIP. This included Senegal recommending adherence to UNDRIP, Hungary and Estonia both recommending the development of a national strategy in partnership with Aboriginal and Torres Strait Islander peoples to give effect to UNDRIP, and Estonia going further to recommend the facilitation of constitutional recognition.⁹⁴
- 2.79 The Government noted these recommendations on the basis of existing law, policy and action, specifically, it did not agree to make any change to current policy approaches.⁹⁵
- 2.80 On the other broader recommendations related to the themes and principles in UNDRIP, such as strengthening the rights of Indigenous Australians, the AHRC reported that:
- ...nine recommendations were made by states relating specifically to the Declaration. Of these only four—all of which were very high-level and recommended that Australia 'continue' action already underway—were accepted.⁹⁶
- 2.81 The third UPR, in January 2021, saw five countries make recommendations about the implementation of UNDRIP, including that the Government:
- [d]evelop, in consultation with Aboriginal and Torres Strait Islander peak organisations, a national action plan in order to implement [UNDRIP] (Bangladesh)
 - [t]ake steps in consultation with Aboriginal and Torres Strait Islander peoples and the representative bodies to implement [UNDRIP] in law, policy and practice (Canada)
 - [i]mplement the principles of [UNDRIP] through program[mes] which make the rights of Indigenous peoples effective, in close consultation with them (Costa Rica)
 - [d]evelop a national action plan to implement the principles in [UNDRIP] (Namibia), [and]

⁹³ UN HRC, Report of the Working Group on the Universal Periodic Review: Australia: Addendum, UN Doc A/HRC/17/10/Add.1, 31 May 2011, p. 3, pages. 7–8.

⁹⁴ These included Senegal, Estonia, Hungary. See, United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/31/14, 13 January 2016, pages 16–17.

⁹⁵ UN HRC, Report of the Working Group on the Universal Periodic Review: Australia: Addendum, UN Doc A/HRC/31/14/Add.1, 29 February 2016, p. 4.

⁹⁶ Australian Human Rights Commission, *Senate Committee Submission* 53, p. 17.

- [i]ncorporate [UNDRIP] into domestic law, establish an independent body to oversee its implementation in consultation with Aboriginal and Torres Strait Islander peoples, and include the Declaration in the *Human Rights (Parliamentary Scrutiny) Act [2011 (Cth)]* (Netherlands).⁹⁷

2.82 The Government accepted the recommendations from Canada and Costa Rica about consulting with Indigenous peoples on policies and programs. However, it ‘noted but declined further consideration’ of the other recommendations (i.e. did not agree), such as the development of a National Action Plan.⁹⁸

United Nations Expert Mechanism on the Rights of Indigenous Peoples

2.83 The Expert Mechanism on the Rights of Indigenous Peoples (the Expert Mechanism) was established in 2007, as a subsidiary body of the UNHRC.⁹⁹ The Expert Mechanism’s mandate was extended in 2016 to provide expertise and advice related to UNDRIP, to promote the Declaration and assist UN member countries to implement UNDRIP, upon request.¹⁰⁰

2.84 A request for assistance from the Expert Mechanism can be made by government or non-government actors and generally takes the form of what is known as a ‘country visit’ whereby a delegation of the Expert Mechanism members visits the country. In 2022, the Government formally accepted a country visit by the Expert Mechanism under its country engagement mandate, as requested by the Noongar Family Safety and Wellbeing Council in WA.¹⁰¹ The Expert Mechanism visited Western Australia 1–10 October 2023, and is expected to report on its visit in the normal way, although a reporting date is unknown.

⁹⁷ Bangladesh, Canada, Costa Rica, Namibia, and Netherlands. See, UN HRC, Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/47/8, 24 March 2021, p. 23.

⁹⁸ UN HRC, Report of the Working Group on the Universal Periodic Review: Australia, Addendum, UN Doc A/HRC/47/8Add.1, 2 June 2021, p. 3.

⁹⁹ UN HRC, Expert Mechanism on the rights of indigenous peoples, resolution 6/36, UN Doc A/HRC/RES/6/36, 14 December 2007.

¹⁰⁰ UN HRC, Expert Mechanism on the rights of indigenous peoples, resolution 33/25, Articles 1 and 2, UN Doc A/HRC/RES/33/25, 5 October 2016.

¹⁰¹ United Nations Economic and Social Council, Report on the Twenty-First Session, UN Doc E/2022/43-E/C.19/2022/1125, April–6 May 2022, p. 11; Torre, G 2022, ‘Top UN Indigenous rights body makes first flight to Australia for human rights probe’, National Indigenous Times, 18 May 2022, <https://nit.com.au/18-05-2022/3091/top-un-indigenous-rights-body-makes-first-flight-to-australia-for-human-rights-probe>, viewed 15 May 2023.

United Nations Permanent Forum on Indigenous Issues

- 2.85 The Economic and Social Council (ECOSOC) is a forum devoted to discussing global economic and social issues, developing policy recommendations and encouraging international cooperation on development.¹⁰² In July 2000, the ECOSOC established the Permanent Forum on Indigenous Issues (UNPFII) as an advisory body mandated to discuss Indigenous issues related to economic and social development, culture, the environment, education and human rights.¹⁰³ UNDRIP Article 42 states that UNPFII ‘shall promote respect for the full application of the provision of [the] Declaration and follow up the effectiveness of [the] Declaration’.¹⁰⁴
- 2.86 UNPFII is the only ‘international setting where Indigenous peoples are represented permanently on a par with governments’¹⁰⁵ and is ‘both the principal organ that facilitates Indigenous peoples’ voices to be heard on a global level and the organ that monitors the implementation of UNDRIP’.¹⁰⁶ The significance of Indigenous peoples having a seat at the international table to provide advice on matters affecting them should not be overlooked.
- 2.87 The UNPFII expressed its support for the Uluru Statement from the Heart at its 21st session in 2022 specifically:
- The Permanent Forum supports the call from indigenous peoples of Australia at the meeting held in Uluru in 2017 for a process on the three core components of the Uluru Statement from the Heart—Voice, Treaty and Truth—and constitutional recognition of indigenous rights consistent with the United Nations Declaration on the Rights of Indigenous Peoples.¹⁰⁷

¹⁰² UN n.d., ‘Economic and Social Council’, <https://www.un.org/en/model-united-nations/economic-and-social-council#:~:text=The%20Economic%20and%20Social%20Council,the%20UN%20family%20of%20organizations,> viewed 12 June 2023.

¹⁰³ United Nations Economic and Social Council (ECOSOC), Establishment of a Permanent Forum on Indigenous Issues, resolution 2000/22, UN Doc E/2000/22, 28 July 2000, p. 2, Article 2.

¹⁰⁴ United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295, 13 September 2007, Article 42.


¹⁰⁵ S Rombouts 2017, ‘The Evolution of Indigenous Peoples’ Consultation Rights Under the ILO and UN Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments’, *Stanford Journal of International Law*, vol. 53, no. 2, p. 203, <https://ssrn.com/abstract=3010261>, viewed 12 June 2023.

¹⁰⁶ S Rombouts 2017, ‘The Evolution of Indigenous Peoples’ Consultation Rights Under the ILO and UN Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments’, *Stanford Journal of International Law*, vol. 53, no. 2, p. 203, <https://ssrn.com/abstract=3010261>, viewed 12 June 2023.

¹⁰⁷ Permanent Forum on Indigenous Issues, Report on the Twenty-First Session, UN Doc E/2022/43-E/C.19/2022/11, 25 April–6 May 2022, p. 11.

Committee Comment

- 2.88 The Committee observed that in Australia, there is no singular or centralised way to implement UNDRIP across or within the Commonwealth, States and Territories. The result of this is the application, by all governments, of ad-hoc approaches to accommodate or respond to specific Articles in UNDRIP within certain policy or program contexts, while leaving gaps in others.
- 2.89 The Committee acknowledges the work that some State and Territory Governments have undertaken to implement UNDRIP through their own human rights frameworks, or implementation of the Uluru Statement from the Heart.
- 2.90 The Committee notes that it is ultimately the Australian Government's responsibility to honour our international commitments, including to the UNDRIP. While implementation of UNDRIP in Australia requires engagement and action from all jurisdictions, due to the nature of the federation, Commonwealth leadership is critical to its success. The Committee therefore considers it to be important to consider how best to coordinate efforts across all Australian jurisdictions to enable the successful implementation of UNDRIP.
- 2.91 The Committee considers the States and Territory efforts to be valuable examples that could inform implementation of UNDRIP at the federal level and urges the Australian Government to monitor and, where appropriate, support these processes.
- 2.92 The Committee notes that there is some promising activity from industry groups and corporations which are seeking to explore ways to adopt or incorporate UNDRIP Articles relevant to their day-to-day operations.
- 2.93 The Committee notes the recommendations made by various United Nations bodies over more than a decade related to the implementation of UNDRIP and realisation of rights for Indigenous peoples. The Committee considers that these reports and recommendations remain relevant for considering implementation of UNDRIP.



3. International experience of implementing UNDRIP

- 3.1 This Chapter outlines international experiences of implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the respective lessons for Australia.

International implementation of UNDRIP

- 3.2 As discussed in Chapter 1, the United Nations (UN) General Assembly adopted UNDRIP by 143 votes to four, with Australia, Canada, New Zealand and the United States of America opposing the resolution in September 2007.
- 3.3 Since then, a number of countries have implemented UNDRIP into law, while others are developing non-legislative ways forward, such as amendments to constitutions, policy-based approaches, and enhancing existing systems of recognising Indigenous rights. The Democratic Republic of the Congo (2006), Ecuador (2008), Kenya (2010), Mexico (2011 and 2016), Morocco (2011), Sweden (2011), Costa Rica (2014), El Salvador (2014), Nicaragua (2014) and Chile (2016) have amended their constitutions to advance Indigenous peoples' rights in-line with UNDRIP.¹
- 3.4 In order to consider the lessons, challenges, and opportunities in implementing UNDRIP, the Committee heard from international experts and explored different approaches taken in New Zealand, Canada, Finland and Norway.

¹ United Nations, *State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, New York, 2019, pages. 9–11. See also Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, UN doc A/HRC/9/9, 11 August 2008.

Aotearoa—New Zealand

Approach to implementation

3.5 Similarly to Australia, New Zealand (NZ) initially withheld its support for UNDRIP.²

3.6 To understand the New Zealand context, it is important to note the following structures, which are described at a high level below:

- The New Zealand Māori Council is a statutory representative body established under the *Māori Community Development Act 1962* (NZ) as a national voice and policy-making body for Māori cultural, economic, social, and political wellbeing.³ The Māori Council comprises 48 members, nominated from 16 District Māori Councils within which there are more than 120 Māori Committees, which may be organised into clusters as Māori Executives.⁴
- In the New Zealand Parliament, there are seven reserved Māori Electorate Seats,⁵ where representatives are elected by voters on the Māori electoral roll.⁶
- The Treaty of Waitangi (or Te Tiriti o Waitangi) is a group of documents from 1840 which together ‘represent an agreement drawn up between representatives of the British Crown on the one hand and representatives of Māori Iwi and Hapū on the other.’⁷ The *Treaty of Waitangi Act 1975* (NZ) provides for the ‘observance, and confirmation, of the principles of the Treaty of Waitangi’.⁸
- The Waitangi Tribunal is a standing commission of inquiry, comprising up to 20 members, which ‘makes recommendations on claims brought by Māori relating to legislation, policies, actions or omissions of the Crown that are alleged to breach the promises made in the Treaty of Waitangi.’⁹
- The National Iwi Chairs Forum is a group of Iwi leaders who come together with the purpose to ‘Share information; Work collaboratively on key priorities of Iwi within the National Iwi Chairs Forum; and Advocate the collective priorities of the Iwi within the National Iwi Chairs Forum in discussions with others, recognising the rangatiratanga/independence of Iwi.’¹⁰

3.7 To date, New Zealand has not incorporated the Declaration into law. However, it has been incorporated in other ways, including through policy and judicial forms. For example, the Declaration has been referenced in several decisions of the Supreme Court of New Zealand and extensively in rulings of the Waitangi Tribunal.¹¹

² UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107, 13 September 2007 p. 19.

³ New Zealand Māori Council, ‘About the Council’, <https://www.nzmaoricouncil.org.nz/>, viewed 9 June 2023.

⁴ New Zealand Māori Council, ‘About the Council’, <https://www.nzmaoricouncil.org.nz/>, viewed 9 June 2023.

⁵ New Zealand Parliament, Members of Parliament - New Zealand Parliament (www.parliament.nz), viewed 9 October 2023.

⁶ Electoral Commission, What is an electoral roll? | Elections, viewed 9 October 2023.

⁷ Archives New Zealand, The Treaty of Waitangi – Archives New Zealand, viewed 9 October 2023.

⁸ Treaty of Waitangi Act 1975 No 114 (as at 17 December 2022), Public Act – New Zealand Legislation.

⁹ Waitangi Tribunal, About the Waitangi Tribunal | Waitangi Tribunal, viewed 9 October 2023.

¹⁰ Iwi Chairs Forum Secretariat, Tikanga | Iwi Chairs Forum Secretariat Sharing The Vision of Kotahitanga, viewed 9 October 2023.

¹¹ Sir Taihakurei Durie, Te Kaunihera Maori o Aotearoa, New Zealand Maori Council, *Committee Hansard*, Canberra, 31 March 2023, p. 24.

- 3.8 The Māori have the formal capacity to make representations through the statutory functions of the Māori Council, and through the specific Māori electorates represented in the New Zealand Parliament.¹²
- 3.9 On 20 April 2010, New Zealand affirmed its support for the Declaration, citing the interconnection between the principles and the Treaty of Waitangi:
- New Zealand's support for the Declaration represents an opportunity to acknowledge and restate the special cultural and historical position of Māori as the original inhabitants, the *tangata whenua*, of New Zealand. It reflects our continuing endeavours to work together to find solutions and underlines the importance of the relationship between Māori and the Crown under the Treaty of Waitangi [Te Tiriti o Waitangi]. Its affirmation of longstanding rights supports and safeguards that ongoing relationship and its proclamation of new aspirations give us all encouragement and inspiration for the future.¹³
- 3.10 In 2014, a United Nations Human Rights Council Universal Periodic Review recommended that New Zealand commit to concrete measures to implement and promote UNDRIP,¹⁴ including the development of a National Action Plan in consultation with Māori, as well as taking steps to align national policy and legislation with the Declaration.¹⁵
- 3.11 In March 2019, the New Zealand Government commenced a process to develop a National Action Plan and engagement strategy to implement the Declaration in partnership with Māori leaders and representatives (through the National Iwi Chairs Forum), and the New Zealand Human Rights Commission (NZHRC).¹⁶
- The New Zealand Government also announced it would create a technical working group, chaired by Dr Claire Charters, to develop a report, *He Puapua*, on proposals for a plan articulating the country's commitment to UNDRIP.¹⁷
- 3.12 To assist in the development of a National Action Plan, the NZHRC and National Iwi Chairs Forum called on the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) to undertake a country engagement mission to New Zealand.¹⁸

¹² Ministry for Culture and Heritage, *Setting up the Māori seats*, Ministry for Culture and Heritage, 28 November 2016, <https://nzhistory.govt.nz/politics/maori-and-the-vote/setting-up-seats>, viewed 9 June 2023.

¹³ Hon Dr Pita Sharples, 'Ministerial Statements: UN Declaration on the Rights of Indigenous Peoples: Government Support', *Statement*, 20 April 2010, Ministerial Statements—UN Declaration on the Rights of Indigenous Peoples—Government Support - New Zealand Parliament (www.parliament.nz), viewed 19 June 2023.

¹⁴ A peer review processes under the auspices of the Human Rights Council in which the human rights records of Member States are considered.

¹⁵ *Report of the Working Group on the Universal Periodic Review*, UN doc A/HRC/41/4, 1 April 2019, p. 21.

¹⁶ Office of Te Minita Whanaketanga [Minister for Māori Development], Update on the development of the Declaration Plan, Government of New Zealand, 22 April 2022, p. 2.

¹⁷ Australian Human Rights Commission, *Senate Committee Submission 53*, pages. 8–9.

¹⁸ United Nations, 'The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Country Engagement Mission (8 – 13 April 2019) – New Zealand - Advisory Note' 14 July 2019, p. 1, <https://www.tpk.govt.nz/documents/download/6305/EMRIPAdvisoryNoteNZ2019.pdf>, viewed 9 June 2023.

3.13 Importantly, it was the non-government negotiating parties who were the ‘requestors’ for this assistance from the EMRIP to provide ‘technical advice on the development of domestic legislation and policies regarding the rights of Indigenous peoples.’¹⁹ The EMRIP undertook the mission to New Zealand in April 2019, and on 14 July 2019 released an Advisory Note to the negotiating parties on the implementation of UNDRIP.²⁰

3.14 In June 2021, the New Zealand Government agreed to targeted engagement and public consultations on an approach to implement a Declaration Action Plan.²¹ The Government described the purpose of the Declaration Action Plan as follows:

The Declaration plan will reaffirm New Zealand’s commitment to realising the Declaration and will present a roadmap of actions to be taken to achieve change. This may require some adjustment to our legal and policy settings over time.²²

3.15 From late 2021, six-months of workshops were held in New Zealand to inform the plan.²³ A draft Declaration plan was due to be presented to the New Zealand Cabinet and then released for public consultation by June 2022,²⁴ with the final Declaration plan to be presented to Cabinet by the end of 2022.²⁵

3.16 At its hearing on 31 March 2023, the Committee heard about how the governance structure adopted to develop the National Action Plan was unique.²⁶ Appearing with the New Zealand Māori Council in her personal capacity, Professor Claire Charters described the structure:

It involved having five national Iwi chairs, leaders at the governance level, sitting alongside four ministers in partnership. That is quite new, to have cabinet members working in partnership, with the idea that one couldn’t veto the other, together to develop that plan. The whole structure, from there on down, emulated that in the sense that the steering committee—I was the National Iwi Chairs’ representative on the steering committee. There was a Government senior official and a senior person from the Human Rights Commission. And then we had our working people. I want to highlight that structure, because I do think that that’s unique and evidences a genuine partnership in that approach.²⁷

¹⁹ United Nations, ‘The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Country Engagement Mission (8 – 13 April 2019) – New Zealand - Advisory Note’ 14 July 2019, p. 1, <https://www.tpk.govt.nz/documents/download/6305/EMRIPAdvisoryNoteNZ2019.pdf>, viewed 9 June 2023.

²⁰ United Nations, ‘The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Country Engagement Mission (8 – 13 April 2019) – New Zealand - Advisory Note’ 14 July 2019, pages. 1–12., <https://www.tpk.govt.nz/documents/download/6305/EMRIPAdvisoryNoteNZ2019.pdf>, viewed 9 June 2023.

²¹ Office of Te Minita Whanaketanga [Minister for Māori Development], *Update on the development of the Declaration Plan*, Government of New Zealand, 22 April 2022, p. 3.

²² Office of Te Minita Whanaketanga [Minister for Māori Development], *Update on the development of the Declaration Plan*, Government of New Zealand, 22 April 2022, p. 6.

²³ Office of Te Minita Whanaketanga [Minister for Māori Development], *Update on the development of the Declaration Plan*, Government of New Zealand, 22 April 2022, p. 5.

²⁴ Glenn McConnell, ‘Co-governance not enough to satisfy indigenous rights declaration, Government told’, 22 April 2022, Co-governance not enough to satisfy indigenous rights declaration, Government told | Stuff.co.nz, viewed 9 June 2023.

²⁵ Office of Te Minita Whanaketanga [Minister for Māori Development], *Update on the development of the Declaration Plan*, Government of New Zealand, 22 April 2022, p. 3.

²⁶ Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 24.

²⁷ Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 24.

- 3.17 The Committee received evidence through its inquiry that, despite the country's progress in negotiations, the National Action Plan's development was placed on hold by the New Zealand Government. On why the negotiations were paused, Professor Charters put to the Committee that:

Effectively, that was because the minister expressly stated this because he thought we were going too far to be progressive, more or less. While this is not an official explanation...there is a lot of nervousness about having the plan on the political agenda in an election year because these issues have been very divisive, not necessarily around the Declaration per se but these issues are hot political potatoes around co-governance and ideas of sharing authority around. The expert report [*He Puapua*] that was given to the Government to help it develop the national plan of action was described as 'separatist', and that sort of language was used around that plan. As I mentioned earlier, politically it's quite volatile.²⁸

- 3.18 One question arising from the challenges New Zealand encountered in its attempts to implement UNDRIP is whether greater public awareness of the Declaration and the Action Plan process would have resulted in quicker success. The Committee heard that there was a clear need for more knowledge about the Declaration and what it is within communities.²⁹

- 3.19 Drawing on several sources, the Waitangi Tribunal's view of the Declaration, particularly in relation to how it impacts the interpretation of and adherence to the Treaty of Waitangi, has been summarised by EMRIP as follows:

The Waitangi Tribunal has indicated that the Declaration is 'perhaps the most important international instrument ever for Māori people' and carries 'great moral and political force', 'valuable guidance on those issues [collective and individual rights in terms of culture, identity, education, health and so forth] and reflects in many ways the spirit of the principles of the Treaty of Waitangi'. Another Waitangi Tribunal report refers to the Declaration, as a 'base standard' and considered that, to the extent that Declaration rights may be recognised consistent with the jurisdiction of the Tribunal, the Tribunal should apply them. Most extensively, the Waitangi Tribunal has stated that the Crown 'accepts that the UNDRIP articles are relevant to the interpretation of the principles of the Treaty. Because the New Zealand Government has now affirmed the Declaration, the obligations described in its articles are a circumstance we can take into account in assessing the Crown's actions'.³⁰

²⁸ Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, pages. 26–27.

²⁹ Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 27.

³⁰ United Nations, 'The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Country Engagement Mission (8 – 13 April 2019) – New Zealand - Advisory Note' 14 July 2019, p. 3, <https://www.tpk.govt.nz/documents/download/6305/EMRIPAdvisoryNoteNZ2019.pdf>, viewed 9 June 2023.

Lessons for Australia

3.20 The New Zealand approach, determined through negotiations between Indigenous peoples, human rights experts, and the Government, and from EMRIP's advice, has primarily been a policy rather than legal model.

3.21 Dr Watchirs OAM, President and Human Rights Commissioner, ACT Human Rights Commission, referenced the approach when advising how Australia might consider implementing UNDRIP, stating:

We consider administrative implementation could occur explicitly by directions from the Government to exercise agency functions consistently with the principles of UNDRIP, and I think this is the New Zealand approach.³¹

3.22 Given the calls for action in the Uluru Statement from the Heart (the Uluru Statement), including the establishment of a Makarrata Commission to oversee a process of agreement making, the intersection between constitutional recognition, treaty rights, and those principles set out in UNDRIP is relevant. The Committee heard about the benefits arising from greater awareness and incorporation of UNDRIP, as well as constitutional guarantees, in jointly leveraging the opportunities and commitments in the Treaty of Waitangi. For example, the Committee heard:

...Te Tiriti o Waitangi guarantees tino rangatiratanga—sovereignty or self-determination—for Māori Iwi Chiefs and so on. That has never been realised. Te Tiriti o Waitangi is unusual. It is often thought by brothers and sisters overseas to be the answer; it's not that, because it has no constitutional force, although it is of constitutional value.³²

3.23 Further, appearing for the Māori Council, Sir Taihakurei Durie KNZM, former Chief Judge of the Māori Land Court and Chairman of the Waitangi Tribunal, described the interaction between UNDRIP and the Treaty of Waitangi:

For us, the Declaration has been a most important source of principle with international standing. In that way, the Declaration has played an important role for us in developing policy for Māori in New Zealand. We also rely on the Treaty of Waitangi in this country, but it's a rather general document, and the Declaration has augmented the treaty with much more specificity.³³

3.24 Similarly, the First Nations Portfolio at the Australian National University observed the historical difference between New Zealand (the Treaty of Waitangi) and Canada (the recognition of rights in the constitution since 1982 and historical treaties) with Australia. Leading it to pose a critical question for determining the next steps in Australia, specifically 'with the limitations that have beset Australia's legal and political history, how can it be strategically done in a way that allows the UNDRIP to be the hook?'³⁴

³¹ Dr Helen Watchirs OAM, *Committee Hansard*, Canberra, 31 March 2023, p. 8.

³² Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 26.

³³ Sir Taihakurei Durie KNZM, *Committee Hansard*, Canberra, 31 March 2023, p. 23.

³⁴ Mr Thomas Snowdon, *Committee Hansard*, Canberra, 10 March 2023, p. 24.

- 3.25 There are also lessons for Australia in terms of inclusive approaches to engagement with First Peoples. For example, despite its statutory strength, the Māori Council was not included in negotiations with the New Zealand Government on the country's Declaration Action Plan.³⁵ When discussing this, Sir Taihakurei Durie KNZM noted:

I think that with Māori people we always strive to have an inclusive approach. So, the New Zealand Māori Council certainly does not believe that it's the beginning and end of everything. There are several other groups that need to be heard as well, and we can actually thrive on diversity.³⁶

- 3.26 This context is relevant for the Australian Government to consider how it will engage with First Nations people to determine the approach to implementing UNDRIP, and ensuring that approach adheres to Article 19 of the Declaration which provides that:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.³⁷

- 3.27 Finally, the experience of Indigenous groups seeking the expertise of EMRIP to inform negotiations with government is a way to address the power imbalance prior to formal negotiations on the form of implementation. Dr Sheryl Lightfoot described the New Zealand country engagement of EMRIP as specifically focusing on how the Iwi leaders and New Zealand Human Rights Commission (the requesters) 'work with government to co-develop a national plan of action to implement the Declaration'.³⁸

Canada

- 3.28 The Committee heard evidence about the implementation of the Declaration by the Federal Government of Canada and in the Province of British Columbia (BC). These perspectives are particularly relevant to Australia's context; given that Canada and Australia are both federations of former colonies with centralised national governments.
- 3.29 As with Australia and New Zealand, Canada initially withheld its support for UNDRIP.³⁹
- 3.30 To understand the Canadian and British Columbian context, it is important to note the following structures, which are described at a high-level below:
- In 1982, the Canadian Constitution was amended to include a new Section 35 titled 'Rights of the Aboriginal Peoples of Canada' which, among other things, recognises and affirms the existing Aboriginal and treaty rights.⁴⁰

³⁵ Ms Donna Hall, *Committee Hansard*, Canberra, 31 March 2023, p. 25.

³⁶ Sir Taihakurei Durie, *Committee Hansard*, Canberra, 31 March 2023, p. 28.

³⁷ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Article 19.

³⁸ Dr Sheryl Lightfoot, *Committee Hansard*, Canberra, 8 June 2023, p. 10.

³⁹ UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107, 13 September 2007, p. 19.

⁴⁰ *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'), s 35.

- There are 70 Historic Treaties recognised in Canada, signed between 1701 and 1923,⁴¹ which have varying degrees of successful implementation.
- There are 26 Modern Treaties with Indigenous groups in Canada, which have been negotiated since 1975 following the *Calder et al. v. Attorney-General of British Columbia* case in the Supreme Court of Canada which recognised Indigenous rights for the first time.
- The British Columbia Treaty Commission is the independent facilitator for Modern Treaty and tripartite agreement negotiations. It 'advocates for and facilitates the recognition and protection of First Nations' rights and title, through the negotiation of Modern Treaties and tripartite agreements among the governments of Canada, British Columbia and First Nations in BC.'⁴²
- The Truth and Reconciliation Commission of Canada was established in 2007 and ran until 2015, as a truth-telling exercise for those impacted by the legacy of the Indian Residential Schools system, and to 'facilitate reconciliation among former students, their families, their communities and all Canadians'.⁴³

Federal Government of Canada

- 3.31 The Canadian Constitution recognises three distinct groups of Aboriginal peoples being Indian (or First Nations), Inuit, and Métis.⁴⁴

Approach to Implementation

- 3.32 On 8 April 2008, the Canadian House of Commons, the lower house of the Canadian Federal Parliament, adopted a motion in support of UNDRIP and called on the Federal Government to 'fully implement the standards contained in [it]'.⁴⁵
- 3.33 On 3 March 2010, the Governor General of Canada stated in a speech to the House of Commons that the Government would 'take steps' to endorse UNDRIP 'in a manner fully consistent with Canada's Constitution and laws'.⁴⁶

⁴¹ Government of Canada, 'Treaties and Agreements', Treaties and agreements (rcaanc-cirnac.gc.ca), viewed 29 June 2023.

⁴² BC Treaty Commission, BC Treaty Commission: Independent Facilitator for Treaty Negotiations, viewed 9 October 2023.

⁴³ Government of Canada, Truth and Reconciliation Commission of Canada (rcaanc-cirnac.gc.ca), viewed 9 October 2023.

⁴⁴ *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'), s 35(1).

⁴⁵ United Nations, 'UN experts welcome Canadian House of Commons endorsement of the Declaration on the rights of Indigenous Peoples', *Media Statement*, 18 April 2008.

⁴⁶ The Right Honourable Michaëlle Jean, Governor General of Canada, in 'Text of Stephen Harper government's speech from the throne', *The Georgia Straight*, 3 March 2010.

- 3.34 On 12 November 2010, Canada announced its qualified support for UNDRIP, describing it as an ‘aspirational document’.⁴⁷ The official statement detailed a range of ongoing concerns the Government held with respect to the text of the Declaration:

Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.⁴⁸

- 3.35 In 2015, the final report of the Truth and Reconciliation Commission of Canada called on Federal, Provincial, and Territory Governments to adopt and implement UNDRIP. It further called on the Federal Government, jointly with Indigenous peoples, to develop a national plan and other measures to implement the goals of the Declaration.⁴⁹

- 3.36 While a number of draft bills to implement UNDRIP had been in circulation dating back to 2008,⁵⁰ none gained mainstream support until 2016. On 21 April 2016 a private member’s bill for an Act to ensure that the laws of Canada are in harmony with UNDRIP was presented in the House of Commons by New Democratic Party member Mr Romeo Saganash MP, but over the three-year period did not pass both Houses of Parliament.⁵¹

- 3.37 In February 2017, the Prime Minister of Canada, the Hon Justin Trudeau PC MP, established a working group of ministers to review existing laws and policies related to Indigenous peoples.⁵²

- 3.38 On 21 June 2021 the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Canada) (Canada’s UN Declaration Act) came into force.⁵³ The Canadian Government described the UN Declaration Act as follows:

This Act provides a roadmap for the Government of Canada and Indigenous peoples to work together to implement the Declaration based on lasting reconciliation, healing, and cooperative relations.⁵⁴

⁴⁷ Government of Canada, ‘Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples’, *Media Statement*, 12 November 2010.

⁴⁸ Government of Canada, ‘Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples’, *Media Statement*, 12 November 2010.

⁴⁹ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, pages. 4–5.

⁵⁰ Parliament of Canada, ‘C-262 United Nations Declaration on the Rights of Indigenous Peoples Act’, About, <https://www.parl.ca/LegisInfo/en/bill/42-1/c-262?view=about>, viewed 9 June 2023.

⁵¹ Parliament of Canada, ‘C-262 United Nations Declaration on the Rights of Indigenous Peoples Act’, Progress, <https://www.parl.ca/LegisInfo/en/bill/42-1/c-262?view=progress>, viewed 9 June 2023.

⁵² United Nations, *State of the World’s Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, New York, 2019, p. 14.

⁵³ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021. c 14.

⁵⁴ Government of Canada, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act*, Department of Justice, www.justice.gc.ca/eng/declaration/index.html, viewed 15 June 2023.

- 3.39 The Committee heard from Mr Keith Smith, Director General of the UN Declaration Act Implementation Secretariat, at Canada's Department of Justice, who said:

There was pretty broad consensus around the UN Declaration Act in parliament, but also amongst Indigenous peoples themselves, on the need to legislatively put in place a mechanism for the implementation of the Declaration. There were some disagreements about what that would look like at the end, that type of legislation. ... There was a lot of outreach and engagement with Indigenous partners in terms of what the bill ultimately looked like. But I think there was pretty strong consensus on the need to pass the bill, if you will.⁵⁵

- 3.40 The UN Declaration Act sets out binding requirements on Canada's Federal Government to implement UNDRIP, including: ensuring the consistency of federal laws with the Declaration;⁵⁶ developing an action plan to implement UNDRIP in consultation with First Nations peoples, Inuit, and the Métis Nation;⁵⁷ and developing Annual Progress Reports to be submitted to Parliament.⁵⁸

- 3.41 Ms Lisa Smith, Interim Advisor to the President, Native Women's Association of Canada (NWAC) described the Indigenous-led consultations on developing an action plan as follows:

So, on 10 December 2021, the Minister of Justice and Attorney General of Canada announced a new consultation process with Indigenous groups which opened new funding to support the engagement process. In addition, the Federal Government has started taking measures to ensure that pre-existing laws are consistent with the Declaration. Also, in the 2022 federal budget here in Canada, the Government of Canada committed to implementing UNDRIP and proposed to provide \$65.8 million over five years, starting in 2022–23, and \$11 million ongoing to Justice Canada to work with Indigenous peoples on an action plan. So NWAC was given project funding to provide a perspective from Indigenous women, girls and gender-diverse people on the draft action plan. Now NWAC is advocating for the final action plan to achieve measurable goals and feasible time frames, to allocate funding and to ensure that there is consideration for some specific needs of Indigenous women, girls and gender-diverse people.

- 3.42 The first Annual Progress Report was tabled in Parliament on 21 June 2022 and was referred to the relevant committee in each House of Parliament.⁵⁹ On 20 March 2023 the Canadian Government released a Draft Action Plan for consultation.⁶⁰

⁵⁵ Mr Keith Smith, *Committee Hansard*, Canberra, 10 February 2023, pages. 9–10.

⁵⁶ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021. c 14, s 5.

⁵⁷ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021. c 14, s 2 (definition of 'indigenous peoples'), s 6; *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'), s 35(2).

⁵⁸ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021. c 14, s 7.

⁵⁹ Canadian House of Commons 2022, *House Publications* no. 93, 21 June 2022, <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-93/journals>, House of Commons, Journals, 15 June 2023.

⁶⁰ Government of Canada, 'Draft UNDA Action Plan', 23 March 2023, <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/index.html>, viewed 9 June 2023.

- 3.43 On 20 June 2023, the final Canadian UNDRIP Action Plan 2023-2028 was released, which is a 'starting point for ongoing consultation and cooperation with Indigenous peoples on UN Declaration implementation' and will invoke both new and existing mechanisms to make progress.⁶¹
- 3.44 The measures that will be taken are set out across five chapters:
- 1 Shared Priorities
 - 2 First Nations Priorities
 - 3 Inuit Priorities
 - 4 Métis Priorities, and
 - 5 Indigenous Modern Treaty Partner Priorities.⁶²
- 3.45 As with other countries' experiences of implementing UNDRIP, Canada experienced a degree of struggle around public education on, and confusion about, the Declaration. An example of this, specifically around the concept of free, prior and informed consent (which is referred to in UNDRIP Articles 10,11,19, and 28), was given to the Committee by Ms Lisa Smith from the NWAC, who stated that:
- When we were advocating for UNDRIP implementation, there were myths that stood in the way as obstacles. For example, in the Declaration, there is 'free, prior and informed consent' and there were a lot of myths surrounding that: 'What does that look like?' or 'Oh, my goodness, resource development is going to be obstructed now,' and that sort of thing. There's a lot to 'free, prior and informed consent' and I love talking about it; but, essentially, at the end of the day, it just means that Indigenous peoples, like anyone else in the world, can say 'yes', 'no' or 'yes, with conditions' when it comes to their land.⁶³
- 3.46 While the Committee heard broadly positive feedback on the consultation process for the Draft Action Plan, Canadian Government witnesses did acknowledge challenges relating to participation, listening, expectation management, and scope setting had arisen in the course of consultations.⁶⁴

⁶¹ Department of Justice Canada, United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan, 2023, p. 19, 2023-06-20_UNDA_Action_Plan_EN.pdf (justice.gc.ca), viewed 29 June 2023.

⁶² Department of Justice Canada, United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan, 2023, p. 5, 2023-06-20_UNDA_Action_Plan_EN.pdf (justice.gc.ca), viewed 29 June 2023.

⁶³ Ms Lisa Smith, *Committee Hansard*, Canberra, 10 February 2023, pages. 1–2.

⁶⁴ Ms Koren Marriott *Committee Hansard*, Canberra, 10 February 2023, p.14.

3.47 At its hearing on 10 February 2023, the Committee heard that references to UNDRIP in existing Canadian legislation had already contributed to social and economic benefits for Indigenous Canadians. Ms Koren Marriott, Acting Director and General Counsel, Legislative and International Policy Unit, Aboriginal Law Centre, Department of Justice of Canada put to the Committee that:

...[A] number of pieces of legislation that refer to the Declaration, some of which address socio-economic issues—things like Indigenous languages, child and family services and some of those specific sectors that the Declaration has referenced, as part of the context of those pieces of specific legislation—all of those, together, help contribute to a variety of social and economic benefits.⁶⁵

3.48 On the potential of other laws to be amended for consistency with UNDRIP, as is required by section 5 of the Canada's UN Declaration Act, Ms Marriot said:

We expect that some federal laws will change over time. If any inconsistencies are identified, they will go through the normal parliamentary and policy development processes with the involvement of Indigenous peoples, because we now have a statutory requirement to consult and cooperate in order to ensure consistency; but then they'll go to parliament and parliament will choose to enact the law or not, as the case may be, in those procedures.⁶⁶

3.49 The Committee heard from several witnesses throughout its inquiry who put the view that the cultural shift in Canada which enabled the Declaration to be implemented was a result of the findings of the Truth and Reconciliation Commission of Canada (TRC). This parallel process helped the public understand the need to grapple with the legacies of colonisation. On the context around the early steps of implementation, Ms Smith stated:

...the Truth and Reconciliation Commission of Canada was happening and that brought to light, for the community and the public, a lot of information about the atrocities that had happened at the hands of the church and state in residential schools. So we saw the public learn the truth about what the colonial powers had done to Indigenous peoples and children and then demand action from the state. So, in a way, there was a kind of perfect storm of public pressure and truth coming to light, with reconciliation at the end of the day then being very important to the public as well as, of course, Indigenous advocates.⁶⁷

⁶⁵ Ms Koren Marriott, *Committee Hansard*, Canberra, 10 February 2023, p.11.

⁶⁶ Ms Koren Marriott, *Committee Hansard*, Canberra, 10 February 2023, p.12.

⁶⁷ Ms Lisa Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 2.

- 3.50 Further, the Canadian witnesses shared evidence about the relationship between Historic and Modern Treaty arrangements with UNDRIP. On that topic the Committee heard from Ms Marriott that:

The Declaration itself calls on states to recognise and observe treaties, agreement and instructive arrangements during the development of the [UNDRIP] Act. That was one of the key principles that Indigenous peoples identified as being particularly important in Canada, because we have historic treaties and Modern Treaties.⁶⁸

- 3.51 Mr Smith provided his view on Modern Treaties, in particular putting that:

...Modern Treaties are really a reflection of the principles that are set out in the UN Declaration itself. They're almost a manifestation of it, if you will. There are ongoing voluntary negotiations that are taking place...They are informed by the UN Declaration and the rights set out in it as well. They are not mutually exclusive. In fact, they are mutually reinforcing, I would suggest. I would point out as well that Canada has a number of historic treaties across the country and those are also to be recognised and observed, and are certainly part of the fabric of Canada.⁶⁹

Province of British Columbia

- 3.52 The Province of British Columbia is Canada's westernmost sub-national jurisdiction (a Province being comparable to a State in Australia). The modern British Columbia has been the home to more than 200 distinct First Nations groups, each with its own unique traditions, history, and laws, for thousands of years.⁷⁰

Approach to Implementation

- 3.53 On 28 November 2019, BC became the first North American jurisdiction to support the implementation of UNDRIP by passing the *Declaration on the Rights of Indigenous Peoples Act* (British Columbia) (the BC Declaration Act) into law.⁷¹

- 3.54 The BC Declaration Act was developed following over a decade of discussion on draft pieces of legislation to implement UNDRIP at a federal level. At a hearing on 31 March 2023, Ms Jessica Wood (Si Sityaawks), Assistant Deputy Minister, BC Declaration Act Secretariat, told the Committee how the Province came to implement UNDRIP, stating:

We've had the benefit of a piece of legislation in various forms circulating federally since 2008 that is substantially similar to what you see introduced here. The Federal Government had introduced a bill that was unsuccessful, so we thought we would be in their wake. The Government here made the decision in

⁶⁸ Ms Koren Marriott, *Committee Hansard*, Canberra, 10 February 2023, p. 9.

⁶⁹ Mr Keith Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 9.

⁷⁰ WelcomeBC, *B.C. First Nations & Indigenous People*, WelcomeBC, <https://www.welcomebc.ca/Choose-B-C/Explore-British-Columbia/B-C-First-Nations-Indigenous-People>, viewed 9 June 2023.

⁷¹ Hon. Murray Rankin KC MLA, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, *Committee Hansard*, Canberra, 31 March 2023, p 1.

the Province of BC to continue on with our version of that bill and to actually go first. With them being unsuccessful and our having a couple of different tools, like we said, we've adopted in track, we're actually in our state, our province, ahead of the other states and we're first, ahead of the nation.⁷²

3.55 As part of consultations on the BC Declaration Act the British Columbian Government engaged in consensus building with First Nations political leaders, major political and economic leaders, and municipalities. They spoke about the impacts of having no legislative framework to affirm UNDRIP rights.⁷³

3.56 Ms Wood advised the Committee on the co-design process, including how Indigenous people were brought into the cabinet-in-confidence process to ensure negotiations were genuinely based on collaborative practices:

We worked together on co-developing, in our parliamentary process, our request for decision, our request for legislation, our three-column documents or instructions to our drafters as well as on the consultation drafts. And then we did a robust non-disclosure agreement process to maintain cabinet confidence where we had over 175 non-disclosure agreements. We went directly to major leaders in nations so that they could preview the bill before it was tabled in the House. It was unprecedented. And that's how we were able to, after 23 hours of community debate, to also have universal support from all sides of the House.⁷⁴

3.57 The BC Declaration Act affirmed the application of UNDRIP to the laws of British Columbia, required the province to develop an implementation plan in consultation with Indigenous peoples (a five-year action plan was released on 7 April 2022),⁷⁵ and authorised the Government to enter into agreements with Indigenous bodies to jointly make certain statutory decisions.⁷⁶

3.58 The BC Declaration Act includes shared decision-making and consent agreement provisions as a mechanism to deal with obtaining free, prior and informed consent (FPIC) in certain contexts. On how consent is dealt with the Hon Murray Rankin KC MLA, British Columbia's Minister for Indigenous Relations and Reconciliation, stated:

I would agree that it is one of the things that was probably the most hotly contested aspect of our commitment. Indeed, the federal bill, which does not contain what I'm about to describe, for those that are following sections 6 and 7 of our Act, the Declaration Act, talks about a variety of consent-seeking agreements that are possible. Section 7 contemplates either a consent based

⁷² Ms Jessica Wood (Si Sityaawks), Associate Deputy Minister of the Declaration Act Secretariat, Government of British Columbia, *Committee Hansard*, Canberra, 31 March 2023, p. 2.

⁷³ Ms Jessica Wood (Si Sityaawks), *Committee Hansard*, Canberra, 31 March 2023, p. 2.

⁷⁴ Ms Jessica Wood (Si Sityaawks), *Committee Hansard*, Canberra, 31 March 2023, p. 2.

⁷⁵ Rose Lemay, 'British Columbia leads with five-year-plan to implement UNDRIP', *Hill Times*, 25 April 2022.

⁷⁶ Emily Chan, 'New BC legislation now in force to implement Declaration on the Rights of Indigenous Peoples Act', Norton Rose Fullbright, December 2019, www.nortonrosefulbright.com/en-ca/knowledge/publications/32ff0686/new-bc-legislation-now-in-force-to-implement-declaration-on-the-rights-of-indigenous-peoples-act, viewed 15 June 2023. For the text of the Act, see, Legislative Assembly of British Columbia, 'Bill 41–2019: Declaration on the Rights of Indigenous Peoples Act', www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1, viewed 15 June 2023.

agreement by which the [First] Nation would have to provide its consent before proceeding. Another is joint decision-making whereby the statutory decision-maker, usually a provincial official of some sort, is joined with the decision-making by the individual [First] Nation. And of course, that, if you think about it, often will require, but not always, the legislation by which that decision-maker, maybe in a mining context, you can think of all the resource regulation, or indeed in the social circles such as in children and family matters, is following the law, and we have to make space for that in order to have it be joint or consent based. Some kind of amendment is often to be sought.⁷⁷

3.59 In addition to implementing UNDRIP by statute, British Columbia continues to facilitate and engage in active Modern Treaty negotiations with First Nations. The British Columbia Treaty Commission is an independent body tasked with overseeing treaty negotiations within the Province.⁷⁸ These negotiations occur in tandem with the implementation of both UNDRIP and findings from the Canadian truth-telling process.

3.60 Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission, told the Committee that:

We assist the parties to implement the United Nations Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission of Canada's 94 Calls to Action and the recognition of First Nations title and rights.⁷⁹

3.61 The Committee heard that consultations on legislating a requirement for there to be an UNDRIP action plan were considered insufficient by some Treaty Nations. However, evidence was given to the Committee that following this, consultations on the content of the Action Plan had been more satisfactory. At a hearing on 10 February 2023, Mr Mark Smith, General Counsel and Director of Process at the British Columbia Treaty Commission told the Committee that:

...when First Nations were being consulted [on the legislation], like all consultations it wasn't perfect and there was a bit of an oversight in that the Modern Treaty Nations in the province were not adequately consulted, if consulted at all, around the legislation. To the credit of the Provincial Government, they fixed that when it came to the action plan and had specific consultation and engagement with the Modern Treaty Nations in British Columbia—there's eight of them—and there's a specific section within that action plan that talks about the relationship with the Modern Treaty Nations.⁸⁰

⁷⁷ Hon. Murray Rankin KC MLA, *Committee Hansard*, Canberra, 31 March 2023, p. 1.

⁷⁸ Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p. 16.

⁷⁹ Ms Celeste Haldane, *Committee Hansard*, Canberra, 10 February 2023, p. 16.

⁸⁰ Mr Mark Smith, General Counsel and Director of Process, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p. 17.

- 3.62 The BC *Declaration Act Action Plan* required under section 4 of the Province's Declaration Act was released on 30 March 2022 and sets out specific actions to be accomplished between 2022–27.⁸¹ The four priority areas set out in the BC *Declaration Act Action Plan* are:
- 1 self-determination and inherent right of self-government
 - 2 title and rights of Indigenous peoples
 - 3 ending Indigenous-specific racism and discrimination, and
 - 4 social, cultural, and economic well-being.⁸²
- 3.63 At its hearing on 10 February 2023, the Committee heard that the BC's adoption of UNDRIP has had an unparalleled positive influence on the speed of reconciliation and change within the jurisdiction. Mr Smith offered his perspective that:
- ...having UNDRIP in Canada has had quicker progress, more progress, in terms of change with the relationship with Indigenous peoples here. I think our constitution, from 1982, has a specific section, section 35, around Aboriginal rights. Although that's a very positive part of our constitution, would say things have moved much quicker since the adoption of the UN Declaration and in the legislation in Canada and in British Columbia. I think it's a valuable mechanism to advance rights and keep everyone focused on these important issues.⁸³
- 3.64 Indeed, the speed of progress in British Columbia since the implementation of UNDRIP became a theme in the evidence received by the Committee. Evidence was provided about positive changes relating to the review and amendment of other laws to accord with the Declaration,⁸⁴ reducing barriers and enabling more progress on Aboriginal title determinations,⁸⁵ and progress on treaty negotiations since the BC Declaration Act's passage.⁸⁶ The Committee also received evidence on the effect Modern Treaties, as constitutional documents, have had on accelerating legislative reform in British Columbia.⁸⁷

⁸¹ Government of British Columbia, 'Declaration Act Action Plan', 30 March 2022, <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation#:~:text=The%20Declaration%20Act%20Action%20Plan,over%20the%20next%20five%20years>, viewed 16 June 2023.

⁸² Government of British Columbia, 'Declaration Act Action Plan', 30 March 2022, <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation#:~:text=The%20Declaration%20Act%20Action%20Plan,over%20the%20next%20five%20years>, viewed 16 June 2023.

⁸³ Mr Mark Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 17.

⁸⁴ Ms Sashia Leung, Director of Communications and International Relations, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p. 17.

⁸⁵ Mr Mark Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 21.

⁸⁶ Ms Sashia Leung, *Committee Hansard*, Canberra, 10 February 2023, p. 20.

⁸⁷ Mr Mark Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 20.

- 3.65 One key distinction between the Australian and Canadian contexts is the longstanding history Canada and its Provinces have in working toward, and under the conditions of, treaties. The outcomes of British Columbia's Modern Treaty Nations provide an example of how UNDRIP can reinforce treaty negotiations. The British Columbian Government noted:

Of course, our first Modern Treaties were done before the UN Declaration was even endorsed by Canada. So a lot of that important work was done before Canada endorsed the UN Declaration, and, again, it's significant work—that these Modern Treaties are sharing sovereignty between the Crown and the Indigenous peoples. And these treaties have elements in them that are very good examples of FPIC. They may not refer to FPIC, but consent is built into the treaties, and now the new treaties are more directly referencing FPIC and the UN Declaration.⁸⁸

- 3.66 On the success and socioeconomic impact of Modern Treaties, the Committee heard:

A lot of successes are coming out of the Modern Treaty Nations. They're seeing huge socioeconomic benefit to treaties and agreements, which, of course, are very much related to the rights that are enshrined in the Declaration. In the work that we're doing, we're seeing Nations coming back to table. We're getting past some stalled issues. We're seeing movement in Government on both sides, Federal and Provincial. We've seen a lot of progress since the Declaration and certainly since the two acts.⁸⁹

- 3.67 The adoption of UNDRIP in British Columbia has also paved the way for the progressive approach to the challenging problem of child and family service delivery to Indigenous people. At its hearing on 31 March 2023, the Committee was informed of British Columbia's approach of entering into consent agreements with First Nations (the groups specifically, as opposed to organisations) and vacating its jurisdiction over children in care. Minister Rankin KC MLA stated that:

It is an absolute sea change. First Nations people have, as I know Australia does too, a remarkable number of children in care of one sort or another who want to go home and be reunited with their family yet they have been seeking forever to have that jurisdiction. Of course, we are concerned, as they are concerned, about the best interests of the child and so forth. We certainly want to ensure that they have a cultural component in their upbringing, so confirming they have that jurisdiction, not in a delegated model but in a recognition model, is really central to the future of those communities. They have reasserted their jurisdiction to look after their own children. It's a real fundamental sea change, as I said.⁹⁰

⁸⁸ Mr Mark Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 19.

⁸⁹ Ms Sashia Leung, *Committee Hansard*, Canberra, 10 February 2023, p. 20.

⁹⁰ Hon Murray Rankin KC MLA, *Committee Hansard*, Canberra, 31 March 2023, p 4.

Lessons for Australia

- 3.68 An important component of the British Columbian and Canadian experiences was the complementary relationship between truth telling, treaty-making and constitutional recognition over many decades, interconnected with UNDRIP implementation.
- 3.69 While the Truth and Reconciliation Commission currently lacks a national equivalent in Australia, there are similarities with the Yoorrook Justice Commission in Victoria, which has a broader scope and terms of reference. Further, the Uluru Statement calls for a Makarrata Commission to supervise truth-telling and agreement-making,⁹¹ and it is therefore useful to consider how progress on these three elements may assist in the successful efforts towards reconciliation.
- 3.70 The Canadian experience shows a scenario where the political will or mandate to implement UNDRIP developed over time, and most significantly following the findings from the Canadian Truth and Reconciliation Commission. As outlined earlier, Ms Smith, Interim Adviser to the President, Native Women's Association of Canada, described a 'perfect storm' where this Commission reported on atrocities that had occurred in Indigenous Residential Schools which led to a report for the Federal, Provincial and Territorial Governments to implement UNDRIP.⁹²
- 3.71 Consideration of how public education and awareness connect to truth-telling as part of implementing both the Uluru Statement from the Heart and UNDRIP should be an important consideration for the Australian Government.
- 3.72 Further, the experiences in Canada are relevant to how the Declaration has been adopted at the Federal, Provincial, and local level. When asked about the interaction between the Federal UNDRIP Act in requiring Provinces to take certain actions, Ms Marriott noted the 'UN Declaration Act does not bind Provinces'.⁹³ While it is effective at requiring action at the Federal level, it is important to consider the limitations of a legislative action plan at the Commonwealth level in Australia in relation to influencing policy areas in the jurisdiction of States and Territories, if done in isolation.
- 3.73 In addition to the Federal and Provincial adoption of UNDRIP, the Committee heard that the City of Vancouver is considering how it can implement UNDRIP at the local level, making it the first municipality to consider such an action.⁹⁴ In 2021 the City of Vancouver established an UNDRIP Taskforce in partnership with First Nations representatives to consider options for implementation.⁹⁵ There may be further lessons for Australia to consider how the more localised approach to implementation could be considered.

⁹¹ Referendum Council, Uluru Statement From the Heart, *Uluru_Statement_From_The_Heart_0.PDF* (referendumcouncil.org.au), viewed 9 October 2023.

⁹² Ms Lisa Smith, *Committee Hansard*, Canberra, 10 February 2023, pages 1–2.

⁹³ Ms Koren Marriott, *Committee Hansard*, Canberra, 10 February 2023, p. 12.

⁹⁴ Ms Sashia Leung, *Committee Hansard*, Canberra, 10 February 2023, p. 22.

⁹⁵ City of Vancouver, 'UNDRIP Task Force', <https://vancouver.ca/people-programs/undrip-task-force.aspx>, viewed 31 May 2023.

Finland

3.74 The Indigenous people of Finland are the Sámi.

3.75 To understand the Finnish experience of implementing UNDRIP, it is important to understand the following structures:

- The Sámi Parliament in Finland was established in 1985 as an 'independent legal entity of public law'⁹⁶ which comprises 21 members to represent the Sámi people of Finland.⁹⁷
- Sámi are recognised in the Finland Constitution, as well as their right to maintain and develop their own language and culture.
- A Sámi Truth and Reconciliation Commission has commenced and is ongoing in Finland.

Approach to implementation

3.76 In 1973, the Sámi people established the Sámi Delegation which acted as their own representative institution to the Finnish Government.⁹⁸ In 1985, the Finnish Government and the Sámi delegation reached an agreement to transform the Sámi delegation into the Sámi Parliament.⁹⁹

3.77 The 21 members and 4 deputies of the Sámi Parliament represent different municipalities and language groups.¹⁰⁰ These members are elected from a single Sámi electoral roll. However, to ensure regional representation, each of the four municipalities of the Sámi homeland must have at least three members each, and one deputy.¹⁰¹

3.78 Mr Juuso, the Sámi Parliament President, noted the benefits of the Sámi Parliament in bringing together diverse views and perspectives from the various regions. He stated:

We have three different languages spoken here on the Finnish side; we have different livelihood structures; we have reindeer herding; Sámi have a fishing background; and there are other kinds of groups of people. But we have identified the need to work together as one people and have decided to do so.

...

But in our context, of course, our people have different kinds of opinions, and to have a platform where we can measure what kinds of views are supported in our

⁹⁶ Sámediggi, The Sámi Parliament of Finland (samediggi.fi), viewed 9 October 2023.

⁹⁷ Mr Tuomas Aslak Juuso, President, Sámi Parliament, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

⁹⁸ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

⁹⁹ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

¹⁰⁰ Ms Johanna Suurpaa, Director General, Department for Democracy and Public Law, *Committee Hansard*, Canberra, 10 February 2023, p. 34.

¹⁰¹ Sámediggi, Sámi Parliaments Plenum - Samediggi, viewed 9 October 2023.

people themselves is quite important in trying to define what the collective view of the Sámi is.¹⁰²

- 3.79 In addition to the Sámi Parliament providing advice directly to the Finnish Government, it also works with the Nordic Sámi Convention to promote and advocate for the shared interests among the Sámi in Finland, Norway and Sweden.
- 3.80 In 1995, the Finnish Government recognised the Sámi people in its constitution and enacted legislation which established the Sámi Parliament as the legal body representing the Sámi, which began operation in 1996.¹⁰³ The Sámi Parliament provides non-binding advice to the Finnish Government.¹⁰⁴
- 3.81 Finland voted to adopt UNDRIP in 2007, and recommitted to achieving the objectives of UNDRIP in 2014. However, it has not implemented the Declaration in legislation. Since 2007, the Sámi Parliament has negotiated with the Finnish Government to adopt some aspects of UNDRIP, which apply to policy matters such as education, livelihoods, land rights and healthcare.¹⁰⁵
- 3.82 The Committee heard from the Director General of the Department for Democracy and Public Law in Finland that they consider it ‘good practice to always have negotiations when the Sámi Parliament finds it important’ to do so.¹⁰⁶ For example, consultation between the Finnish Government and the Sámi Parliament has resulted in the production of school materials that provide cultural context and preserve Sámi language.¹⁰⁷
- 3.83 The Committee heard from the Finnish witnesses about how UNDRIP was adopted in more informal or iterative ways across legislation, policies and through the existence of the Sámi Parliament. For example, the Director General for the Department for Democracy and Public Law in Finland said UNDRIP has had indirect influence on how the Finnish Government operates, as all government agencies have been provided advice (in collaboration with the Sámi Parliament) on guidelines for consulting and negotiating with the Sámi people within the spirit of UNDRIP.¹⁰⁸ Similarly, UNDRIP is described as a ‘lens through which we interpret our current legislation’.¹⁰⁹
- 3.84 The Sámi Parliament has proposed to the Finnish Government collaboration to develop a National Action Plan to fully implement UNDRIP, however, this has not occurred to date.¹¹⁰

¹⁰² Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 26.

¹⁰³ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

¹⁰⁴ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 25.

¹⁰⁵ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 25.

¹⁰⁶ Ms Johanna Suurpaa, *Committee Hansard*, Canberra, 10 February 2023, p. 32.

¹⁰⁷ Ms Johanna Suurpaa, *Committee Hansard*, Canberra, 10 February 2023, p. 32.

¹⁰⁸ Ms Johanna Suurpaa, *Committee Hansard*, Canberra, 10 February 2023, p. 33.

¹⁰⁹ Ms Johanna Suurpaa, *Committee Hansard*, Canberra, 10 February 2023, p. 33.

¹¹⁰ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

- 3.85 The President of the Sámi Parliament told the Committee that the content of UNDRIP has been a crucial tool for the UN Human Rights Committee for interpreting and implementing the International Covenant on Civil and Political Rights (ICCPR).¹¹¹

Lessons for Australia

- 3.86 Throughout the inquiry, there were many parallels and lessons from the experience of the Sámi Parliament in relation to the then proposed Voice to Parliament and Executive Government. Like the Sámi Parliament, the proposed Voice was intended to make non-binding representations to the Parliament and Executive Government on matters that affect Indigenous peoples. It was intended to bring together the perspectives of Indigenous people from across the country, including regionally, to ensure they are heard. As noted in this Report, the proposed amendment to the Constitution was put to referendum on 14 October 2023 and was not supported by the Australian electors. However, the experience of a Sámi Parliament or a representative body to provide advice to policymakers remains a relevant consideration for Australia, even if not enshrined in the Constitution.
- 3.87 When articulating the structural underpinnings of the Sámi Parliament, Mr Juuso, President of the Sámi Parliament Finland, stated ‘the provisions of the basic structure of the linguistic and cultural autonomy of the Sámi are laid down in the [*Sámi Parliament*] Act (Finland); that entered into force in 1996’.¹¹² However, as outlined earlier, iterations of a Sámi representative body existed prior to this legislation and constitutional recognition.
- 3.88 Further, the Sámi Parliament’s enduring existence was strengthened through the constitutional recognition of Sámi people which gives rights for ‘the Sámi to maintain and develop our language and culture’ and to ‘self-government’.¹¹³ While this amendment occurred prior to the Declaration being adopted by the UN, the combination of constitutional recognition of these rights, the existence of the Sámi Parliament to negotiate on policy matters, and the UNDRIP Articles being adopted morally and through policy are significant and relevant to Australia.

¹¹¹ Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

¹¹² Mr Tuomas Aslak Juuso, *Committee Hansard*, Canberra, 10 February 2023, p. 24.

¹¹³ Library of Congress, Norway: Parliament Includes Indigenous People Designation in Constitution | Library of Congress (loc.gov), viewed 9 October 2023.

Norway

- 3.89 The Indigenous people of Norway are the Sámi.
- 3.90 To understand the context of Norway, it is important to note the following structures:
- A Sámi Parliament (or Sámediggi) was established in October 1989, which comprises 39 members, who represent Sámi living in Norway,¹¹⁴ and the Norwegian Government is required 'to consult with officially elected constituents [of the Sámi Parliament] on political issues relevant to the Sámi people'.¹¹⁵
 - Section 108 of the Norwegian Constitution guarantees certain rights by stating the government 'shall create conditions enabling the Sámi people to preserve and develop its language, culture and way of life'.
 - The Norway Truth and Reconciliation Commission conducted an inquiry between 2018 and 2023 into the process of 'Norwegianisation' or assimilation and tabled its report in June 2023.¹¹⁶

Approach to implementation

- 3.91 The Norwegian Government has a long history of utilising established laws and mechanisms to protect the rights of the Indigenous people of Norway, the Sámi. A Sámi Parliament (or Sámediggi) was established in October 1989.
- 3.92 The Sámediggi does not have legislative powers but can make regulatory decisions on issues relating to the Sámi people, such as the Sámi school curriculum and some land rights regulations covered under the *Finnmark Act* (Norway).¹¹⁷ The *Finnmark Act* is an Act relating to legal relations and management of land and natural resources in Finnmark, a region in the country's north.
- 3.93 Norway was the first country to ratify International Labour Organization (ILO) 169 in 1990, which meant that it undertook a responsibility to consult the Sámi under Article 6 of that convention.¹¹⁸
- 3.94 During negotiations on the *Finnmark Act* the Norwegian Government and the Sámediggi agreed upon procedures for consultations between state authorities and the Sámediggi. The Norwegian Parliament subsequently approved those procedures in 2005, enshrining them as the normative guidelines that regulate Norway's consultation obligations contained in Article 6 of ILO 169.¹¹⁹

¹¹⁴ Mrs Silje Karine Muotka, President, Sámediggi of Norway, *Committee Hansard*, Canberra, 19 May 2023, p. 25.

¹¹⁵ Australians for Native Title and Reconciliation, *Senate Committee Submission 42*, p. 9.

¹¹⁶ Foreign Policy, 'What Norway's Truth and Reconciliation Commission Report Means for Indigenous Rights' (foreignpolicy.com), viewed 9 October 2023.

¹¹⁷ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 25.

¹¹⁸ Ravna, Ø 2020, 'The Duty to Consult the Sámi in Norwegian Law', *Arctic Review on Law and Politics*, vol. 11, pages 233–255, pages 250–251, <http://dx.doi.org/https://doi.org/10.23865/arctic.v11.2582>, viewed 18 April 2023.

¹¹⁹ Ravna, Ø 2020, 'The Duty to Consult the Sámi in Norwegian Law', *Arctic Review on Law and Politics*, vol. 11, pages 233–255, p. 250–251, <http://dx.doi.org/https://doi.org/10.23865/arctic.v11.2582>, viewed 18 April 2023.

- 3.95 The Australian Human Rights Commission noted that the legislation:
- ...ensures that new measures, legal provisions and consultations procedures are conducted in accordance with the Sámi peoples' right to participate and have a tangible influence in the decision-making procedures that directly affect their interests.¹²⁰
- 3.96 Norway endorsed the adoption of UNDRIP in 2007. In the same year the Sámi presented a draft consultation Act to the Norwegian Government. The draft Act proposed that the Norwegian Government consult the Sámediggi and other Sámi rights holders to gain their conditional free, prior, and informed consent for measures that are particularly important for Sámi culture.¹²¹
- 3.97 In the Nesseby Case, concerning a dispute between Sámi and government over the management of land and renewable natural resources in north-east Finnmark, the Supreme Court of Norway noted that UNDRIP was neither legally binding nor of direct significance to the case,¹²² but did acknowledge the general importance of UNDRIP for its reflection of international law principles.¹²³
- 3.98 The Committee heard that when UNDRIP was adopted by the General Assembly it was the Norwegian Government's view that UNDRIP had already been implemented in Norway as a result of previous undertakings, such as the ratification of the ILO 169 convention and the *Finnmark Act*.¹²⁴ Mr Bjørn Megard, Director General, Department of Indigenous and National Minority Affairs, put the view that the existing international rights instruments, such as ILO 169, are 'often in agreement' with UNDRIP, potentially rendering it unnecessary for the Norwegian Government to rely on UNDRIP alone to inform legislative change.¹²⁵
- 3.99 At its hearing on 31 March 2023, the Committee heard from the President of the Sámi Parliament of Norway that the establishment of the Sámediggi in 1989 has encouraged the Norwegian Government and the Sámi people to consult with each other, and to 'find good faith solutions'.¹²⁶ Director General Megard also told the Committee that consultations between the Norwegian Government and the Sámediggi have led to decisions being 'better, more informed, and then easier to implement'.¹²⁷

¹²⁰ Australian Human Rights Commission, *Senate Committee Submission* 53, p. 8.

¹²¹ Ravna, Ø 2020, 'The Duty to Consult the Sámi in Norwegian Law', *Arctic Review on Law and Politics*, vol. 11, pages 233–255, p. 246, <http://dx.doi.org/https://doi.org/10.23865/arctic.v11.2582>, viewed 18 April 2023.

¹²² Supreme Court of Norway, *Finnmark Estate and others vs. Unjárgga gilisearvi / Nesseby Community Association* HR–2018–456–P, (case no. 2017/860) (Nesseby Case), para. 97, p. 15.

¹²³ Supreme Court of Norway, *Finnmark Estate and others vs. Unjárgga gilisearvi / Nesseby Community Association* HR–2018–456–P, (case no. 2017/860) (Nesseby Case), para. 97, p. 15.

¹²⁴ Mr Bjørn Olav Megard, Director General, Department of Indigenous and National Minority Affairs, *Committee Hansard*, Canberra, 19 May 2023, p. 31.

¹²⁵ Mr Bjørn Olav Megard, *Committee Hansard*, Canberra, 19 May 2023, p. 32.

¹²⁶ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 25.

¹²⁷ Mr Bjørn Olav Megard, *Committee Hansard*, Canberra, 19 May 2023, p. 34.

- 3.100 The right to free, prior and informed consent was raised as an ongoing issue in Norway, with the President of the Sámediggi telling this Committee that ‘free, prior, and informed consent...is one of the most challenging aspects we have with implementing the UNDRIP’.¹²⁸ One example provided to the Committee of FPIC being in doubt was a wind power plant recently established on the grazing land used by the Fosen Sámi.¹²⁹
- 3.101 Despite the iterative approach to implementing UNDRIP, and the formalisation of both ILO 169 and the Sámi Parliament the President of the Sámediggi expressed a desire for an action plan to be developed regarding the full implementation of UNDRIP.¹³⁰ An action plan with the Norwegian government could increase knowledge and acceptance of the Sámi people in Norway, and the prevention of human rights abuses.¹³¹
- 3.102 While FPIC and self-determination were identified as areas of continuing development,¹³² the establishment of the Sámediggi has provided opportunities for the Sámi people living in Norway to confer with the Norwegian Government, and to explore solutions to issues affecting the Sámi.

Lessons for Australia

- 3.103 The powers of the Sámediggi in Norway have evolved and iterated over time since it was first established, with several powers being added to its original capacity to provide advice on any topic it considered to be of interest.¹³³ Many of these changes have been in response to international developments, such as ILO 169 and UNDRIP, and to the general public awareness and understanding of Indigenous rights. This iterative approach is a useful consideration for Australia’s efforts regarding UNDRIP.
- 3.104 Further, the Norwegian Government and President of the Sámediggi talked about the complementary relationship between legislative forces of enacting ILO 169, with the moral force and power of UNDRIP, co-existing with rights in the *Sámi Parliament Act* (Norway).
- 3.105 It provides an interesting context for Australia to consider how existing UN treaties or covenants, that have previously been used to drive policy or legislative reform for Indigenous peoples, may need to be reconsidered as part of implementing UNDRIP. The challenges and balance of relying on previous steps forward, as opposed to shifting towards UNDRIP, were discussed:

Whenever there is a different instrument, a legally binding power, we refer to that instead. That is often ILO convention 169 and ICCPR article 37, which are often more powerful. That is also implemented in Norwegian law at a quasi-constitutional level, so it has more legal power. We don’t actually often

¹²⁸ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 28.

¹²⁹ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 27.

¹³⁰ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 29.

¹³¹ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 29.

¹³² Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 28.

¹³³ Mr Bjørn Olav Megard, *Committee Hansard*, Canberra, 19 May 2023, p. 32.

refer to the UNDRIP but to the older instruments. They are often in agreement. It's not the UNDRIP that is driving it. It's a more recent development.¹³⁴

- 3.106 When asked about the challenges of implementation, the Norwegian Government again talked about the importance of public education and awareness being critical, but did not provide advice on government-led initiatives to support this.¹³⁵
- 3.107 Further, in regard to the iterative development of powers and understanding of UNDRIP, the President of Sámediggi noted she thought additional powers were needed and referenced the upcoming report of the Truth and Reconciliation Commission.¹³⁶ The Commission inquired into Norwegianisation and assimilation, and may have similar effects to the uptake of UNDRIP implementation, particularly given the weight placed on ILO 169 in Norway.

Committee comment

- 3.108 The Committee notes that each country examined has adopted a different approach to implementing UNDRIP in ways that reflect the aspirations of Indigenous peoples and the unique political circumstances in that country. Broadly, this has included legislative change, policy change, the adoption of co-design principles or other means by parliaments or governments to enhance engagement with Indigenous peoples, or the transfer of some statutory decision-making authority to Indigenous groups.
- 3.109 The Committee acknowledges that there is no perfect or 'right' approach to implementing UNDRIP internationally, and that the countries implementing UNDRIP are experiencing both successes and challenges.
- 3.110 The implementation of UNDRIP was recognised by witnesses as an ongoing, long-term process to respond to, and contemplate, changes to arrangements between governments and Indigenous peoples, to allow Indigenous peoples to participate and carry greater management control and responsibility over their lives. The Committee notes that the realisation of the implementation of UNDRIP will be an iterative and enduring process.
- 3.111 Nevertheless, the Committee considers that the approach in any given country will be stronger where Indigenous peoples are deeply engaged in the process; including the early stages of determining the way forward to improve adherence to UNDRIP. This invokes the need to consider the structural and systemic participation of Aboriginal and Torres Strait Islander peoples in the implementation of UNDRIP, in a manner that is respectful of UNDRIP's commitments, such as self-determination.

¹³⁴ Mr Bjørn Olav Megard, *Committee Hansard*, Canberra, 19 May 2023, p. 32.

¹³⁵ Mr Bjørn Olav Megard, *Committee Hansard*, Canberra, 19 May 2023, p. 32.

¹³⁶ Mrs Silje Karine Muotka, *Committee Hansard*, Canberra, 19 May 2023, p. 29.

- 3.112 The Committee notes that in Australia, the Commonwealth, States and Territories all play a role in relation to policies and programs for First Nations peoples, particularly following the 1967 referendum and the addition of section 51(26) to the Australian Constitution. Therefore, it will be important for efforts to implement UNDRIP to have the cooperation and collaboration of States and Territories to be successful. On this note, the Canadian intergovernmental experience is particularly informative and relevant.
- 3.113 The Committee observed that where progress was being made on implementing UNDRIP, it coincided with other activities, such as truth-telling processes, building on recognition, giving new life to modern and historic treaties, or flowing from the advocacy of representative Indigenous bodies.
- 3.114 The Committee notes the relationship between parallel processes and the ability for these to co-exist in a manner that builds public awareness and understanding, and supports iterative progress towards greater national cohesion and unity. On this, the Committee notes the implementation of the Uluru Statement from the Heart could support the application of certain rights in UNDRIP.
- 3.115 The Committee notes that the differing approaches to implementing the Declaration in the jurisdictions considered have resulted in UNDRIP being interpreted differently by nation states. The Committee considers the approach adopted in Canada and proposed in New Zealand through National Action Plans, as recommended by UN guidance bodies, to be of relevance to the Australian context. On this point, the Committee notes that it may be appropriate for the government or another entity to invite EMRIP for a country visit to provide expert advice on processes best adopted in the Australian context.
- 3.116 The Committee recognises the general lack of understanding and limited public awareness of UNDRIP in Australia, as well as its relationship with United Nations human rights covenants and instruments. The Committee notes the unique fact that UNDRIP recognises collective rights for Indigenous peoples and does so particularly in response to the previous international instruments which were less focused on such rights.
- 3.117 The Committee notes that there is no quick approach to implementing UNDRIP. Successful implementation requires coordination among all levels of government, as well as a national strategy of education and an ongoing commitment to respecting the United Nations' international standards for the best-practice human rights enjoyment for all citizens.



4. Ways forward for implementing UNDRIP in Australia

- 4.1 This Chapter discusses options for implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration) in Australia, including by responding to the Uluru Statement from the Heart, processes to consider human rights through the Parliament and the development of a National Action Plan.
- 4.2 As a general theme, the Committee heard the importance of ensuring Aboriginal and Torres Strait Islander people are involved in determining the approach to implementing UNDRIP.

Uluru Statement from the Heart

- 4.3 The *Uluru Statement from the Heart* (the Uluru Statement) calls for Voice, Treaty, and Truth.¹ Specifically, it seeks a constitutionally enshrined Voice and a Makarrata Commission to oversee a process of agreement making and truth-telling.
- 4.4 In the Referendum Council Final Report, the reforms outlined in the Uluru Statement were assessed as being consistent with the standards established under UNDRIP and advancing self-determination.²
- 4.5 As discussed in Chapter 2, the Australian Government in 2022 committed to the implementation of the Uluru Statement in full, with the enshrinement of a Voice to Parliament and the Executive Government as a priority. The *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* passed the Parliament, requiring the referendum for the Voice to be held within 2 to 6 Months.

¹ Synot, E 2019, 'The Universal Declaration of Human Rights at 70: Indigenous rights and the Uluru Statement from the Heart', *Australian Journal of International Affairs*, vol. 73, no. 4, pages 320–325, p. 324, <https://www.tandfonline.com/doi/full/10.1080/10357718.2019.1631252>, viewed 24 May 2023.

² Referendum Council, 2017, *Final Report of the Referendum Council*, https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf, viewed 31 October 2023, p. 29.

- 4.6 The Explanatory Memorandum for the Constitutional Alteration referenced UNDRIP, explaining that the proposed Voice engages Articles 2 (self-determination) and 3 (equality and non-discrimination).³ Further, the Parliamentary Joint Committee on Human Rights (PJCHR) noted that the Constitutional Alteration would promote the rights of Aboriginal and Torres Strait Islander peoples, including self-determination, free, prior and informed consent, the right to equality and non-discrimination'.⁴
- 4.7 On 19 June 2023, the Senate passed a motion that the full implementation of the Uluru Statement from the Heart was a priority.⁵
- 4.8 As mentioned in this report, the referendum required under the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 was held on 14 October 2023. The referendum was unsuccessful, meaning the Uluru Statement's request for a constitutionally enshrined Voice was unfulfilled. Despite this result, this Report reflects some of the evidence that expressed support for this proposal in relation to UNDRIP.
- 4.9 During the inquiry, the Committee heard a great deal of evidence regarding the relationship between the Uluru Statement and UNDRIP, and that the implementation of Voice, Treaty, and Truth supports the application of UNDRIP in Australia.
- 4.10 Submitters to both this inquiry and to the Senate Standing Committee on Legal and Constitutional Affairs, made references to the following UNDRIP Articles when describing the relationship with the Uluru Statement, such as:
- Article 3—the right to self-determination and free determination of political status.
 - Article 4—the right to autonomy or self-government in matters relating to internal and local affairs.
 - Article 5—the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully, if so chosen, in the political, economic, social and cultural life of the state.
 - Article 15—the right to dignity and diversity of cultures, traditions, histories and aspirations, to be appropriately reflected in educational and public information.
 - Article 18—the right to participate in decision-making on matters that affect them through chosen representatives.
 - Article 19—the right to be consulted and cooperated with in good faith by the state, to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures affecting Indigenous peoples.

³ Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, *Explanatory Memorandum*, pages 7–8.

⁴ Parliamentary Joint Committee on Human Rights (PJCHR), 2023, *Report 5 of 2023*, p. 2.

⁵ Senate 2023, *Senate Journals no. 53*, 19 June 2023, pages 1514–1515.

- Article 32—the right to determine and develop priorities and strategies for the development or use of lands or territories and other resources.
 - Article 37—the right to recognition, observance and enforcement of treaties and agreements made with the state.
 - Article 40—the right to accessible, just, fair and prompt resolution procedures for disputes with the nation state and other parties.⁶
- 4.11 The Federation of Victorian Traditional Owners Corporation (FVTOC) stated that implementing the Uluru Statement presents an opportunity for the Australian Government to ‘deliver its commitment to the rights and principles of...UNDRIP’.⁷ In making this statement, FVTOC noted the Uluru Statement’s consistency with UNDRIP articles 3, 4, 18–19 and 37.⁸
- 4.12 The Torres Shire Council drew the Committee’s attention to the connection between the Uluru Statement, the Masig Statement (Malungu Yangu Wakay—The Voice from the Deep) and UNDRIP.⁹ The Masig Statement’s purpose is to:
- ... pursue and achieve self-determination and regional autonomy and, in doing so, preserve our distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which we have a connection under Ailan Kastom and Aboriginal tradition¹⁰
- 4.13 All three of these documents seek to achieve the right to self-determination and participation in decision-making on matters that affect Aboriginal and Torres Strait Islander peoples.
- 4.14 The Torres Shire Council further made the point that ‘[UNDRIP] establishes a universal framework of minimum standards for survival, dignity and well-being of the Indigenous peoples of the world’. The Torres Shire Council is a signatory to the Masig Statement, a supporter of the Uluru Statement, and calls upon the Government to support Aboriginal and Torres Strait Islander peoples in achieving the ambitions of both statements, and enshrine UNDRIP in Commonwealth law.¹¹
- 4.15 Indigenous Allied Health Australia believed that the pursuit of Voice, Treaty, and Truth realises the right to recognition, and observance and enforcement of treaties, agreements and other arrangements between Indigenous peoples and nation states under UNDRIP Article 37(1).¹²

⁶ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007.

⁷ Federation of Victorian Traditional Owners Corporation (FVTOC), *Joint Committee Submission 36*, p. 32.

⁸ FVTOC, *Joint Committee Submission 36*, p. 32.

⁹ The Masig Statement, according to the Torres Shire Council, seeks self-determination, political participation and the free pursuit of economic, social and cultural development for people of the Torres Strait and Northern Peninsula.

¹⁰ Torres Shire Council, *Joint Committee Submission 4:1*, p. 1.

¹¹ Torres Shire Council, *Joint Committee Submission 4*, pages 6, 10.

¹² Indigenous Allied Health Australia, *Joint Committee Submission 12*, p. 4.

- 4.16 The Kimberley Land Council stated, in its submission, that enshrining the Voice in the Australian Constitution ensures, despite changes in governments and policy settings, 'the principles of UNDRIP will remain a feature of the nation now and into the future'.¹³
- 4.17 Academics, and legal and human rights experts agreed with the above evidence provided by Aboriginal and Torres Strait Islander participants in the inquiry. The Australian National University's First Nations Portfolio submitted that the constitutional enshrinement of a Voice 'is an important opportunity to advance the implementation of...UNDRIP in Australia [and] could provide a vital forum for the expression of free, prior and informed consent' (FPIC).¹⁴
- 4.18 Both the Law Council of Australia and Terri Janke and Company submitted that the establishment and enshrinement of a Voice to Parliament 'would be a manifestation of the right to self-determination'¹⁵ under UNDRIP Article 3.
- 4.19 The Castan Centre for Human Rights Law at Monash University noted that, in its view, although the Uluru Statement does not explicitly link itself to UNDRIP, its text is imbued with the principles and rights recognised in UNDRIP in several ways,¹⁶ including that:
- Both are predicated on 'the historic injustices suffered by Indigenous peoples, including from colonisation and dispossession from lands and resources'.¹⁷
 - The Uluru Statement speaks of the potential for Aboriginal and Torres Strait Islander peoples' sovereignty to 'shine through as a fuller expression of Australia's nationhood',¹⁸ and UNDRIP recognises Indigenous peoples' right to self-determination 'which can co-exist with the...international [legal] understanding of the sovereignty of the State' under Articles 3 and 5.¹⁹
 - Constitutional change and structural reform sought by the Uluru Statement, Voice, Treaty and Truth,—is grounded in UNDRIP Articles 18 and 19, which recognise the rights to participate in decision making and to be consulted by states to obtain free, prior and informed consent.²⁰

¹³ Kimberley Land Council, *Joint Committee Supplementary Submission 22*, p. 4.

¹⁴ First Nations Portfolio, Australian National University, *Joint Committee Submission 31*, pages 4, 18.

¹⁵ Law Council of Australia, *Senate Committee Submission 60*, p. 5; Terri Janke and Company, *Joint Committee Submission 10*, p. 5.

¹⁶ Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 7.

¹⁷ Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 7.

¹⁸ Uluru Statement from the Heart, 2017, referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF, viewed 5 October 2023.

¹⁹ Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 7; United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Article 3, Article 5.

²⁰ Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 8; Articles 18 and 19, UNDRIP.

- 4.20 Associate Professor Hannah McGlade an academic, legal practitioner, and member of the UN Permanent Forum for Indigenous Issues, expressed the view that the implementation of the Uluru Statement supports UNDRIP, stating:

...the Uluru process or call for Voice, Treaty, and Truth is very fundamental to the realisation of UNDRIP principles, and constitutional recognition of a national Indigenous representative body that has proper representation throughout Australia is essential to the Declaration.²¹

- 4.21 The inherent connection between the concepts of Voice, Treaty, and Truth and the Declaration was reiterated by the Indigenous peoples who appeared before the Committee. For example, Mrs Muotka, Sámediggi President (Norway), told the Committee that:

We do have present all the pain, tears, anger and frustration even though we have the Sámi Parliament, but we have the possibility to raise our voice and negotiate our politics. I do find that valuable.

- 4.22 Similarly, Sir Taihakurei Durie KNZM emphasised the complementary relationship between a representative voice, treaty and the Declaration in making progress in New Zealand, noting:

We also rely on the Treaty of Waitangi in this country, but it's a rather general document, and the declaration has augmented the treaty with much more specificity.²²

- 4.23 Finally, the Canadian, Finnish and Norwegian experiences all observed that their respective truth and/or reconciliation processes (past and ongoing) were instrumental in building broader awareness and understanding in order to progress action to support the realisation of rights under UNDRIP.

- 4.24 As outlined in the previous paragraphs, submitters to the inquiry stated implementing the Uluru Statement progresses the application of UNDRIP in Australia. However, the Committee were advised that it would not complete implementation of UNDRIP.²³ In other words, the implementation of UNDRIP is an ongoing and evolving process. This point was clearly articulated by the Castan Centre for Human Rights:

...while the UNDRIP and the Uluru Statement cohere with each other, implementing the Uluru Statement is merely the beginning and not the end of ensuring the application of the UNDRIP in Australia.²⁴

²¹ Dr Hannah McGlade, *Committee Hansard*, Canberra, 31 March 2023, p. 32.

²² Sir Taihakurei Durie, *Committee Hansard*, Canberra, 31 March 2023, p. 23.

²³ FAIRA, *Joint Committee Submission 13*; Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 8; NSW Council for Civil Liberties, *Senate Committee Submission 30*, p. 5.

²⁴ Castan Centre for Human Rights, *Joint Committee Submission 14*, p. 8.

Human rights considerations of Parliament

- 4.25 Throughout the course of its inquiry the Committee received a large body of evidence in support of implementing UNDRIP through the scrutiny processes of the Australian Parliament. The primary mechanism for the scrutiny of human rights in Parliament is the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR was established in 2012 under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (the Human Rights Act) and consists of five members from each House of Parliament.²⁵
- 4.26 The PJCHR is required to examine all bills and legislative instruments that come before the Parliament for compatibility with certain human rights and to report to both Houses of Parliament on its findings.²⁶ The term ‘human rights’ is defined in the Human Rights Act to include the rights and freedoms recognised or declared by seven treaty-level human rights instruments. These are some of the international instruments that the Australian Government has signed up to and is therefore accountable to upholding their standards. The human rights instruments are:
- International Convention on the Elimination of all Forms of Racial Discrimination
 - International Covenant on Economic, Social and Cultural Rights
 - International Covenant on Civil and Political Rights
 - Convention on the Elimination of All Forms of Discrimination Against Women
 - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 - Convention on the Rights of the Child
 - Convention on the Rights of Persons with Disabilities.²⁷
- 4.27 The Human Rights Act requires that all bills and disallowable instruments presented to the Parliament be accompanied by a Statement of Compatibility assessing whether the bill or instrument is compatible with the human rights recognised under the Act.²⁸ The Statement of Compatibility is prepared by the relevant Minister or sponsor of the bill or instrument.²⁹

²⁵ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s. 2, s. 5.

²⁶ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s. 7.

²⁷ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s. 3 (definition of ‘human rights’).

²⁸ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss. 8–9.

²⁹ Attorney General’s Department, ‘Statements of Compatibility’, <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility#:~:text=What%20must%20a%20Statement%20of,treaties%20which%20Australia%20has%20ratified>, viewed 31 October 2023.

- 4.28 Currently, only the legally binding human rights instruments are considered formally in the PJCHR's mandate for the scrutiny of legislation.³⁰ The Statement of Compatibility is often the starting point for the PJCHR's process. The human rights implications are therefore considered broadly for all citizens, and there is no formal mechanism to consider the impact for the unique experience of First Peoples.
- 4.29 It should also be noted that these assessments are undertaken from the perspective of the Parliament and government (i.e. not necessarily by First Nations people), which can lead to the same issues that arise when First Nations people do not have a direct say on such matters. Mr Tony McAvoy SC described this:
- I find that the ability of non-First Nations people to understand the way that the machine of government and the laws move against us to be rather limited because they see it through the lens of non-Indigenous people. But when you are on the receiving end you can see it very clearly.³¹
- 4.30 The Committee observed that while UNDRIP is not a formal consideration in these processes, the PJCHR has at different stages used UNDRIP as an interpretive tool. For example, the PJCHR Annual Report 2020 noted:
- While this Declaration is not included in the definition of 'human rights' ... the Declaration provides clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of Indigenous peoples.³²
- 4.31 Similarly, Emeritus Professor Altman drew the attention of the Committee to the fact that the Declaration had been taken into account on several occasions, including six bills cited in the 2020 Annual Report.³³
- 4.32 The Declaration has been used by the PJCHR even more recently in consideration of the *Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023*, where it considered the Declaration's Articles, specifically those related to self-determination, equality and non-discrimination.³⁴
- 4.33 Ultimately, the consideration of UNDRIP occurs informally, rather than as one of the express human rights instruments.³⁵ It has been used as an interpretative tool in an ad hoc, rather than systematic, way, requiring either the government or PJCHR to determine UNDRIP as relevant, rather than it being a requirement.

³⁰ Ms Anne Sheehan, *Committee Hansard*, Canberra, 8 June 2023, p. 6.

³¹ Mr Tony McAvoy, *Committee Hansard*, Canberra, 8 June 2023, p. 24.

³² PJCHR, 2020, *Annual Report 2020*, p. 32.

³³ Emeritus Professor Jon Altman, *Senate Committee Submission 44*, pages 4–5.

³⁴ Mr David Lewis, General Counsel (Constitutional Law), Attorney General's Department, *Committee Hansard*, Canberra, 8 June 2023, p. 6.

³⁵ Dr Watchirs, *Committee Hansard*, Canberra, 31 March 2023, p. 8.

- 4.34 The Committee heard from human rights organisations and academics such as the Australian Human Rights Commission,³⁶ ACT Human Rights Commission,³⁷ and Professor Maguire,³⁸ that UNDRIP should be included in the Human Rights Act so that it can be considered formally through the scrutiny processes.
- 4.35 At its hearing on 31 March 2023, Mr Darren Dick, Policy Executive, Human Rights and Strategy, Australian Human Rights Commission, told the Committee about the Commission's long-standing view on the matter of UNDRIP's consideration by the PJCHR, stating:
- One [legislative amendment] which we advocated on behalf of for a long time is adding the UNDRIP to the parliamentary scrutiny process for the Joint Committee on Human Rights. ... We do think it would be a lack for it not to be included in that parliamentary scrutiny process which also requires consideration by departments when they are developing statements of compatibility with human rights. We have been making that recommendation since the inception of that committee, so for 10 years plus.³⁹
- 4.36 A large number of submissions to the inquiry also put to the Committee that the definition of 'human rights' under the Human Rights Act should be amended to include, as a consideration for the PJCHR, UNDRIP.⁴⁰ Emeritus Professor Jon Altman, Australian National University (ANU) School of Regulation and Global Governance further stated:
- A flow on benefit of such an amendment will be the requirement that any legislation introduced into the Federal Parliament will require a statement of compatibility with human rights that is inclusive of UNDRIP. Hopefully such inclusiveness will also ensure that both Indigenous-specific policy and policy that disproportionately impacts on First Nations people is crafted to ensure it is UNDRIP compatible even before it is drafted into legislation.⁴¹
- 4.37 Similarly, during the UN Human Rights Council's third Universal Periodic Review of Australia in 2021, the Netherlands recommended that Australia include UNDRIP in the Human Rights Act.⁴² The Australian Government response to the recommendation in 2021 states that it '[n]otes but will not consider further [the recommendation] at this time'.⁴³

³⁶ *Committee Hansard*, Canberra, 31 March 2023, p. 16.

³⁷ *Committee Hansard*, Canberra, 31 March 2023, p. 8.

³⁸ *Committee Hansard*, Canberra, 10 March 2023, p. 32.

³⁹ Mr Darren Dick, *Committee Hansard*, Canberra, 31 March 2023, p. 16.

⁴⁰ For example, see: Save the Children, *Senate Committee Submission 3*, p. 4; ACT Human Rights Commission, *Senate Committee Submission 5*, p. [8]; Law Council of Australia, *Senate Committee Submission 60*, p. 5.

⁴¹ Emeritus Professor Jon Altman, *Senate Committee Submission 44*, p. 9.

⁴² Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/47/8, 24 March 2021, p. 23.

⁴³ Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/47/8/Add.1, 2 June 2021, p. 3.

National Action Plan

- 4.38 Throughout this inquiry, the development of some form of an action plan appeared as a frequent recommendation to guide domestic implementation of UNDRIP. Most notably, the World Conference for Indigenous Peoples recommended the co-development of an Action Plan to guide the implementation of UNDRIP.⁴⁴ Throughout this inquiry, the development of some form of an Action Plan appeared as a frequent recommendation.
- 4.39 During the UN Human Rights Council's third Universal Periodic Review of Australia in 2021, both Bangladesh and Namibia made explicit recommendations for Australia to develop a National Action Plan to implement UNDRIP.⁴⁵ In its response to those recommendations the Australian Government of the day stated that it 'notes but will not consider [the recommendations] further at this time'.⁴⁶
- 4.40 As outlined in Chapter 2, Action Plans have been explored as a means of implementing the Declaration in both Canada and New Zealand, with the former legislating a requirement to negotiate an Action Plan within a certain timeframe, and the latter appearing to adopt a policy-based approach to negotiating an Action Plan.
- 4.41 Developing an Action Plan by legislative, rather than non-legislative policy-based means offers relative advantages. Legislation may be binding on the government, can provide firm deadlines for attaining certain steps in the development of an Action Plan, may lend the force of law to obligations under the action plan and provide for parliamentary scrutiny of its implementation.
- 4.42 Policy based approaches may offer greater flexibility to parties involved in the co-development to decide on terms of consent, remedies, and timeframes for developing an Action Plan, but would not strictly have the parliamentary accountability that comes from legislating the requirement to develop a plan. For example, in terms of flexibility on timelines, the Committee heard that the New Zealand Action Plan process was 'expressly paused', and an interim education and engagement process put in place to socialise the UNDRIP with the public.⁴⁷ However, it was noted that it was a one-sided decision to pause this process, and it is not clear when this process will commence again.
- 4.43 The exact contents of an Action Plan are open to agreement between a nation state and Indigenous peoples. However, it is generally accepted that an Action Plan should be negotiated with Indigenous peoples and set out tangible commitments by government to improve adherence to UNDRIP following an assessment of the current gaps. This was the approach adopted in both Canada and New Zealand.

⁴⁴ Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, UN Doc A/69/L.1*, 15 September 2014, p. 2.

⁴⁵ Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/47/8, 24 March 2021, p. 23.

⁴⁶ Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/47/8/Add.1, 2 June 2021, p. 3.

⁴⁷ Professor Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 24.

- 4.44 For example, to give effect to the legislative requirement to co-develop an action plan, the Canadian Government:

...launched a 'two-phased, broad, inclusive and distinctions based engagement process with Indigenous peoples to advance the implementation of the act. The first phase involved identifying priorities and potential measures for a draft action plan, while the second phase will consist of validating proposed measures and identifying any gaps and additional measures.⁴⁸

- 4.45 Whereas New Zealand established a governance structure, somewhat like a steering committee, which included the national Iwi chairs and four ministers to work in partnership on an action plan and oversee more than 70 seminars and workshops.⁴⁹

- 4.46 In terms of the content of an Action Plan, the Hon Murray Rankin KC MLA, British Colombian Minister of Indigenous Relations and Reconciliation, described the Province's Action Plan to the Committee at its hearing on 31 March 2023, stating:

That Action Plan consists of 89 tangible, measurable, achievable, specific matters—not, if you will, generalities; but, rather, specific actions—that engage every single one of our ministries. That's, I think, central, and the scheme of it is really quite simple. There must be an annual report on how we're doing, and that annual report for the five-year plan it involved will hold us to account. Everything is co-developed with the Indigenous leadership in British Columbia, so it's not just the government saying, 'What do you think?'. Every action was co-developed, and we work together going forward.

- 4.47 Co-design or co-development of an Action Plan between government and Indigenous peoples was consistently raised as an essential aspect of any development process for an Action Plan. This reflects the rights set out in the Declaration for self-determination and autonomy or self-governance as well as the need for FPIC.⁵⁰

- 4.48 It was raised that successful implementation of UNDRIP requires an approach that is negotiated with, and led by, First Nations people. For example, Ms Kacey Teerman, Indigenous Campaigns Associate, Amnesty International, stated:

For the government to do this in any kind of meaningful way, it's a thing that First Nations people have been saying since colonisation. First Nations people need to lead this work. They were instrumental in making UNDRIP. When you don't let First Nations people lead work about our own communities, it fails. You can see that across every single area—health, education, everything. For the government to do this properly, it needs to be led by First Nations people. They need to be assured that it will be implemented in a meaningful way that isn't at the whim of government.⁵¹

⁴⁸ Mr Smith, *Committee Hansard*, Canberra, 10 February 2023, p. 8.

⁴⁹ Professor Charters, *Committee Hansard*, Canberra, 31 March 2023, p. 24.

⁵⁰ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Article 4, Article 10.

⁵¹ Ms Kacey Teerman, *Committee Hansard*, Canberra, 19 May 2023, p. 23.

- 4.49 Similarly, Mr Darren Dick, Policy Executive, Human Rights and Strategy, Australian Human Rights Commission, also said:

If we're going to say that the rights of Indigenous people are important, then we should have a national articulation of that which governments are taken to account for. That should of course be negotiated with Indigenous people for what the content of that is.⁵²

- 4.50 A National Action Plan could also act as a key reliable point of reference for how the Government works with Aboriginal and Torres Strait Islander peoples. On this, Mr Darren Dick, Senior Policy Executive, Australian Human Rights Commission, told the Committee that:

...[I]f you have a national action plan from a declaration, you have a clear set of commitment processes from government as to how they will engage of Indigenous rights and commitments as to what they will do—commitments to co-design all these sorts of things. It will make a very significant difference.⁵³

- 4.51 Action Plans have also received considerable endorsement from fora, institutions, and mechanisms. On whether an action plan would be an appropriate mechanism to meet Australia's obligations under UNDRIP, Dr Hannah McGlade, Member of the United Nations Permanent Forum on Indigenous Issues, told the Committee that:

Yes, absolutely. I think we should be, obviously, looking at the British Columbia approach through legislation as well, with the level of accountability that that then exacts in terms of implementing UNDRIP. The World Conference on Indigenous Peoples was, over a decade ago, urging states to implement national action plans. I know it was a live issue when I was a fellow at the OHCHR in 2016. We really haven't taken any action, which is rather extraordinary.⁵⁴

- 4.52 Similarly, in her submission to the inquiry, Dr Terri Janke, Solicitor Director, Terri Janke and Company (TJC), stated that:

As prioritised by both the Canadian and New Zealand government, Australia should seek to develop a national action plan to facilitate the implementation of the UNDRIP as a matter of national significance.⁵⁵

⁵² Mr Darren Dick, *Committee Hansard*, Canberra, 31 March 2023, p. 21.

⁵³ Mr Darren Dick, *Committee Hansard*, Canberra, 31 March 2023, p. 17.

⁵⁴ Dr Hannah McGlade, *Committee Hansard*, Canberra, 31 March 2023, p. 35.

⁵⁵ Terri Janke and Company, *Joint Committee Submission 10*, p 4.

- 4.53 The Committee heard how implementing UNDRIP may assist in fulfilling the objectives in the *National Agreement on Closing the Gap*. At its hearing on 31 March 2023, Dr Helen Watchirs OAM, President and Human Rights Commissioner, ACT Human Rights Commission, discussed how a national action plan may form part of a centralised approach from Federal Government in Closing the Gap, stating:

Our federalised system has much to commend it, but it has not resulted in closing the gap. It has resulted in buck-passing and loopholes. There has been a service delivery limbo for several decades for Aboriginal and Torres Strait Islander peoples. We hope a centralised approach, on the advice of Aboriginal people, to legislate and implement UNDRIP through a National Human Rights Act and action plan, as well as cabinet and a treaty for all Australians, could pave the way to close these gaps.⁵⁶

- 4.54 Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, Attorney General's Department, raised the need to consider the interaction between a National Action Plan and other plans and policies:

One of the issues to consider would be how it interacts with other action plans. We have mentioned the National Agreement on Closing the Gap, which covers a variety of the principles that are reflected in UNDRIP, and there are the priority reforms that are occurring under that process. I think it would be important to look at what is the overlap with those frameworks that are already in place.⁵⁷

Public awareness and education

- 4.55 Throughout the inquiry, a recurrent theme from international experiences and the expert opinion was the importance of ensuring the general public understood human rights, UNDRIP and the unique domestic experience of colonisation.
- 4.56 Ms Sam Klintworth, National Director of Amnesty International Australia, advised the Committee that education campaigns have led to more successful implementation:

In jurisdictions where the UNDRIP has been more effectively implemented, there have been very coordinated campaigns that include community education, human rights education more broadly as well as addressing the human rights violations that are currently occurring in contravention of the declaration.⁵⁸

⁵⁶ Dr Helen Watchirs OAM, *Committee Hansard*, Canberra, 31 March 2023, p. 8.

⁵⁷ Ms Anne Sheehan, *Committee Hansard*, Canberra, 8 June 2023, p. 5.

⁵⁸ Ms Klintworth, *Committee Hansard*, Canberra, 19 May 2023, p. 22.

4.57 Professor Claire Charters, who spoke to the Committee along with members of Te Kaunihera Māori o Aotearoa (New Zealand Māori Council) noted they too need more community education around UNDRIP:⁵⁹

...the socialisation conscientisation idea [is that] there needs to be more knowledge in our communities about the declaration and what it is.⁶⁰

4.58 The Hon Murray Rankin KC MLA, Minister of Indigenous Relations and Reconciliation, British Columbia, stated that:

I can tell you that education is at the core of so much of what we need to do. I'm sure you would agree that the Australian situation is the same. I am proud to say that one of the things in our action plan that I referred to earlier is that we'll change our curriculum in our high schools to make sure that no child will ever graduate from high school without knowing the real history of our province and our country, including the residential school experience.⁶¹

4.59 TJC told the Committee that the lack of education around the rights affirmed by UNDRIP 'provides an impediment to [the] application of UNDRIP'.⁶² TJC referenced the development of and use of their True Tracks framework and principles by themselves, Indigenous and non-Indigenous peoples as a best practice guide for consultation and benefit-sharing, and as an education tool.⁶³

4.60 TJC made the following recommendations to improve awareness, understanding and adherence across government and private sectors and Indigenous-led organisations:

- implement UNDRIP adherence guidelines for government and private sectors, such as the UN's *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*⁶⁴ and the *Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples*,⁶⁵ and
- develop an UNDRIP guide to assist Indigenous-led organisations and communities in understanding UNDRIP and utilising the Declaration to progress negotiations and projects, with particular reference to FPIC, such as the *Community Guide to the UN Declaration on the Rights of Indigenous Peoples*.⁶⁶

⁵⁹ Professor Claire Charters, Te Kaunihera Māori o Aotearoa, New Zealand Māori Council, *Committee Hansard*, Canberra, 31 March 2023, pages 24, 27.

⁶⁰ Professor Claire Charters, Te Kaunihera Māori o Aotearoa, New Zealand Māori Council, *Committee Hansard*, Canberra, 31 March 2023, p. 27.

⁶¹ Hon. Murray Rankin KC MLA, *Committee Hansard*, Canberra, 31 March 2023, p. 7.

⁶² Mr Adam Broughton, Solicitor, Terri Janke and Company, *Committee Hansard*, Canberra, 8 June 2023, p. 18.

⁶³ Mr Adam Broughton and Ms Neane Carter, Solicitors, Terri Janke and Company, *Committee Hansard*, Canberra, 8 June 2023, p. 19.

⁶⁴ United Nations 2013, *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*, <https://unglobalcompact.org/library/541>, viewed 16 June 2023.

⁶⁵ Global Compact Network Australia, KPMG & University of Technology Sydney 2020, *The Australian business guide to implementing the UN Declaration on the Rights of Indigenous Peoples*, https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf, viewed 16 June 2023.

⁶⁶ TJC, *Joint Committee Submission 10*, pages 5–6; Australian Human Rights Commission & National Congress of Australia's First Peoples 2010, *Community Guide to the UN Declaration on the Rights of*

- 4.61 TJC further stated that, in addition to developing guidelines and increasing awareness across the government and private sectors, the wider-Australian community would also benefit from improved awareness and understanding of UNDRIP, noting that:

With improved awareness and education on the aspirations, responsibilities and practices of the UNDRIP, the Australian public could champion for greater adherence across various jurisdictions and sectors.⁶⁷

- 4.62 The North Australian Aboriginal Justice Agency (NAAJA) has put the view that to effectively implement and improve adherence to UNDRIP through legal and policy reforms, a public awareness education campaign should also be initiated.⁶⁸ NAAJA recommended that a campaign should focus on UNDRIP principles and Government planned policy objectives for adherence.⁶⁹

- 4.63 The Law Council of Australia additionally highlighted the importance and 'potentially transformative role of education in promoting the application of UNDRIP rights and principles in Australia'.⁷⁰ The Law Council of Australia further noted that establishing a base knowledge and understanding of UNDRIP principles and Indigenous rights should be a central objective of government and private institutions and industries.⁷¹

- 4.64 Further, witnesses suggested to the committee that a greater understanding of UNDRIP can assist a Nation State to come together as a whole. For example, Mr Keith Smith, Director General, United Nations Declaration Act Implementation Secretariat, Department of Justice, Canada, told the Committee:

...we've talked about education as well more broadly, really sort of explaining how the implementation of rights can actually lead to very positive change and not just for Indigenous peoples but for the country as a whole.⁷²

- 4.65 Likewise, Ms Sashia Leung, Director of Communications and International Relations, British Columbia Treaty Commission, when discussing the challenges of implementing UNDRIP talked about all levels of government raising awareness:

We're all still raising a lot of that awareness, whether it's the federal government, the provincial government, the commission. I think understanding the declaration and knowing that it really can be a unifying tool.⁷³

Indigenous People, <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/community-guide-un>, viewed 16 June 2023.

⁶⁷ TJC, *Joint Committee Submission 10*, p. 6.

⁶⁸ North Australian Aboriginal Justice Agency (NAAJA), *Senate Committee Submission 47*, p. 15.

⁶⁹ NAAJA, *Senate Committee Submission 47*, p. 15.

⁷⁰ Law Council of Australia, *Senate Committee Submission 60*, p. 28.

⁷¹ Law Council of Australia, *Senate Committee Submission 60*, p. 28.

⁷² Mr Smith, *Committee Hansard*, Canberra, 10 February 2023, p.14.

⁷³ Ms Leung, *Committee Hansard*, Canberra, 10 February 2023 p. 20.

- 4.66 In a domestic context, witnesses also advised the need to improve awareness of Australia's history as foundational to implementation of UNDRIP. For example:

I think that the mindset that we're in, the relationship we have, the disadvantage that First Nations people still experience, the injustice that they can still experience, certainly all stems from a prevailing inaccurate view of Australia's history.⁷⁴

Additional and complementary approaches

- 4.67 Along with constitutional, legislative and policy options for implementing UNDRIP in Australia outlined above, several other approaches were proposed by inquiry stakeholders. These proposals included a compliance audit of current legislation and government policies and programs; Closing the Gap; and protecting cultural heritage and traditional knowledge.

Compliance audit of legislation against UNDRIP Articles

- 4.68 During the inquiry submitters and witnesses raised the issue that current legislative frameworks do not meet UNDRIP standards,⁷⁵ and that existing legislation and policies have not been reviewed for compliance with the Declaration.⁷⁶
- 4.69 Mr McAvoy SC noted the lack of an audit of existing legislation and government policies in the years since the Australia endorsed UNDRIP:

One thing that one would have thought would have occurred in that period is that the national legislation in particular would have been audited against that declaration, at least to know where the inconsistencies lie. The fact that that hasn't been done, to me, discloses a great lack of commitment to the principles set out in the declaration.⁷⁷

⁷⁴ Mr Andersen, *Committee Hansard*, Canberra, 19 May 2023, p. 11.

⁷⁵ Centre for Law and Social Justice, *Senate Committee Submission 36*, p. 21.

⁷⁶ For example, see: UNSW Law Society, *Senate Committee Submission 4*, p. [4].

⁷⁷ Mr Tony McAvoy SC, *Committee Hansard*, Canberra, 8 June 2023, p. 22.

- 4.70 Mr McAvoy SC noted that, while an audit would require a considerable amount of work, an existing government agency or the Australian Human Rights Commission could undertake this work if properly resourced.⁷⁸ Mr McAvoy SC suggested there could be a host of benefits to conducting such an audit, including the introduction of a bill similar to Canada's federal UNDRIP Act requiring harmonisations of laws with the Declaration.⁷⁹
- 4.71 The ANU's First Nations Portfolio (FNP) recommended that the Australian Law Reform Commission be appointed to review and report on the consistency of current legislation with UNDRIP. FNP noted that this work should also include 'articulating the scope and substantive meaning of key rights and developing an assessment standard to address ongoing issues of identifying inconsistencies with the UNDRIP in Australia'.⁸⁰ In support of this recommendation, Professor Peter Yu, FNP Vice-President, advised the Committee that as pre-existing legal frameworks interact and intersect with fundamental rights and interests a review would '...be able to adequately address the inadequacies of existing statutes and practices'.⁸¹
- 4.72 Similarly, World Vision and Voices of Influence Australia put that current legislation and policies should be reviewed for adherence against UNDRIP principles.⁸² FVTOC suggested that the Government utilise the examples set by Canada and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), to review existing laws and policies related to Indigenous peoples.⁸³
- 4.73 Change the Record submitted that such a review should focus on laws and policies identified by Aboriginal and Torres Strait Islander communities, Indigenous-led organisations and the UN Special Rapporteur on the Rights of Indigenous Peoples.⁸⁴
- 4.74 NAAJA went further, recommending that all existing and proposed legislation and policies be reviewed against an impact statement prepared by an independent Indigenous advisory group to ensure there is no adverse impact on Aboriginal and Torres Strait Islander peoples.⁸⁵

⁷⁸ Mr Tony McAvoy SC, *Committee Hansard*, Canberra, 8 June 2023, p. 24.

⁷⁹ Mr Tony McAvoy SC, *Committee Hansard*, Canberra, 8 June 2023, pages 22–23.

⁸⁰ Australian National University First Nations Portfolio (FNP), *Joint Committee Submission 31*, p. 6.

⁸¹ Professor Peter Yu, Vice-President, FNP, *Committee Hansard*, Canberra, 10 March 2023, p. 29.

⁸² World Vision, *Senate Committee Submission 81*, p. 4; Voices of Influence Australia, *Senate Committee Submission 9*, p. 3.

⁸³ FVTOC, *Senate Committee Submission 65*, p. 3; United Nations, *State of the World's Indigenous Peoples: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 2019, p. 14; s. 41 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁸⁴ Change the Record, *Senate Committee Submission 16*, pages 6–7.

⁸⁵ NAAJA, *Senate Committee Submission 47*, p. 15.

Cultural heritage and traditional knowledge protection

- 4.75 There are several UNDRIP Articles that affirm Indigenous peoples' rights to culture. For example, Articles 11 and 12 affirm the right to practise and revitalise cultural traditions and customs, along with the provision of effective mechanisms for the return and redress of cultural, intellectual, religious and spiritual property taken without free, prior and informed consent, access to cultural sites and the repatriation of ceremonial objects and human remains.⁸⁶ Article 31 affirms the right to 'maintain, control, protect and develop...cultural heritage, traditional knowledge and traditional cultural expressions' including the right to control, protect and develop intellectual property.⁸⁷
- 4.76 The Kimberley Aboriginal Law and Cultural Centre (KALACC) contends that the Government is not currently meeting its obligations under Articles 11 and 12 by failing to adequately enable and facilitate access to, and the repatriation of, ceremonial objects and human remains in the possession of Commonwealth institutions.⁸⁸ KALACC recommends the Commonwealth, State, and Territory Governments implement recommendations from the 2021 report *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia the Best Practice Standards in Indigenous cultural heritage management and legislation* (Dhawura Ngilan).⁸⁹ Dhawura Ngilan was developed by Australian national, State and Territory heritage bodies and presented to the Heritage Chairs of Australia and New Zealand, to provide a framework for 'improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia'.⁹⁰
- 4.77 KALACC suggested the Government implement the following three Dhawura Ngilan recommendations to 'make considerable progress towards meeting its obligations under Articles 11 and 12':⁹¹
- amend its policy on Indigenous repatriation of cultural materials to align with current governmental practices, working with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and communities to coordinate repatriation approaches⁹²

⁸⁶ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Articles 11–12.

⁸⁷ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007, Article 31.

⁸⁸ Kimberley Aboriginal Law and Cultural Centre (KALACC), *Joint Committee Supplementary Submission 3.1*, pages 3–4.

⁸⁹ KALACC, *Joint Committee Supplementary Submission 3.1*, pages 3–4.

⁹⁰ Department of Climate Change, Energy, the Environment and Water 2022, 'Heritage Chairs and Officials of Australia and New Zealand', <https://www.dcceew.gov.au/parks-heritage/heritage/organisations/hcoanz>, viewed 9 June 2023.

⁹¹ KALACC, *Joint Committee Supplementary Submission 3.1*, pages 3–4.

⁹² KALACC, *Joint Committee Supplementary Submission 3.1*, pages 3–4; Heritage Chairs of Australia and New Zealand 2021, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia the Best Practice Standards in Indigenous cultural heritage management and legislation*, Department of Climate Change, Energy, the Environment and Water, p. 23, <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>, viewed 9 June 2023.

- ‘work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way’⁹³
 - recognise and prioritise the rights of Aboriginal and Torres Strait Islander peoples to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors⁹⁴
- 4.78 The New South Wales Aboriginal Land Council also stated to the Committee that the Commonwealth Government ‘is currently failing to ensure the rights of Aboriginal and Torres Strait Islander peoples to the protection of their culture and the repatriation of their human remains’ under UNDRIP Articles 11 and 12. The ALC recommended that:
- all artefacts, cultural and ceremonial items, and ancestral remains be returned unconditionally
 - all institutions, including universities recognise Aboriginal and Torres Strait Islander communities’ right to be involved in all stages of the repatriation process
 - the development of a whole-of-government approach to the provision of access and culturally appropriate presentation of cultural materials.⁹⁵
- 4.79 TJC also advocated for acknowledgement of these rights affirmed by UNDRIP. To progress compliance with UNDRIP, TJC made several recommendations:
- improve cultural heritage protection by implementing the recommendations of Dhawura Ngilan
 - improve the recognition of Indigenous cultural intellectual property (ICIP) and best practice guides such as AIATSIS’s *Code of Ethics for Aboriginal and Torres Strait Islander Research*⁹⁶ and Screen Australia’s *Pathways and Protocols: A filmmaker’s guide to working with Indigenous people, culture and concepts*⁹⁷
 - establish a National Indigenous Cultural Authority to administer government and private sector engagement with and use of ICIP.⁹⁸

⁹³ KALACC, *Joint Committee Supplementary Submission 3.1*, pages 3–4; Heritage Chairs of Australia and New Zealand 2021, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia the Best Practice Standards in Indigenous cultural heritage management and legislation*, Department of Climate Change, Energy, the Environment and Water, p. 23, <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>, viewed 9 June 2023.

⁹⁴ KALACC, *Joint Committee Supplementary Submission 3.1*, pages 3–4; Heritage Chairs of Australia and New Zealand 2021, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia the Best Practice Standards in Indigenous cultural heritage management and legislation*, Department of Climate Change, Energy, the Environment and Water, p. 24, <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>, viewed 9 June 2023.

⁹⁵ NSW ALC, *Senate Committee Submission 49*, p. 7.

⁹⁶ AIATSIS 2020, *Code of Ethics for Aboriginal and Torres Strait Islander Research*, aiatsis-code-ethics-jan22.pdf, viewed 16 June 2023.

⁹⁷ Terri Janke 2009, *Pathways and Protocols: A filmmaker’s guide to working with Indigenous people, culture and concepts*, Screen Australia, <https://www.screenaustralia.gov.au/getmedia/16e5ade3-bbca-4db2-a433-94bcd4c45434/Pathways-and-Protocols.pdf>, viewed 6 October 2023.

⁹⁸ TJC, *Joint Committee Submission 10*, pages 3, 6–7.

- 4.80 In its submission to the inquiry, the South Australia Government highlighted the efforts it has undertaken to align its repatriation efforts with UNDRIP, stating:

Guided by the UNDRIP, the South Australian Museum is actively correcting the wrongs of the past. With support from both the SA and Federal Governments, the South Australian Museum is leading Australia in Aboriginal and Torres Strait Islander repatriation policy and practice on behalf of all South Australians. The South Australian Museum has adopted the UNDRIP as the foundation of its repatriation of Aboriginal ancestral remains, secret sacred objects and secular cultural heritage policies. Developed in consultation with Aboriginal leaders and communities, the policies reference UNDRIP article 12 and have recently facilitated repatriation of over 600 Aboriginal ancestral remains, 15 secret sacred objects and two secular artefacts to Aboriginal communities across Australia.⁹⁹

- 4.81 The South Australia Government has also recently introduced a bill to amend the *Aboriginal Heritage Act 1988* (SA) (the Act) intended to strengthen heritage protection laws in the State through ‘enhanced penalty provisions under the Act, including by introducing powers for the courts to make remedial, compensation and profit forfeiture orders against offenders who have breached the Act’s offences of damaging Aboriginal heritage’.¹⁰⁰

Development of a Commonwealth Human Rights Act

- 4.82 Throughout its inquiry the Committee received evidence on the need for greater human rights codification in Australia. The primary method suggested to the Committee for achieving this was through the creation of a federal Human Rights Act, similar to legislation adopted in the Australian Capital Territory (ACT) in 2004,¹⁰¹ Victoria in 2006,¹⁰² and Queensland in 2019.¹⁰³ State and Territory Human Rights Acts are discussed in Chapter 2.
- 4.83 The PJCHR is currently inquiring into Australia’s human rights framework. There was also an inquiry undertaken in 2008 by the National Human Rights Consultation Committee, chaired by Father Frank Brennan, which recommended Australia adopt a federal Human Rights Act.¹⁰⁴
- 4.84 The State and Territory Human Rights Acts in Australia adopt specific international human rights instruments as legal standards, create a commission to oversee those rights, and establish a framework for parliamentary scrutiny to ensure compatibility of new laws with the adopted human rights standards. While the Commonwealth does have a human rights commission (the AHRC) and parliamentary scrutiny framework

⁹⁹ South Australian Government, *Joint Committee Supplementary Submission 49*, p. 5.

¹⁰⁰ South Australian Government, *Joint Committee Supplementary Submission 49*, p. 7.

¹⁰¹ *Human Rights Act 2004* (ACT); (also see *Human Rights Commission Act 2005* (ACT)).

¹⁰² *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁰³ *Human Rights Act 2019* (Qld).

¹⁰⁴ Australian Parliament, *Parliament and the protection of human rights*, Parliament and the protection of human rights – Parliament of Australia (aph.gov.au), viewed 9 October 2023.

(primarily exercised by the PJCHR),¹⁰⁵ it lacks a standalone statute which explicitly adopts international human rights standards as legally binding individual rights and freedoms.¹⁰⁶

- 4.85 The AHRC supports the adoption of a federal Human Rights Act and submitted that UNDRIP could be made a consideration under such as statute.¹⁰⁷ In its submission to the inquiry the AHRC recommended that:

A Human Rights Act should be passed which implements rights within the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, alongside key Declaration rights and principles, into Australian domestic law. The contents of the Human Rights Act as it relates to the Declaration should be developed in consultation with First Nations peoples.¹⁰⁸

- 4.86 On the effect of adopting a federal Human Rights Act the Law Council of Australia stated that, in its view:

[A] federal Human Rights Act would establish a strong ethos of respect for the fundamental rights of all Australians across the public and private sectors, including areas in which systemic racial discrimination has been found, such as within police, prisons, courts, aged care, disability services, child services, schools and hospitals. It would also foster a better parliamentary understanding of human rights, and, by extension, certain federal laws such as the *Racial Discrimination Act 1975* (Cth).¹⁰⁹

- 4.87 At its hearing on 31 March 2023, Dr Helen Watchirs OAM, President and Human Rights Commissioner, ACT Human Rights Commission, drew attention to the fact that Australia does not have a Commonwealth Human Rights Act compared to Canada and New Zealand. Stating that:

... Canada has a constitutional human rights act, and New Zealand has a statutory one, and we're the three nations with big issues in relation to our treatment of First Peoples. I think that's been very valuable in those countries, and it's a missing link in Australia. We don't have that positive obligation to act and make decisions consistently with human rights, which we do now at the local level in three states. I really like the Free and equal position paper talking about having a participation right to bring to life UNDRIP through having a new Human Rights Act.¹¹⁰

¹⁰⁵ *Australian Human Rights Commission Act 1986* (Cth); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

¹⁰⁶ Australia has reflected international human rights in its adoption of the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), and *Age Discrimination Act 2004* (Cth).

¹⁰⁷ AHRC, *Senate Committee Submission 53*, p. 26.

¹⁰⁸ AHRC, *Senate Committee Submission 53*, p. 28.

¹⁰⁹ Law Council of Australia, *Senate Committee Submission 60*, p 17.

¹¹⁰ Dr Helen Watchirs OAM, *Committee Hansard*, Canberra, 31 March 2023, p. 11.

Committee comment

- 4.88 The Committee heard from most witnesses and submissions about the strong alignment between the Uluru Statement from the Heart and the United Nations Declaration on the Rights of Indigenous Peoples.
- 4.89 The Committee notes the importance of self-determination and participation in decision-making, through free prior and informed consent, as well as First Peoples' perspectives being central to the deliberation and development of policies, programs, legislation and decisions made about matters that affect Aboriginal and Torres Strait Islander peoples. The Committee notes that this is consistent with UNDRIP, particularly Articles 3, 18, 19 and 23. The Committee also recognises that facilitating formal mechanisms or institutions for this to occur is consistent with UNDRIP, particularly Articles 3, 4, 5, 18 and 19.
- 4.90 A constitutionally enshrined Voice was one proposed mechanism to give effect to a representative body of Aboriginal and Torres Strait Islander peoples for such a purpose. The Committee acknowledges and accepts the outcome of the referendum held on Saturday 14 October 2023, which resulted in a 'No' response to the question: 'A proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?'.
- 4.91 Based on the evidence heard throughout this inquiry, the Committee considers that the request in the Uluru Statement from the Heart for a Makarrata Commission to oversee a process of truth-telling and agreement-making remains consistent with the Articles outlined in UNDRIP, and with the evidence received during this inquiry.
- 4.92 Based on the evidence received, and reflecting on the outcome of the referendum, the Committee considers that progressing a national process of truth-telling and human rights awareness is of utmost importance in order for Australia to pursue the realisation of rights outlined in UNDRIP and enhance public understanding of Australia's history.
- 4.93 The Committee notes the importance of Australia engaging fully with the Permanent Forum on Indigenous Issues and other UN accountability mechanisms and treaty bodies, in order to continue to evolve and respond to best practice approaches.
- 4.94 In this regard, the Committee observes that it may be beneficial to invite the Expert Mechanism on the Rights of Indigenous Peoples to undertake a country visit to work with the Commonwealth, State and Territory Governments, as well as Aboriginal and Torres Strait Islander peoples to provide expert advice on options for implementing UNDRIP.
- 4.95 The Committee is of the view that a National Action Plan should be developed to guide Australia's implementation of UNDRIP and that the decision whether to adopt a legislative or non-legislative approach should be made in consultation with Aboriginal and Torres Strait Islander people.

- 4.96 The Committee considers that the plan must be co-developed with Aboriginal and Torres Strait Islander peoples.
- 4.97 The Committee considers that further work is likely required to determine the best approach for coordination of such a plan across all levels of government, to ensure that local First Nations communities can benefit from any commitments.
- 4.98 The Committee is of the view that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) should be amended to include UNDRIP in the definition of 'human rights' for consideration by the PJCHR under that Act. The Committee considers that this change offers a simple and fast reform option which is in line with the PJCHR's recent practice.
- 4.99 The Committee heard other complementary options (such as paragraphs 4.67–4.87) for implementing UNDRIP. The Committee considers these options should be considered in consultation with First Nations people, to assess whether they may be an appropriate way to further progress implementation of the Declaration.

Recommendation 1

- 4.100 The Committee recommends that the Commonwealth Government ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including, but not limited to, Closing the Gap initiatives) be consistent with the Articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.**

Recommendation 2

- 4.101 The Committee recommends development of a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples, that outlines the approach to implementing the United Nations Declaration on the Rights of Indigenous Peoples in Australia.**

Recommendation 3

- 4.102 The Committee recommends that any National Action Plan should consider the legislative, policy, and other approaches to implement, and assess compliance with, the United Nations Declaration on the Rights of Indigenous Peoples across all jurisdictions and should seek to include coordination agreements with all levels of government to maximise success.**

Recommendation 4

- 4.103 The Committee recommends that the Commonwealth Government establish an independent process of truth-telling and agreement making, as requested by Aboriginal and Torres Strait Islander peoples, as a mechanism to support healing and assist implementation of the United Nations Declaration on the Rights of Indigenous Peoples (particularly Articles 3, 8, 11, 28, 32, and 37).

Recommendation 5

- 4.104 The Committee recommends that the Commonwealth Government work with State and Territory Governments and non-government education institutions to develop and adopt content for all levels of education, including for new citizens, in order to enhance awareness of:
- Australia's human rights framework, including the relationship between the United Nations Declaration on the Rights of Indigenous Peoples and human rights covenants,
 - Australian history in respect to the relevance of the legal fiction of 'terra nullius' in facilitating the colonisation and settlement of Australia, and its impact on Aboriginal and Torres Strait Islander peoples, and
 - General civics awareness, including the functions and operations of Australian political and legal institutions.

Recommendation 6

- 4.105 The Committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the definition of 'human rights', so that it be formally considered by the Parliamentary Joint Committee on Human Rights when scrutinising legislation.

Senator Patrick Dodson

Chair

22 November 2023



Dissenting report from Coalition Members and Senator

Overview

- 1.1 Australia endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2009.
- 1.2 The Declaration (UNDRIP) contains 46 Articles that describe the standard of achievement to be pursued in relation to the rights and interests of Indigenous peoples.
- 1.3 Australia is not legally bound by UNDRIP.
- 1.4 The principles contained in UNDRIP are already found across many Australian, State and Territory initiatives, programs, charters and legislation. However, in Australia there is currently no single or centralised mechanism for implementing UNDRIP.
- 1.5 While the Coalition does not agree with all the Government's recommendations, the Coalition is committed to working in good faith to close the gap and acknowledges that the JSCATSIA will continue to play an important role.

National Action Plan

- 1.6 During the inquiry the Committee heard of different approaches taken by other signatory nations. There was not a clear benefit to developing a national action plan.
- 1.7 The Coalition does not agree with the need for a formal, structural, regulatory national action plan for the implementation of UNDRIP, and therefore does not support recommendation 2 or 3 of the Government's report.
- 1.8 A call for a national action plan neglects to mention the existing ways UNDRIP principles are being adhered to or currently reported or mentioned by the UN.
- 1.9 As noted, the principles contained in UNDRIP are already found across many initiatives, programs, charters and legislation, however, in Australia there is currently no single or centralised mechanism for implementing UNDRIP.

- 1.10 For example, there is the work and intent of the Human Rights Commission, the Native Title Act, Land Rights Acts, Indigenous Land and Sea Corporation (ILSC), Indigenous Business Australia (IBA), the Aboriginal Community Controlled Sector, bi-lingual education, AIATSIS, Indigenous media, Reconciliation Australia, and Close the Gap initiative.
- 1.11 Private entities, including philanthropic, also have an opportunity to affirm their commitment and progress of UNDRIP.
- 1.12 UNDRIP principles also underpin government contracts with independent business.
- 1.13 There are also existing mechanisms that allow for the United Nations to assess, monitor, promote and report on Australia embedding UNDRIP principles. These include:
- The UN Human Rights Council Special Rapporteur who makes recommendations, reports on and promotes best practice and addresses violations.
 - The Universal Periodic Review through a peer review process. Australia has been subject to three reviews (2010, 2015 and 2021).
 - The UN Human Rights Committee comprising 18 independent experts that monitor adherence to this covenant by UN member countries.
 - In 2023 the Australian Government appointed an Ambassador for First Nations People who leads Australia's international engagement at the UN.

Uluru Statement from the Heart

- 1.14 In 2023 Australians endured a divisive, failed Referendum campaign for an Indigenous Voice to Parliament as expressed in the Uluru Statement from the Heart which called for Voice, Treaty, Truth.
- 1.15 The Statement from the Heart is referenced extensively throughout this report, despite the Voice to Parliament being convincingly defeated at referendum more than a month before its publication. The report does not sufficiently recognise that no single action will likely meet all 46 principles of the UNDRIP.
- 1.16 The rejection of the Voice was not a rejection of Indigenous peoples or of a need to improve the lives of disadvantaged Indigenous peoples. It was a rejection of the referendum proposition.
- 1.17 Recommendation 4 of the Government's report seeks to recommit the Commonwealth to the Truth and Treaty elements of the Uluru Statement.
- 1.18 The Coalition does not support recommendation 4.

Public Awareness

- 1.19 The Coalition supports Recommendation 5 of the Government's report, in particular enhancing awareness of Australia's human rights framework and improving general civics awareness through our education institutions.
- 1.20 The Coalition agrees that increased awareness and education about UNDRIP (and other international human rights covenants) and its intent will lead to greater appreciation, compliance, and reporting.
- 1.21 Educational efforts surrounding the settlement of Australia should include a factually accurate and balanced telling of history. This should detail past injustices and existing gaps, the progress Australia has made, and an acknowledgement of Australia's development into one of the most egalitarian countries in the world.

Parliamentary Joint Committee on Human Rights

- 1.22 The Coalition does not support recommendation 6 of the Government's report.
- 1.23 The definition of 'human rights' already includes the rights and freedoms recognised or declared by the seven international conventions outlined in paragraph 4.26 of this report. These rights and freedoms are not limited to non-Indigenous Australians and protect Aboriginal and Torres Strait Islander peoples.
- 1.24 The Declaration can and has previously been considered by the Parliamentary Joint Committee on Human Rights (PJCHR) in its analysis of legislation and policy.
- 1.25 The Coalition believes that the PJCHR has the capacity to determine when the Declaration is relevant and should be informally considered.

Dissenting Recommendations of Coalition Members and Senator

Recommendation 1

- 1.26 **The Coalition recommends that when the Commonwealth Government is developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including Closing the Gap initiatives), it considers the Articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.**

Recommendation 2

- 1.27 The Coalition recommends that the Government consults with established Aboriginal Torres Strait Islander Peoples bodies regarding the application and reporting against the United Nations Declaration on the Rights of Indigenous Peoples, such as through the annual Closing the Gap reporting process to Parliament.**

Recommendation 3

- 1.28 The Coalition supports Recommendation 5 of the Government's report, in particular enhancing awareness of Australia's human rights framework and improving general civics awareness through our education institutions.**

The Hon. Melissa Price MP

Deputy Chair

Member for Durack

Senator Kerryanne Liddle

Member

Senator for South Australia

Mr Llew O'Brien MP

Member

Member for Wide Bay

22 November 2023



Additional comments from Senator Dorinda Cox

- 1.1 First Nations peoples across this nation have never ceded their sovereignty. All throughout the history of colonisation, First Peoples have survived against all odds. This strength and resilience must be highlighted and culture celebrated in the context of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- 1.2 The Australian Greens strongly believe that the implementation of UNDRIP into Commonwealth Law and the creation of a legislated framework must be a priority for the Federal Government and pursued as a matter of urgency. There is a desire for this from stakeholders, industry and community, as many of them are already commencing this work where they can. The Federal Government has a central role to play in leading this, providing incentives and a framework for this widespread implementation to occur.
- 1.3 A prime example of this is how the Murray Darling Basin plan can be reviewed and amended to respect First Nations water rights and allow for cultural flows, which are distinct from environmental flows. The importance of water in First Nations culture is directly linked to the wellbeing of both individuals and communities, the protection of this is vital in the implementation of UNDRIP. Fundamentally UNDRIP contains four key principles:
 - self-determination;
 - participation in decision-making;
 - respect for cultures and the protection of culture; and
 - equality and non-discrimination.
- 1.4 These four principles must be at the core of the implementation of UNDRIP at all levels and organisations. As the Chair's report states, the nature of UNDRIP means that there are many ways it can be implemented both within Governments and in the private sector. These principles offer guidelines for organisations and entities to come back to as they are implementing the rights contained within UNDRIP.

- 1.5 The Australian Greens were the first party to endorse the Uluru Statement from the Heart and we remain committed to its implementation. The Voice to Parliament referendum campaign and the result on 14 October 2023, has shown the clear need for truth telling processes at a Federal level. This must be independent, co-designed and self-determined by First Nations people and pursued with respect to the inherently traumatising stories that will arise as a result of this process. As stated by the Chair's report, the Uluru Statement from the Heart is directly linked to the principles and articles contained within UNDRIP.
- 1.6 Finally, the Australian Greens acknowledge that there is already work underway that relates to the rights contained within UNDRIP. The Chair's report outlines this with specific reference to Closing the Gap and Empowered Communities. This work is important and must continue but it does not remove the need for programs, funding, and legislative change that specifically relates to and arises from the rights and articles of UNDRIP. It is not good enough that measures are announced and then related back to UNDRIP after the fact, this does not constitute as implementation. UNDRIP must be a primary consideration for any measures that are to be deemed implementation of UNRIP.

Senator Dorinda Cox

Member

Senator for Western Australia

22 November 2023



Additional comments from Senator Lidia Thorpe

Structure of additional comments

1. Introduction

2. Summary and recommendations

3. The importance of the United Nations Declaration on the Rights of Indigenous Peoples

a. Status of the declaration in international law

b. Group rights

c. Cultural rights

d. Self-Determination

4. Implementation of the UNDRIP in Australia

a. Government response to Australia's UNDRIP implementation

- National Indigenous Australians Agency
- Attorney General's Office
- Closing the Gap

b. Criticism of Australia's UNDRIP implementation

- Criticism from First Nations communities and organisations
- Criticism from Legal Experts and the United Nations

c. Criticism of Australia's International Human Rights Implementation

5. International experiences of implementing the UNDRIP

a. Canada and British Columbia

b. Aotearoa

c. Finland

6. Lessons Learnt

- a. Political Will*
- b. Legislative Commitment*
- c. Justiciability*
- d. Interaction with Prior Treaties and Legislation*
- e. Free, Prior and Informed Consent (FPIC)*

7. Why enshrine the UNDRIP into law?

- a. Uphold International Obligations*
- b. Guidance for Government*
- c. Clarity of Free, Prior and Informed Consent*
- d. Address Inequality*
- e. Protect and Promote Culture*

8. Complementing the UNDRIP

- a. Legislative incorporation of UNDRIP must be led by First Peoples*
- b. Legislative Review*
- c. Inclusion of UNDRIP in Human Rights (Parliamentary Scrutiny) Act 2011*
- d. EMRIP Engagement*
- e. Compliance with 2021 UPR Recommendations*
- f. Legislate a Human Rights Act*
- g. Justiciability*
- h. Treaty*

9. Key areas requiring reform to comply with UNDRIP

- a. Self-determination*
- b. Criminal Justice and Child Removals*
- c. Cultural Rights*

Addendum: Implementing the UNDRIP - Case Study - Children's Ground

1. Introduction

- 1.1 I welcome the committee's report on the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia and wish to thank the committee and the secretariat for conducting the inquiry. I welcome the recommendations put forward by the committee but wish to add to the report itself to centre First Nations voices in particular, and to add to the recommendations put forward, based on the comprehensive evidence received in the course of the inquiry.
- 1.2 The terms of reference of the inquiry are to examine "the international experience of implementing the UNDRIP, options to improve adherence to the principles of UNDRIP in Australia and how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP" and any other related matters.¹
- 1.3 It is worth noting from the outset of this response to the final report of the Joint Standing Committee, that the inquiry at hand is a distorted version of an original inquiry that I instigated with the introduction of the United Nations Declaration on the Rights of Indigenous Peoples Bill ('the Bill') to the Federal Senate on the 29th March 2022.
- 1.4 As stated in the Explanatory Memorandum, the purpose of the Bill is to "address Australia's lack of UNDRIP's implementation into law, policy and practice, the lack of a National Action Plan to implement the UNDRIP, negotiated with indigenous peoples, and the lack of auditing of existing laws, policies and practice for compliance with the UNDRIP."²
- 1.5 The Bill proposes three basic legislative responsibilities on the Commonwealth, in summary being that the Commonwealth Government must "take measures to ensure consistency between Commonwealth law and the Declaration" and "prepare and implement an action plan to achieve the objectives of the Declaration" and that the Prime Minister must, each financial year "present a report to each House of the Parliament on the progress of those actions."³
- 1.6 This Bill mirrors recent successful implementation of similar legislation in Canada⁴, a jurisdiction with a very similar colonial history. An inquiry into the Bill was undertaken during the 46th Parliament by the Senate Standing Committee on Legal and Constitutional Affairs, 'Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia'.
- 1.7 That inquiry had a far broader scope than the current one, with the terms of reference including an examination of:
 - a) the history of Australia's support for and application of the UNDRIP;

¹ Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, 'Inquiry into the United Nations Declaration on the Rights of Indigenous People', Terms of Reference (2 August 2022)

² United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) Explanatory Memorandum

³ United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) s. 5

⁴ United Nations Declaration on the Rights of Indigenous Peoples Act (Canada)

- b) the potential to enact the UNDRIP in Australia;
 - c) international experiences of enacting and enforcing the UNDRIP;
 - d) legal issues relevant to ensure compliance with the UNDRIP, with or without enacting it;
 - e) key Australian legislation affected by adherence to the principles of the UNDRIP;
 - f) Australian federal and state government's adherence to the principles of the UNDRIP;
 - g) the track record of Australian Government efforts to improve adherence to the principles of UNDRIP;
 - h) community and stakeholder efforts to ensure the application of UNDRIP principles in Australia;
 - i) the current and historical systemic and other aspects to take into consideration regarding the rights of First Nations people in Australia; and
 - j) any other related matters.⁵
- 1.8 The inquiry drew 92 responses, the majority supporting the legislative implementation of the introduced Bill in its full form.
- 1.9 However, this inquiry lapsed with the dissolution of the 46th Parliament, only to be replaced with the current, watered-down and bastardised version which seeks simply to support the current government's agenda to undermine First Nations' Sovereignty by assimilating First Peoples into the colonial Constitution and further co-opting our people by way of a powerless 'Voice to Parliament'.
- 1.10 The colonial agenda in this current inquiry is to convince the public – and First Nations Peoples – that the 'Voice' would somehow grant First People the rights that are enshrined in the Declaration. In my position as a Senator and First Nations woman, I strongly reject this flawed attempt to avoid legislating and fully implementing the rights outlined in the UNDRIP. As the referendum result has shown on 12 November, so do the Australian people.
- 1.11 Government submissions to the current inquiry - from the National Indigenous Australians Agency, no less – have attempted to present an argument that the National Agreement on Closing the Gap somehow adheres to the principles of the United Nations Declaration on the Rights of Indigenous Peoples, when we all know the many shortfalls of those attempts and breaches of the principle of Free, Prior and Informed Consent.

⁵ Senate Standing Committee on Legal and Constitutional Affairs, 'Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia', Terms of Reference (29 March 2022)

- 1.12 Closing the Gap is, and always has been, about addressing fundamental inequalities in basic social indicators of quality of life – soaring incarceration rates, low life expectancy, poorer education and employment outcomes, high rates of out-of-home care. Closing the Gap is not about rights, it is about achieving basic equality outcomes in one of the wealthiest countries on the planet.
- 1.13 For too long First Peoples have been afforded a ‘hand-me-down’ approach to politics, rather than Self-determination.
- 1.14 The Bill I introduced in 2022 seeks to amend this and hold governments to account, and this response – along with supportive evidence from both inquiries – upholds my commitment to the intent of my proposed legislation.

2. Summary and Recommendations

- 1.15 I welcome and endorse the committee’s recommendations as to how to progress the implementation of UNDRIP in Australia, in particular the development of a National Action Plan with this very objective, the pursuit of Truth and Treaty, and the amendment of the Human Rights (Parliamentary Scrutiny) Act 2011 to include the consideration of UNDRIP. These are all very important to further First Peoples rights in this country.
- 1.16 In particular I wish to underline our people’s calls for Truth and Treaty since the day this country was colonised, and that these processes should be delayed no further but need to be pursued immediately. Their compatibility and indeed complementary and beneficial effects on implementing UNDRIP have been clearly outlined in the committee report, and so we may not waste any time in pursuing them alongside each other.
- 1.17 Besides these commendable recommendations, the committee falls short of endorsing a legislative approach to UNDRIP’s implementation in Australia.
- 1.18 This is despite clear evidence provided during the inquiry, from a range of international and domestic human rights experts, governments and First Nations groups, that a legislative approach provides clear advantages over a policy approach to a National Action Plan, which the committee itself acknowledges in the relevant report chapter.
- 1.19 As Mr Warren Dick from the Human Rights Commission stated: ‘If we’re going to say the rights of Indigenous people are important, then we should have a national articulation of that which governments are taken to account to.’⁶

⁶ Mr Warren Dick, *Committee Hansard*, Canberra, 31 March 2023, p. 21

- 1.20 Given that the UNDRIP embodies many human rights principles already protected under international customary and treaty law, and sets the *minimum standard* of human rights for First Peoples and State Parties' interactions with their First Peoples, implementing the UNDRIP should be of no concern to any human rights respecting government.
- 1.21 Legislative implementation of the UNDRIP is a fundamental principle of international law and has been recommended by member states of the United Nations. It would provide greater support for, and clarification of, principles such as self-determination and Free, Prior and Informed Consent.
- 1.22 History has shown that implementing the UNDRIP has not been a priority for governments and there has been widespread assessment of Australia's failure to comply with the principles of the Declaration.
- 1.23 Legislative implementation of the UNDRIP would enhance outcomes in social, political and cultural indicators that consecutive governments have repeatedly failed to address, while ensuring greater accountability of state, territory and federal government and associated portfolios and organisations. It would also prevent racist (and disastrous) legislation such as the 2007 Northern Territory Intervention from occurring in the future. It would provide for a tangible timeframe for the implementation of the Declaration, with the ability for governments to be held accountable for its progression according to it.
- 1.24 Legislative implementation of the UNDRIP would ensure greater protection, promotion and prioritisation of First Peoples rights and ensure that the advancement of First Peoples rights remains the responsibility of any future government, independently of their political leaning.
- 1.25 Policy-based approaches to implementing UNDRIP can result in future governments deprioritising its advancement, leading to significant delays in implementation (as can be seen in the case of Aotearoa/ New Zealand) or is complete abandoning. Given Australia's colonial history and the ongoing resulting injustices and structural racism, and the lack of even a broader Human Rights framework in this country (contrary to Canada and Aotearoa/ New Zealand) to revert to, this is not a risk we can take as a nation.

Recommendation 1

- 1.26 That the Australian government enshrines the UNDRIP into domestic law.**
- 1.27 The committee noted evidence provided that the current legislative framework in Australia does not meet UNDRIP standards and that existing legislation and policies have not been reviewed for their compliance with UNDRIP.
- 1.28 Human Rights experts have indeed repeatedly pointed out Australia's failure to comply with the principles of UNDRIP. Then UN Special Rapporteur Victoria Tauli-Corpuz, following her visit to Australia in 2017, stated that 'a comprehensive revision

of the policies needs to be a national priority'.⁷ In 2010, the Universal Periodic Review of Australia's human rights record concluded with a recommendation for the government to 'conduct an audit of its federal legislation for compliance with UNDRIP, specifically mentioning the Racial Discrimination Act 1975'.⁸

- 1.29 The Australian government at the time, however, decided to simply note but not consider further the recommendations put forward, essentially simply ignoring them in an attempt to absolve itself of its responsibilities.
- 1.30 Committee recommendation 3 recommends for any National Action Plan to assess compliance with the UNDRIP across all jurisdictions without further clarifying what this would imply.
- 1.31 Given the many breaches of the principles under UNDRIP an extensive audit of the compliance of all legislation with the UNDRIP, on the Commonwealth as well as state and territory level, should be undertaken, prioritising the audit and reform of the legislation of most significance to First Peoples and most in breach of their rights.

Recommendation 2

- 1.32 **That the government progress an audit of existing laws, policies and practice for compliance with the UNDRIP immediately, starting with those most directly concerning First Peoples and breaching their rights.**
- 1.33 Free, Prior and Informed Consent (FPIC) is one of the core principles of the UNDRIP and a key prerequisite for colonial government interactions with First Peoples and ensuring their right to Self-determination is upheld.
- 1.34 Article 19 of the Declaration says that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures affecting them.⁹
- 1.35 Unfortunately, FPIC is also one of UNDRIP's most disregarded principles. This country has a shocking record of decision-making for and often to the detriment of First Peoples, completely ignoring the principle of FPIC. This manifests in the failure of achieving the Closing the Gap targets, destruction of Country and cultural heritage—without consent of Traditional Owners and often even consultation, to name just a few.

⁷ UN HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, UN Doc A/ HRC/36/46/Add.2, 8 August 2017, pg. 18-19

⁸ United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/17/10, 24 March 2011

⁹ UNDRIP, Article 19, p. 16

- 1.36 Our people's right to Self-determination is often proclaimed by governments but rarely followed and a drastic change needs to occur immediately to stop so-called Australia's violation of the principle of FPIC immediately. This should even be in the government's own best interest as international and national examples have shown that self-determined solutions are more informed, effective and easier to implement.

Recommendation 3

- 1.37 That the government commit to follow the principle of Free, Prior and Informed Consent in legislation, policy and practice.**
- 1.38 The United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 received high levels of support in the original inquiry submissions, from a range of First Nations community and legal organizations, legal experts, interested persons and resources corporations. It would combine important steps towards the implementation of UNDRIP as outlined during this inquiry, such as the development of a National Action Plan, parliamentary accountability and transparency towards its progression, an audit of existing Commonwealth legislation as to its compliance with the principles of UNDRIP as well as ensuring that all future legislation is compliant with it.

Recommendation 4

- 1.39 That the government passes the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022.**
- 1.40 Any legislative implementation of the UNDRIP should be complemented with a process by which alleged breaches could seek remedy and there should be an oversight mechanism that ensures governmental and other compliance with the principles and obligations that the UNDRIP would confer on relevant government ministries and related apparatus and institutions, such as police, criminal justice institutions, education, health and welfare.

Recommendation 5

- 1.41 That the government pursue justiciable legal mechanisms to underpin the legislative implementation of the UNDRIP.**
- 1.42 The committee observed that UNDRIP is being incorporated into certain policies and programs, but that it is far from being fully implemented or considered across the board and that there is an absence of a coordinated guiding framework.
- 1.43 The government initiated a change of Terms of Reference for this inquiry from the much more comprehensive previous ones focused on the government's attempt to centre the proposed Voice to Parliament (as per the October 2023 referendum) as their way of progressing the implementation of UNDRIP.

- 1.44 While the committee report is still heavily promoting this approach, international examples of non-binding advice through First Peoples advisory bodies, such as the Sami Parliament, have shown limitations of this approach. Given First Peoples are not the decision makers in this approach, it does not comply with the principle of self-determination. The Finnish Sami Parliament's request for collaboration with the Finnish Government on the development of a National Action Plan to fully implement UNDRIP has been unsuccessful to date and is a potent example of the limitations of this pathway.
- 1.45 The inquiry made clear that the proposed Constitutional amendment and Voice to Parliament and the National Agreement on Closing the Gap have many shortcomings and are not substitutes for legislative implementation of the United Nations Declaration on the Rights of Indigenous Peoples. There should, however, be increased alignment of Closing the Gap with the principles of UNDRIP, and I welcome committee recommendation 1 to this effect. To further ensure compliance of Closing the Gap with the principles of UNDRIP, I suggest the following:

Recommendation 6

- 1.46 That UNDRIP be incorporated into Closing the Gap implementation plans for each jurisdiction.**
- 1.47 Apart from its clear failure to the rights and principles outlined in the UNDRIP, so-called Australia also has a terrifying human rights record, with ongoing breaches on the level of legislation, policies and practice. This record has repeatedly been pointed out by international human rights experts, and has also been highlighted throughout this inquiry.
- 1.48 A comprehensive Commonwealth Human Rights Act would complement the legislative introduction of the UNDRIP and would also serve as a mechanism to protect human rights more broadly, many of which would intersect with the principles of the UNDRIP.
- 1.49 Australia is the only liberal democracy without a Human Rights Act or Charter at the national level. There are few legal protections for the fundamental rights of Australians, which explains why governments have been getting away with breaches for so long.
- 1.50 A justiciable Human Rights Act would complement the legislative implementation of the UNDRIP and possibly provide a framework by which alleged breaches of rights as per the Declaration could seek legal remedy.

Recommendation 7

1.51 That a comprehensive Human Rights Act be enshrined in Commonwealth law.

- 1.52 The committee acknowledges the potential benefit of receiving advice on the implementation of UNDRIP in Australia from the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), but falls short of recommending this approach. In the case the government decides against a legislative approach to implementing UNDRIP, this should be prioritised to assist with progressing the implementation through other means, but can also be a beneficial approach under any pathway.

Recommendation 8

1.53 That the government invite the Expert Mechanism on the Rights of Indigenous Peoples for a country visit to provide expert advice on processes best adopted in the Australian context.

- 1.54 The UN cannot just provide guidance for the implementation of the UNDRIP through the EMPRIIP but also through its Universal Periodic Reviews (UPR).
- 1.55 In 2021, Australia undertook its third UPR during which 122 countries made 344 recommendations. The Australian Government responded to those recommendations, accepting 177 but not accepting 167. It noted recommendations to incorporate the UNDRIP into domestic legislation but stated that it would not consider this further at the time. Not even considering this option is a blatant disregard for international human rights experts and completely undermines Australia's stated commitment to the UNDRIP.

Recommendation 9

1.56 That the Australian Government comply with international recommendations as per the 2021 Universal Periodic Review.

- 1.57 Though the committee report dedicated a chapter on cultural heritage and traditional knowledge protection, it failed to put forward recommendations to address the government's shortcomings on providing protections for these as based on the evidence received during the inquiry.
- 1.58 Every day, more of our cultural heritage and sacred sites are being destroyed, and with it our traditional knowledge and ability to practice rituals and pass these on to future generations. Following the destruction of the Juukan gorge caves, the Australian parliament undertook an extensive inquiry into heritage protection in Australia, resulting in the Juukan report handed down in October 2021. Besides the urgency to protect our cultural heritage, sacred sites and Country, the government has to date failed to implement even a single of the recommendations of the report and has not even provided a timeline for its implementation.

- 1.59 I therefore propose the following recommendations to specifically progress Australia's adherence on Articles 11, 12 and 31 of the Declaration:

Recommendation 10

- 1.60 That the government urgently progress the full implementation of the recommendations of the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia and immediately present a timeline for the implementation.**

Recommendation 11

- 1.61 That the government implement the following recommendations from the 2021 report Dhawura Ngilan:**
- **amend its policy on Indigenous repatriation of cultural materials to align with current governmental practices, working with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and communities to coordinate repatriation approaches**
 - **'work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way'**
 - **recognise and prioritise the rights of Aboriginal and Torres Strait Islander peoples to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors¹⁰**

3. The importance of the United Nations Declaration on the Rights of Indigenous Peoples

- 1.62 The United Nations Declaration on the Rights of Indigenous Peoples ('the UNDRIP') is a landmark piece of international law that was presented to the global community in 2007 after decades of negotiation and development by Indigenous Peoples from around the globe.
- 1.63 Noting that international human rights law largely excluded Indigenous Peoples, efforts were made to bring the UNDRIP into fruition.
- 1.64 UNDRIP is significant given it was—and remains—an initiative developed by and for Indigenous Peoples.

¹⁰ Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation, Department of Climate Change, Energy, the Environment and Water, pg 23-24, <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>, viewed 14 November 2023

- 1.65 The UNDRIP is both significant and necessary not only to redress the lack of First Peoples representation in international human rights law, but more importantly to use the language and mechanisms of such law to counter both the historical and ongoing impacts of colonisation in respective Indigenous territories and to promote the aspirations and values of Indigenous Peoples globally.
- 1.66 However, rather than creating new rights specifically for Indigenous Peoples, the UNDRIP enshrines existing human rights within an Indigenous context, albeit with a focus on, and consideration for, aspects such as self-determination, cultural rights and the rights of the collective.
- 1.67 Dr Sheryl Lightfoot, Senior Adviser to the President on Indigenous Affairs, University of British Columbia and Vice Chair and Member from North America, United Nations Expert Mechanism on the Rights of Indigenous Peoples, told the Joint Standing Committee:
- That's what the declaration is about. It's about taking all of the human rights principles that already exist and putting indigenous context on them. There's nothing extraordinary or special about it. It is in 100 per cent alignment with every other human rights document and instrument. It's strictly the indigenous voice, what the context is for indigenous people, on a global level that also recognises the specificity of the local.¹¹
- 1.68 Significantly, Australia was one of the so-called CANZUS cohort – Canada, Australia, New Zealand/ Aotearoa and the United States – to delay endorsing the UNDRIP. All four states are colonial enterprises with significant Indigenous populations and significant historical and contemporary human rights abuses enacted upon First Peoples.
- 1.69 As Ms Sam Klintworth, National Director, Amnesty International Australia, told the Joint Standing Committee:
- The United Nations declaration is a product of 25 years of consultation between states and Indigenous peoples, including First Nations peoples in Australia. Over a decade after Australia endorsed the declaration, we have not seen the real actions required to comply with its principles. The systemic breaches of the rights of Aboriginal and Torres Strait Islander peoples are widespread, as evident in the overrepresentation of First Nations children and adults in the criminal justice system, dispossession of their land and resources, policies imposed on their lives without consent or consultation and profound social and economic inequality.¹²

¹¹ Dr Sheryl Lightfoot, Senior Adviser to the President on Indigenous Affairs, University of British Columbia; Associate Professor, School of Public Policy and Global Affairs, Department of Political Science, University of British Columbia; Faculty Associate, Institute for Critical Indigenous Studies, University of British Columbia; Vice Chair and Member from North America, United Nations Expert Mechanism on the Rights of Indigenous Peoples, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 8 June 2023, p.11

¹² Ms Sam Klintworth, National Director, Amnesty International Australia, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 19 May 2023, p.18

1.70 While the Rudd government rectified this in 2009, the UNDRIP has yet to take much more of a formal, legal presence in so-called Australia, as has been undertaken in Canada and as I seek to implement through my Private Members Bill.

1.71 However, it is widely considered by almost all submissions and testimonies to both the previous and current federal inquiries into the legislative enshrinement of the UNDRIP to be of benefit to First Peoples and the overall objective of reconciliation in so-called Australia.

1.72 As the Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada, told the Joint Standing Committee, with regard to the implementation of the UNDRIP in Canada:

We think the declaration is the cornerstone of our commitment to reconciliation.¹³

1.73 While colonial government agencies such as the National Indigenous Australians Agency (NIAA) and the Attorney General's Office point to vague observations of the 'principles' of the UNDRIP, the soaring incarceration rates, deaths in custody, numbers of First Nations children in detention and out-of-home care, the destruction of Country and cultural heritage all point to a failure to observe even the most basic principles of the UNDRIP, being the support of self-determination, application of cultural rights, and the requirement to seek Free, Prior and Informed Consent.

1.74 This needs to be rectified.

a. Status of the Declaration in international law

1.75 It is my view that the UNDRIP should be enshrined in domestic law and provide a reference for the promotion and application of First Peoples rights, values and aspirations within the legal framework.

1.76 Rather than simply an 'aspirational document', the United Nations Declaration on the Rights of Indigenous Peoples provides a practical framework by which the ongoing impacts of colonisation on First Nations peoples can be redressed, and their rights and values upheld.

1.77 Given Australia's status as a dualist country, any international law – binding or not – does not give direct effect unless implemented directly into domestic legislation (eg. the 1975 Racial Discrimination Act).

1.78 As such, the UNDRIP – even as an 'aspirational' Declaration – creates no legally binding obligation on Australia to implement or act upon any of the rights contained therein.

1.79 As the ANU state:

¹³ Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 31 March 2023, p.1

The dualistic nature of international law means that, regardless of its status at international law, the UNDRIP will not formally become part of Australian law and so have any domestic effect until it is incorporated into domestic law by legislation.¹⁴

1.80 Unlike other treaties, the UNDRIP – being a declaration – is technically not binding on signatory states. However, arguments are made that the universal values and practical application of the rights contained therein have elevated the UNDRIP into international customary law.

1.81 As stated by the Australian Law Council in a previous report by the Australian Law Reform Commission:

The Law Council of Australia has adopted the position that the UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.¹⁵

1.82 As such, the case against implementing the UNDRIP – as simply being an 'aspirational' non-binding declaration – runs contrary to international legal opinion concerning its legal application in domestic jurisdictions.

1.83 Further, legislative implementation of the UNDRIP would counter the historical and ongoing breaches of the Declaration's principles (discussed below). The ongoing breach of First Peoples' human rights within so-called Australia requires every effort to redress; legislative application of the UNDRIP is central to this.

As stated by Amnesty International in their submission to the current inquiry:
Australia was a founding member of the United Nations and has ratified almost all international human rights instruments. Engagement on Indigenous rights was one of the ten priorities set by Australia during its term at the UN Human Rights Council from 2018-2020. Australia continues to engage with various multilateral human rights engagements to this day. Australia must step up to become a human rights champion by realising its declared commitment to the UNDRIP.¹⁶

And as further stated by Tony McAvoy, SC, to the same inquiry:

It can't be the case that Australia endorses an international declaration on a matter setting out international norms and then doesn't analyse its legislative

¹⁴ Australian National University First Nations Portfolio, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 31*, p.10

¹⁵ The Law Council of Australia as cited in the Australian Government, Australian Law Reform Commission, 'Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126)' (2015) 2.110

¹⁶ Amnesty International, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 25*, p.6

base to see whether any of its legislation is consistent. It's a ridiculous situation, in my view. It shows an absence of commitment to the principles.¹⁷

b. Group rights

- 1.84 The UNDRIP is a significant piece of human rights legislation in communicating the rights, values and goals of Indigenous Peoples globally. Further to this, it is the only piece of international human rights law that provides rights to distinct groups of people. Unlike all other human rights law – which grants rights to individuals – the UNDRIP significantly demonstrates the necessity of group rights for Indigenous Peoples. The conferring of group rights reflects the collective cultural values, decision making and ways of being that Indigenous Peoples (generally speaking) adhere to worldwide.
- 1.85 The conferring of group rights is also significant with respect to the devastating impacts that colonisation had on Indigenous Peoples as collectives. Examples of this can be seen in massacres and forced dispossession, right through to concerted governmental efforts to introduce genocidal legislation that aimed to eradicate Indigenous cultures, languages and spiritual connections to Country in the name of forced assimilation.
- 1.86 The significance of group rights in this context cannot be underestimated. The ongoing challenges neo-colonialism poses to First Peoples in so-called Australia continues to undermine and attempt to decimate First Peoples as groups.
- 1.87 Whether it be attacks on Traditional Owner land rights through mining, fracking and other resource exploitation, or the multi-generational incarcerative experiences of Indigenous families, such attacks are still felt by First Peoples as collectives.
- 1.88 This can be seen in UNDRIP Article 1:
- Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights 4 and international human rights law.¹⁸
- 1.89 And also exemplified by Article 7.2 which states:
- Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.¹⁹

¹⁷ Tony McAvoy SC, *Committee Hansard*, Canberra, 8 June 2023, p.24

¹⁸ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Article 1. Available at: <https://www.refworld.org/docid/471355a82.html> [accessed 5 July 2023]

¹⁹ Ibid. Article 7.2

- 1.90 As further stated by the Australian National University First Nations Portfolio in their submission to the current Inquiry:

The UNDRIP is a direct challenge to the marginalisation of Indigenous peoples. Its implementation into Australian law must therefore be aimed at changing the status quo and at making meaningful space for the protection and advancement of the rights of Indigenous peoples. It is a critical matter in the pursuit of a more equitable and harmonious Australia.²⁰

...

The Declaration's very existence is in direct response to the failing of the international system of nation-states to sufficiently protect and promote the rights of Indigenous peoples. It is a tool to change the nature of the relationship between Indigenous peoples and states and to put it on a more equal footing.²¹

- 1.91 As such, the group rights conferred by the UNDRIP are central to redressing these human rights abuses and as such, must be legislated to provide a framework for which such rights can be promoted and supported.

c. Cultural rights

- 1.92 Of further significance to the UNDRIP is the embedding of First Nations' cultural rights throughout the document as per Articles 11 through 16.

- 1.93 For example, Article 11.1 states:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.²²

- 1.94 Again, this speaks to the development of the declaration by and for, Indigenous Peoples globally, for whom all-of-life is underscored by continuous cultural actions and connections.

- 1.95 The importance of cultural rights within the UNDRIP is paramount to its distinction from other human rights law. Like group rights, cultural rights provide a framework not only for outlining what rights are significant to First Peoples, but also provides a means and methodology by which such rights can be upheld, strengthened and promoted – by valuing and being underpinned by culture.

²⁰ Australian National University First Nations Portfolio, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 31*, p.5

²¹ Ibid. p.8

²² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 11.1. Available at: <https://www.refworld.org/docid/471355a82.html> [accessed 5 July 2023]

- 1.96 The important inclusion of cultural rights within the UNDRIP also speaks to the ongoing consequential and devastating impacts of colonisation and neo-colonisation on First Peoples. The historical and ongoing attacks on Indigenous languages, cultural practices and connections to Country have underscored and directly led to the significant human rights abuses experienced by First Peoples, including incarceration, endemic poverty, economic exclusion and a significant inequality in health, wellbeing and life expectancy.
- 1.97 Cultural rights have already been recognised at a state level by human rights charters implemented in Victoria, ACT and Queensland. This has proven to have positive outcomes both as an underlying principle and a justiciable legal factor in the courts. As such, the legislative protection and promotion of cultural rights as per the UNDRIP is a vital component of alleviating such impacts while simultaneously providing a practical framework for protecting and promoting the longest continuous culture on the planet.

d. Self-determination

- 1.98 Another underlying principle of the UNDRIP is the right of self-determination for Indigenous Peoples. This right is expressed through a variety of applications as exemplified by Articles 3, 4 and 5 and also through the right to Free, Prior and Informed Consent (FPIC).
- 1.99 For example, Article 3 states:
- Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.²³
- 1.100 The requirement for Self-determination to be a central tenant to any decision making, policy or legislative development in a neo-colonial setting is twofold.
- 1.101 Firstly, Sovereignty was never ceded by First Peoples across what is now known as Australia. No Treaty or formal handover of land, territories, governorship or control was ever established by the British upon the invasion of the continent.
- 1.102 In fact, upon Cook's landing that precipitated colonisation, Cook completely disregarded his instructions to seek the 'consent of the natives' altogether, and further inconsideration of First Peoples' 65 000-thousand-year occupancy was maintained by the declaration of terra nullius. As such First Peoples have always had the right to self-determination, and at no point in colonial history was this revoked.
- 1.103 As stated in Gudanji for Country's submission to the original inquiry:
- The most critical right we need to see achieved is that of Self-determination. We have never relinquished our right to self-determination - it has been taken from us. It is critical to our existence that our right to self-determination is

²³ *General Assembly*, 2 October 2007, A/RES/61/295, Article 3. Available at: <https://www.refworld.org/docid/471355a82.html> [accessed 5 July 2023]

respected. Only through self-determination can we reclaim control over our existence and repair the damage done over the last two hundred and fifty years. The most important step that we need to take to see this achieved is the formation of Treaties between the Australian government and First Nations (Article 37). At present, we remain unwilling 'wards of the State' - deemed unfit to make decisions for ourselves and incapable of acting upon them. We are not free to 'determine (our) political status (Article 3)' nor 'freely pursue (our) economic, social and cultural development.' Our laws and customs, formed and practised over millennia, have been cast aside, disregarded. In their place, a paternalistic colonial structure has been imposed upon us.²⁴

1.104 And as Ms Roj Amedi, Chief Campaigns Officer, GetUp! told the Joint Standing Committee:

I think it's really important to acknowledge that sovereignty by First Nations people hasn't been ceded. Despite ongoing treaty negotiations that are state based, that's something really important to affirm and to acknowledge in all of our work.²⁵

1.105 As such, legislative enactment of the UNDRIP as per my Bill simply upholds a right to Self-determination that has never been ceded.

1.106 Secondly, Self-determination across all areas of policy has proven to have beneficial outcomes in terms of redressing the ongoing harms of colonisation and neo-colonisation. Whether it be in community health programs, youth justice initiatives, economic opportunity and resource and land management, the capacity for First Peoples to make autonomous decisions by and for our own communities has a proven positive impact.

1.107 Conversely, government-led initiatives that undermine Self-determination – such as the Northern Territory Intervention and Closing the Gap – have significantly failed in their aims and at worst, devastated communities with yet further trauma.

1.108 As such, legislative application of the UNDRIP will not only acknowledge that Sovereignty and therefore the right to Self-determination was never ceded, but will also provide a framework by which government agencies cede control over First Peoples' affairs to allow for autonomy and improved, self-determined outcomes for Indigenous communities.

1.109 As Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, told the Joint Standing Committee:

We are self-determining peoples at the end of the day, as reflected in UNDRIP. Also, as I've said, UNDRIP is the minimum standard of human rights for

²⁴ Gudanji for Country, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 41*, p.2

²⁵ Ms Roj Amedi, Chief Campaigns Officer, GetUp!, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 19 May 2023, p.17

indigenous peoples; it doesn't create any new rights but is what's already existing in international law. So not having direct say and jurisdiction over our children and other important matters is a direct violation of self-determination.²⁶

Ms Sam Klintworth, National Director, Amnesty International Australia, further told the Inquiry:

[H]ow can we ensure that this United Nations Declaration on the Rights of Indigenous Peoples is fully implemented into law, policy and practice to protect the fundamental human rights of First Nations people? We believe that the solution is self-determination. Indeed, the rights of First Nations people to self-determination is foundational to the United Nations declaration, which recognises that, by virtue of the right, Indigenous peoples freely determine their political status and freely pursue their economic, social and cultural development. The declaration further recognises that, in exercising their right to self-determination, Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions.²⁷

4. Implementation of the UNDRIP in Australia

- 1.110 As per the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022, the proposal has been made to implement the UNDRIP into Australian law with nearly consensus support from submitters to both the original submissions and the current iteration of the inquiry.
- 1.111 While there were deliberate delays to ratifying the UNDRIP after its release in 2007 by then-Prime Minister John Howard (who stated the decision not to sign 'wasn't difficult at all') the Rudd government amended this overt disregard of First Peoples rights in 2009 and ratified the Declaration.
- 1.112 However, since then, no effort has been made to further the Declaration or to implement articles by the Australian government, and with little evidence of application within policy development or other administrative areas.
- 1.113 It is for this reason that I maintain that the original intent of the 2022 Bill as introduced to Parliament be maintained, being to "address Australia's lack of UNDRIP's implementation into law, policy and practice, the lack of a National Action Plan to implement the UNDRIP, negotiated with indigenous peoples, and the lack of auditing of existing laws, policies and practice for compliance with the UNDRIP."
- 1.114 The Australian National University First Nations Portfolio supports this view by stating:

²⁶ Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 10 February 2023, p.2

²⁷ Ms Sam Klintworth, National Director, Amnesty International Australia, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 19 May 2023, p.19

Holistic implementation of the UNDRIP into Australia's domestic affairs should be seen as fundamental to efforts to substantively recognise and protect the rights of Indigenous peoples in Australia. Comprehensive legislative incorporation of the UNDRIP should therefore be the ultimate aim of the Parliament.²⁸

a. Government response to Australia's UNDRIP implementation

- 1.115 I note the below mentioned submissions to the current inquiry regarding government engagement with the UNDRIP, and provide my responses.

National Indigenous Australians Agency (NIAA)

- 1.116 The NIAA submission does not state conclusively whether or not it supports the legislative implementation of the UNDRIP.

- 1.117 However, they state that the Australian Government supports the principles underlying the UNDRIP, noting:

Australia is only legally bound by the obligations under international human rights treaties to which it is a party. Notwithstanding, the Australian Government supports the principles underlying the UNDRIP, which it recognises as an expression by the international community of respect for the dignity of Indigenous peoples.²⁹

- 1.118 I question why the lead government agency for Indigenous Peoples – and who states it works “in genuine partnership to enable the self-determination and aspirations of First Nations communities” and “is committed to improving the lives of all Aboriginal and Torres Strait Islander peoples” would not wholeheartedly and publicly endorse the legislative enactment of the UNDRIP.

- 1.119 In their supplementary submission (responses to questions on notice), the NIAA states that the “United Nations views the UNDRIP as a set of principles to aspire towards, with nations encouraged to work towards the progressive realisation of these rights. The Australian Government views the matters set out in UNDRIP as principles to aspire to.”³⁰

- 1.120 However, the nature of the ‘aspirational’ aspect is contested in international law, given that the UNDRIP reflects already existing principles and articles in binding treaties, as applied in an Indigenous context. It does not create new rights in and of itself.

²⁸ Australian National University First Nations Portfolio, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 31*, p.4

²⁹ National Indigenous Australians Agency, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 9*, p.1

³⁰ National Indigenous Australians Agency, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 9.1*, p.1

1.121 There is also the principle of customary law which binds states to international laws and standards, along with the increased documentation of the UNDRIP being advised to be justiciable law.

1.122 As per the Australian National University submission to this inquiry:

The view that the UNDRIP has no binding effect at international law is contested. Although a non-binding instrument, rights set out in the UNDRIP are significant because they generally reflect well-established rights under international law [...] The UNDRIP is therefore a non-binding, influential and aspirational statement, and also an instrument that reflects established and binding rules of customary international law.³¹

1.123 The two statements below made in the NIAA Supplementary Submission 9.1 (responses to questions on notice) are contradictory to almost every other submission which state that Australia could quite easily follow the models of both Canada and Aotearoa/ New Zealand precisely given the similarities all three nations face with regard to the history of, and contemporary impacts resulting from, First Nations- colonial state relationships.

1.124 The NIAA stated that:

We note the implementation of UNDRIP for our key international partners, such as New Zealand and Canada, are not easily compared to Australia. The challenges and opportunities faced by other countries are not the same as Australia.³²

1.125 And continues to state that:

Each country has a discrete historical context and distinct compositions of their Indigenous population. These need to be considered when undertaking a consultative process to consider how to most effectively implement programs and policies in line with UNDRIP.³³

1.126 However, nearly every other submission supports the legislative implementation of the UNDRIP with general support of the Canadian model and its suitability in the Australian context.

1.127 For example, Tony McAvoy SC stated to the Joint Committee that:

[A]t a structural level, there's no reason why Australia could not introduce a bill similar to that which has been introduced in Canada requiring harmonisation of the laws of the nation with the declaration so that, in circumstances where pieces of legislation have available interpretations to them, the court can then take the

³¹ Australian National University First Nations Portfolio, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 31*, p.9

³² National Indigenous Australians Agency, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 9.1*, p.1

³³ Ibid.

interpretation of the legislation which is consistent with the Declaration on the Rights of Indigenous Peoples.³⁴

1.128 Further, Terri Janke and Company state in their submission:

As prioritised by both the Canadian and New Zealand government, Australia should seek to develop a national action plan to facilitate the implementation of the UNDRIP as a matter of national significance.³⁵

Attorney General's Office

1.129 I also note the Attorney General's Office statement at the Joint Standing Committee which further highlights a non-commitment from the government, rather than any other, to enshrine the UNDRIP into domestic legislation.

1.130 Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department, stated that:

In terms of the application of the UNDRIP in Australia, as the committee is aware, the declaration takes the form of a United Nations General Assembly resolution, which carries both political and moral weight but is not legally binding as an instrument in and of itself. While Australia is not legally bound by the text of the declaration, to some extent the principles in the declaration are reflected in the seven core human rights treaties to which Australia is a party, and those treaties are clearly binding on Australia in international law. As a matter of policy, though, Australia supports the declaration and shares the declaration's underlying commitment to delivering real and lasting improvements for First Nations people and their communities.³⁶

1.131 However, in response to this, I note the ongoing and regular criticism consecutive Australian governments have faced regarding the the lack of implementation and upholding of the 'seven core human rights treaties', and more generally its human rights record, and note that only one treaty has been specifically legislated into domestic legislation, given Australia's dualist status, being the 1975 *Racial Discrimination Act* (Cth) as per the International Convention on the Elimination of All Forms of Discrimination (1965).

1.132 Further, adherence to the seven core treaties—which arguably Australia fails to do in the first instance—does not create an adherence to the UNDRIP by way of any form of legal relationship, binding or otherwise.

³⁴ Tony McAvoy SC, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 8 June 2023, p.22

³⁵ Terri Janke and Company, Inquiry into the UN Declaration on the Rights of Indigenous People, Submission 10, p.1

³⁶ Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department, Inquiry into the UN Declaration on the Rights of Indigenous People, *Committee Hansard*, Canberra, 8 June 2023, p. 1

- 1.133 As has been noted elsewhere, the UNDRIP was specifically created not to introduce new rights, but to enshrine those rights in an Indigenous context, reflecting both First Peoples' values and cultures, and also with specific regard to the collective nature and experience of First peoples subject to colonisation.
- 1.134 Notably, the UNDRIP also provides provisions for collective rights, which other treaties do not. As such, I find the Attorney General's response disingenuous on a number of points and believe it serves to obfuscate the responsibility of the Australian Government to introduce such legislation.
- 1.135 Further, the argument presented by the Attorney General's Office does not eliminate the responsibility for the Australian Government to legislate the UNDRIP into domestic law as *sui generis* law.
- 1.136 This is supported by Terri Janke and Company, who state in their submission to the current Inquiry that:

TJC strongly supports the implementation of the UNDRIP in Australia [...] It is a ground-breaking legal instrument that advocates for and protects the rights of Indigenous peoples at an international level, and has the potential to do the same domestically if embedded in the form of *sui generis* law.³⁷

Closing the Gap

- 1.137 I note the NIAA cites the 2019 Partnership Agreement on Closing the Gap Partnership as an example of the principles of the UNDRIP in action, and provides a list of programs as examples they claim to be in adherence with, and support of, the UNDRIP.
- 1.138 However, while the NIAA claims that Closing the Gap is an example of the principles of the UNDRIP in action - in particular Self-determination - there is ample evidence to attest to the failure of the multi-governmental Closing The Gap policy since its inception in 2007.
- 1.139 The consecutive failure of this policy largely rests on the failure to consult adequately with First Nations communities, with even former Prime Minister Scott Morrison acknowledging this in 2020.³⁸
- 1.140 In fact, instead of Closing the Gap demonstrating a successful adherence to UNDRIP principles at a government policy level, its ongoing failure actually demonstrates exactly why the UNDRIP needs to be legislated, in particular with respect to Free, Prior and Informed Consent, Self-determination and cultural rights.

³⁷ Terri Janke and Company, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 10*, p.2

³⁸ Isabella Higgins, 'Closing the Gap agreement reset with 16 new targets to improve lives of Aboriginal and Torres Strait Islander Australians', ABC (30 July 2020)

1.141 The repeated failure of Closing the Gap also illustrates why the proposed Action Plan and other initiatives to improve the UNDRIP implementation as per the 2022 Bill are required.

1.142 The Australian Human Rights Commission – in response to the original inquiry – supports this position, and highlights that in the Prime Minister’s Closing the Gap reports of 2010 and 2018, the UNDRIP is only mentioned on two occasions, and has failed to observe First Peoples’ rights to Self-determination.

1.143 They state:

Australia has identified the Closing the Gap Strategy as its key policy platform to give effect to the Declaration. However, from 2008 to 2020 the Declaration is mentioned only twice in any of the Prime Ministers’ Closing the Gap Reports (2010 and 2018), in both instances only to note the Government’s endorsement of the Declaration in 2009 [...] Furthermore, for most of the period it has been in effect, Closing the Gap has been government-led without significant engagement of indigenous communities in setting priorities or in delivery, an approach clearly inconsistent with First Nations people’s rights to self-determination and to participation in decision-making.³⁹

1.144 The AHRC further add:

The work of First Nations peaks and the Morrison Government has gone some way towards addressing this through the 2019 National Partnership Agreement on Closing the Gap. In the Commission’s view, the National Partnership Agreement would be further strengthened by the inclusion of references to Australia’s commitments under the Declaration and linkages between the rights contained in the Declaration and Closing the Gap targets and priority reforms.⁴⁰

1.145 The University of New South Wales also highlighted the failure of Closing the Gap as an example of Australia’s failure to implement the UNDRIP, stating:

[T]he strategy has significantly failed to engage First Nations communities and enable them to actively contribute to the planning and delivery of the initiative [...] Additionally, in the fourteen years since Closing the Gap was adopted, only two out of seven targets were on track to be met. This has contributed to Australia’s poor track record in implementing the UNDRIP, and it has limited the ability for First Nations peoples to exercise basic rights that they deserve to have.⁴¹

1.146 Further, it is my view that the Closing the Gap policy largely aims to simply reduce the vast inequalities experienced by First Peoples as a consequence of historical and ongoing colonisation (hence the use of the term ‘gap’). The policy was never in and

³⁹ Australian Human Rights Commission, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 53*, p.19

⁴⁰ Ibid.

⁴¹ University of New South Wales, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 4*, pp.4-5

of itself designed to ensure First Peoples' rights as granted under international law; as such, it is my view that it is disingenuous for the government to misrepresent efforts to simply provide First Peoples with the same quality of life, health, education and opportunity as everyone else.

b. Criticism of Australia's UNDRIP implementation

- 1.147 As has been already highlighted, Australia - along with Aotearoa/ New Zealand, Canada and the United States - initially refused to endorse the UNDRIP in 2007, ostensibly with what they perceived to be the problematic aspect of Self-determination. In fact, then Prime Minister John Howard stated at the time that what he referred to as 'customary law' would not be granted precedence over Australia's domestic jurisdiction via the UNDRIP's endorsement, a legal impossibility given that the UNDRIP is not binding in any sense, internationally or domestically.⁴²
- 1.148 That same government oversaw the greatest breach of UNDRIP principles in Australia's recent history via the Northern Territory Emergency Response suite of legislation. NTER – as it became known – flagrantly and blatantly ignored consecutive articles enshrined in the Declaration, with the government even suspending the 1975 Racial Discrimination Act in order to implement racist laws severely impacting First Peoples.
- 1.149 In their submission to the original inquiry, Dr. Shelly Bielefeld, Senior Lecturer, Griffith Law School, notes the ongoing negative impacts the NTER and Stronger Futures policies had on First Nations communities.
- “Lengthy colonial power dynamics have resulted in an Australian Indigenous policymaking approach where laws and policies have often been pre-determined by government and then presented to First Nations Peoples as a fait accompli. For example, this occurred with the 2007 Northern Territory Emergency Response, and the lack of consultation and negotiation with Northern Territory Indigenous Elders and communities has been criticised in the strongest terms, as has the trauma, shame, and stigma inflicted through this policy. The impacts of the Intervention are still being carried by First Peoples in the Northern Territory under the successor policy framework – Stronger Futures. This too must be addressed in order for UNDRIP to be adhered to – as destroying self-determination through NTER styled Stronger Futures measures will not create a better or stronger future for those subject to such laws and policies.”⁴³
- 1.150 NTER was criticised by then-Special Rapporteur on Indigenous Rights James Anaya as he concluded a visit in 2009, stating:

⁴² Emeritus Professor Jon Altman, School of Regulation and Global Governance, The Australian National University, Canberra, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 44*, p.4

⁴³ Dr. Shelly Bielefeld, Senior Lecturer, Griffith Law School, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 29*, p.3

In my view, the Northern Territory Emergency Response is not. In my opinion, as currently configured and carried out, the Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.⁴⁴

- 1.151 I note that, while the Labor government under Kevin Rudd endorsed the UNDRIP in 2009, it was the Labor government under Julia Gillard that continued the NTER legislation under the new guise of the 2012 'Stronger Futures' legislation. More than 10 years later, the continued soaring of First Peoples' incarceration rates and deaths in custody demonstrates once again the abject failure of government policy and only serves to provide more weight to the argument to legislatively implement the UNDRIP to finally ensure our people's rights are being respected.

Criticism from First Nations communities and organisations

- 1.152 Submissions to both inquiries from First Nations communities and organisations highlighted the lack of UNDRIP implementation being a direct influencer of the inequalities and ongoing colonial oppression and control experienced by First Peoples. Some of the key concerns highlighted were the over-incarceration of First Nations children, young people and adults; the high rates of First Nations children in out-of-home care; lack of control and consultation in resource extraction and land rights; lack of Treaty; and a general lack of cultural consideration and consultation in all other areas of First Peoples' lives, including health, economics, education, language and ways of living, being and doing.

- 1.153 Mr Yingiya Guyula MLA, states in their submission:

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a statement that gives voice to Indigenous peoples identity, and our right to be who we are. It is a powerful document that protects our rights to our culture, our language, our law, our way of life. In this way, it is a powerful document for all Australians because it provides guidelines about how to protect the diversity of First Nations cultures that exist across the country. Our cultures should be seen in the light of our strength and gifts that we have, something that should be fought for and protected because it is unique and magnificent, and despite all the disadvantage, oppression, assimilation, murder and hatred we have faced and still face - we are still here in 2022.⁴⁵

- 1.154 Also highlighted was the failure to adequately address and redress so-called Australia's historical and ongoing genocidal impacts, including the assimilation

⁴⁴ James Anaya, 'Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia', 27 August 2009.

⁴⁵ Mr Yingiya Guyula MLA, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 51*, p.1

policies that created the Stolen Generations, the forced dispossession of land and the ongoing ramifications seen in intergenerational trauma, and multi-generational experiences and impacts of poverty and incarceration.

- 1.155 The submission by Gudanji for Country to the original inquiry highlights some of these key areas:

“Articles 7 and 8 reference our right to “liberty” and the right “not to be subjected to forced assimilation or destruction of (our) culture”. Our nation's history (Australia) clearly defines our failure to meet all the components of Article 7. The genocide of First Nations across this country is Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia well documented, although its true magnitude may never be known. Additionally, our history of Stolen Generations of children continues to this day. Our “liberty” was taken two hundred and fifty years ago and has not been returned to us. We continue to see ourselves over-represented in our nation's prisons and youth detention centres and our people continue to die in police custody. It is hoped that, through a return to self-determination, our First Nations will be able to take back our liberty.”⁴⁶

- 1.156 The Healing Foundation also highlighted the nexus between UNDRIP implementation and redress for survivors of the Stolen Generations and their families, stating:

The UNDRIP represented hope upon its development, but its failure to be implemented in Australia in a way which responds to, and supports healing has been identified by Stolen Generations survivors as a barrier to effective healing, and the perpetuating of harm. They are owed dignity and healing, and a promise that future generations will be free of trauma.⁴⁷

Criticism from Legal Experts and the United Nations

- 1.157 Submissions to both inquiries from legal and other experts also highlighted the failure of consecutive Australian governments to implement or adhere to principles enshrined in the UNDRIP.

- 1.158 The University of New South Wales notes the hypocrisy of ongoing Australian ‘pledges’ to implement the UNDRIP in the international arena while subsequently failing to do so:

In international forums, the Australian Government has pledged to take steps to implement UNDRIP and enhance First Nations Australians’ enjoyment of their rights. However, the Australian Federal and State governments have failed to follow through on these promises; the principles of UNDRIP have not been implemented into domestic law, policy and practice, and existing laws and policies have not been reviewed for compliance with the declaration. The

⁴⁶ Gudanji for Country, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 41*, pp.2-3

⁴⁷ Healing Foundation, Inquiry into the UN Declaration on the Rights of Indigenous People, Submission 34, p.6

Australian Government has also failed to negotiate a National Action Plan to implement UNDRIP in consultation with First Nations peoples.⁴⁸

- 1.159 The Australian Human Rights Commission notes that Australia has voluntarily accepted the UNDRIP and as such, has a duty and obligation to uphold the principles enshrined therein:

“The Declaration specifically requires that ‘[s]tates, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration’. This is the standard that Australia has voluntarily accepted, and which it should stand by.”⁴⁹

- 1.160 The AHRC declares Australia’s non-compliance at an international level, highlighting that at Australia’s second Universal Periodic Review (UPR) in 2015, nine recommendations were made by UN member states relating specifically to the Declaration. Of these, only four were accepted:

“The five recommendations that would have required the Government to commit to tangible outcomes, including a national strategy to implement the Declaration, were all noted and rejected [...] Likewise, the 2017 report of the UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz highlighted major insufficiencies in Australia’s approach, noted the inconsistency in Australia’s agreement to the World Conference on Indigenous Peoples Outcome Document and its subsequent rejection of the UPR recommendation to commit to a national strategy to implement the Declaration.”⁵⁰

- 1.161 This clearly demonstrates the Australian government’s unwillingness to actually progress its adherence with UNDRIP and completely undermines its verbal statements of commitment to it.

- 1.162 As stated by United Nations’ Special Rapporteur on Indigenous Rights James Anaya in 2009:

I would like to reiterate the importance of the United Nations Declaration on the Rights of Indigenous Peoples for framing and evaluating legislation, policies, and actions that affect the Aboriginal and Torres Strait Islanders Peoples. The Declaration expresses the global consensus on the rights of indigenous peoples and corresponding state obligations on the basis of universal human rights. I recommend that the Government undertake a comprehensive review of all its

⁴⁸ University of New South Wales, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 4*, pp.3-4

⁴⁹ Australian Human Rights Commission, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 53*, p.5

⁵⁰ Ibid. pp.17-18

legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders in light of the Declaration.⁵¹

- 1.163 It is my belief that this call to action – made nearly 15 years ago by no less than a representative of the United Nations - be finally implemented.

c. Criticism of Australia's International Human Rights Implementation

- 1.164 Along with the criticism of Australia's implementation (or lack thereof) of the UNDRIP in both inquiries, consecutive Australian governments have also received widespread criticism for the ongoing failure to implement and uphold a suite of other international human rights obligations.

- 1.165 In its submission to the original inquiry, the University of New South Wales summed up Australia's dismal track record of human rights, describing it as 'exceptionally mediocre.'

"Australia, in particular, has an exceptionally mediocre track record in relation to compliance with international treaties. This is despite the fact that Australia is a signatory to all core UN human rights treaties. As of 2021, Australia has received 344 recommendations from 122 countries to improve its human rights record; and of the mere 177 that have been accepted, few have seen full implementation. Such shortcomings, as evident in the present submission, have been especially conspicuous in failure of successive Australian governments to adequately adhere to the provisions laid out in UNDRIP."⁵²

- 1.166 To exemplify this, at the recent Universal Periodic Review in January 2021, member states criticised Australia's treatment of asylum seekers and questioned why incarceration rates of First Nations people remain so high.

- 1.167 Human Rights Watch reported that "more than 40 nations questioned Australia's policies toward asylum seekers and refugees, from Brazil to Germany, South Korea to the US. Among the concerns raised was Australia's continued use of offshore processing and prolonged detention for asylum seekers."⁵³

- 1.168 They further reported that "several countries raised Australia's continued failure to reduce the significant over-representation of Indigenous Australians in the criminal justice system. Other concerns raised included the severe inequality experienced by Australia's First Nations people."⁵⁴

- 1.169 Human Rights Watch also noted that twenty-seven countries urged Australia to raise the minimum age of criminal responsibility, noting that the UN Committee on the

⁵¹ James Anaya, 'Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia', 27 August 2009.

⁵² University of New South Wales, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 4*, p16

⁵³ Human Rights Watch, 'Australia: Address Abuses Raised at UN Review' (20 January 2021)

⁵⁴ Ibid.

Rights of the Child recommends that countries increase their minimum age of criminal responsibility to at least 14.⁵⁵

- 1.170 And in 2022, the United Nations Human Rights Committee found that Australia has failed to adequately protect Torres Strait Islanders against adverse impacts of climate change, thereby violating their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home.⁵⁶
- 1.171 It is my view that the failure to adequately adhere to or implement the principles enshrined in the UNDRIP is a governmental pattern of colonial control and abuse that continues to target First Peoples, and other marginalised and criminalised groups such as asylum seekers and refugees and seriously breaches international law on a regular basis.
- 1.172 This is not simply my own view, but by the United Nations as an international and legal organisation supported by the views of Australia's contemporaries in the form of member states.

5. International experiences of implementing the UNDRIP

a. Canada and British Columbia⁵⁷

- 1.173 Initially voting against the Declaration, the Canadian Government has since changed their position, and have legislated the UNDRIP in both federal and provincial jurisdictions.
- 1.174 In 1982, s 35 was added to the Canadian Constitution, affirming existing rights and treaty rights of First Nations peoples. In addition, the Canadian First Nations peoples have a national representative voice, established in 1985, which comprises 630 First Nations communities who meet to set national policy in relation to Indigenous rights.
- 1.175 These constitutional mechanisms were established prior to the signing of the UNDRIP, yet provide a strong foundation for the Declaration's recognition in Canadian law, in particular – as noted by the Australian National University in their submission to the original Inquiry, Articles 1⁵⁸ and 18.⁵⁹
- 1.176 Despite the provision of s 35 of the Canadian Constitution, there was a lack of political will to recognise the UNDRIP in domestic law following Canada's signing of

⁵⁵ Ibid.

⁵⁶ United Nations Human Rights Office of the High Commissioner, 'Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds' (23 September 2022)

⁵⁷ This section summarised from the Australian National University Law reform and Social Justice Research Hub's submission to the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, (*Submission 36*)

⁵⁸ Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

⁵⁹ Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

the Declaration in 2010 with the assertion that s 35 of the Constitution would serve to fulfil the principles of the UNDRIP.

- 1.177 However, recent legislative reform in Canada has occurred at the provincial and federal level, reflected in the Declaration on the Rights of Indigenous Peoples Act in British Columbia and the United Nations Declaration on the Rights of Indigenous Peoples Act at the federal level.
- 1.178 The former was developed in collaboration with the First Nations Leadership Council and passed in November 2019, with unanimous approval from all political parties. The Federal Act followed the British Columbia Act, and was developed at the Assembly of First Nations, achieving royal assent in June 2021.
- 1.179 Both Acts serve primarily to formally recognise the UNDRIP in domestic law and map out actions to implement the Declaration's provisions. In particular, they require the respective governments to implement an Action Plan in consultation and cooperation with Indigenous peoples and to take all measures necessary to ensure that their laws are consistent with the Declaration.
- 1.180 The British Colombian Act and the Federal Act implement Article 38 of the UNDRIP, which establishes the manner in which nation states may seek to implement the Declaration:
- States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this declaration.
- 1.181 Much critique surrounding the British Columbia and Federal Acts draws on the fact that neither Act provides any kind of enforcement mechanism for Indigenous peoples, and in this way, they serve more as symbolic instruments rather than having significant legal impact.
- 1.182 However, it is important to note that the incorporation of the UNDRIP into Canadian law is considered to alter regulatory and administrative processes by putting into practice the engagement of First Nations people's participation.
- 1.183 Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, stated to the current inquiry:
- I think the bill is good because it does have 'teeth'—as I'll call them—because of the requirement to align all policies and legislation in Canada with the declaration, keeping in mind that the declaration is the minimum standard of human rights for indigenous peoples. So it is very much calibrated here in Canada.⁶⁰

⁶⁰ Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, *Committee Hansard*, Canberra, 10 February 2023, pp.1-2

- 1.184 Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission, also stated:

It is a framework for reconciliation. If you have the underpinnings of a constitution as well as legislation then it continues to enshrine that framework for reconciliation and how to move rights recognition forwards, particularly looking at all of Australia.⁶¹

- 1.185 Particularly heartening to hear from the Canadian witnesses in the course of the hearings in this inquiry was the account of progress made since the UNDRIP had been enshrined into law, and how this very fact had sped up its implementation more than any previous efforts had. This in and of itself is an incredibly strong testimony to the value of legislating the UNDRIP domestically.

b. Aotearoa⁶²

- 1.186 In 2007, Australia and Aotearoa/ New Zealand/ were two of the four countries to vote against adopting the Declaration. In 2009-2010, both Australia and New Zealand/ Aotearoa changed their position and announced support for the Declaration.
- 1.187 Aotearoa/ New Zealand/ has since committed to undertake measures to implement the UNDRIP with the Māori calling for a monitoring plan to check the implementation of the Declaration into domestic law.
- 1.188 In 2014, the National Iwi Chairs Forum established an Independent Monitoring Mechanism to monitor and report annually to the United Nations Expert Mechanism on the Rights of Indigenous Peoples in Geneva. In 2016, the Te Puni Kōkiri agency found that while progress towards the aspirations of the Declaration were happening across government, there was no definite line between the activities and the commitment to the Declaration.
- 1.189 This would lead the development of a National Plan of Action for New Zealand's progression towards the objectives of the UNDRIP with the Agency noting that the Declaration plan would provide an opportunity to establish a coherent delivery of the Declaration across government.
- 1.190 In March 2019, Cabinet approved a process to develop a Declaration plan and in June 2021, the next steps for developing a declaration that included a partnership with leaders of Te Minita Whanaketanga Māori, Pou Tikanga of the National Iwi Chairs Forum and the Human Rights Commission to work together to create and operate a program to engage Māori perspectives on their objectives in a Declaration plan.

⁶¹ Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p.17

⁶² This section summarised from the Australian National University Law reform and Social Justice Research Hub's submission to the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, (*Submission 36*)

- 1.191 In April 2022, feedback from Māori groups, consisting of 69 workshops and 370 participants, prompted publication of a draft Declaration plan. Three concepts were considered: *inamata* (looking back), *onamata* (the present) and *anamata* (looking forward).
- 1.192 These concepts allowed for the responders to reflect on their experiences of Self-determination, equality, culture and access to land and resources. The groups were also asked what they would do to realise Maori rights to Self-determination, land, culture and equality if they had control of the resources and ability to take decisive action. The groups were further asked what they believe the actions of the government should be to support Indigenous peoples rights to exercise Self-determination, culture, and equality.
- 1.193 The summary features of this engagement process for monitoring the Declaration plan were to consider Indigenous international frameworks; for Indigenous groups to lead the implementations independent of government; for legislated reporting from government to include the impact on Indigenous families; measuring collective, family and environmental wellbeing; and to monitor establishment and resources of the Maori authority and institutions.
- 1.194 The next step is drafting an official plan in partnership with Te Puni Kōkiri, the National Iwi Chairs Forum's Pou Tikanga and the Human Rights Commission, originally due by the end of 2022, to then be consulted on widely with the broader Aotearoa/ New Zealand society.
- 1.195 However, the Declaration Plan development has been put on hold by the government, apparently due to it being a too political and possibly too progressive issue to pursue at the time.⁶³
- 1.196 The Australian National University states that "the draft Declaration plan has already provided a clear pathway to monitor New Zealand's commitment to the Declaration and can produce meaningful outcomes for the Declaration's aspirations."⁶⁴
- 1.197 However, the lack of legislative obligation to progress UNDRIP's implementation can be seen as a factor in it being stalled, once again underlining the importance of legislating the Declaration domestically to ensure it can effectively be implemented and government's being held to account to this extent.
- 1.198 Professor Claire Charters, Te Kaunihera Maori o Aotearoa, New Zealand Maori Council, stated to the current inquiry:

The biggest development in Aotearoa has been the decision by the New Zealand government, in around 2018, to develop a national plan of action to implement the declaration. That process has now been paused but went on for a number of years. It included bringing the UN Expert Mechanism on the Rights of Indigenous

⁶³ Professor Claire Charters, *Committee Hansard*, Canberra, 31 March 2023, pg. 26-27

⁶⁴ Australian National University Law reform and Social Justice Research Hub, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, (*Submission 36*) p.9

Peoples out to Aotearoa, New Zealand, to provide guidance in the early days on how to go about developing the national plan of action. It included the establishment of an expert working group to provide advice to the government and then it included the negotiations, on the national plan of action itself, proper [...] [T]he structure for developing that national plan of action was quite unique. It involved having five national Iwi chairs, leaders at the governance level, sitting alongside four ministers in partnership. That is quite new, to have cabinet members working in partnership, with the idea that one couldn't veto the other, together to develop that plan. The whole structure, from there on down, emulated that in the sense that the steering committee—I was the National Iwi Chairs' representative on the steering committee. There was a government senior official and a senior person from the Human Rights Commission. And then we had our working people. I want to highlight that structure, because I do think that that's unique and evidences a genuine partnership in that approach.⁶⁵

c. Finland

- 1.199 While Finland has not incorporated the UNDRIP directly into domestic legislation, the principles of the Declaration are enacted by way of the Sami Parliament, which represents Finland's Indigenous peoples, the Sami. However, the Sami Parliament has made the request to the Finnish government to enact a National Action Plan similar to Canada and that which informs my Private Senator's Bill and within their testimony to the current inquiry, it was noted there were ongoing negotiations with the Finnish government on the issue of Self-determination and Free, Prior and Informed Consent.
- 1.200 The Sami Parliament is a self-governing body of the Sami, and its purpose is to plan and implement a cultural Self-government. It is quarantined by the Constitution of Finland to the Sami as Indigenous peoples. This parliament is the supreme political body of the Sami in Finland. Its 21 members and four deputies are elected from among the Sami every four years. Within this there is also the Skolt Sami community, which is its own small group within the Sami.
- 1.201 Further, there is cooperation between the various Indigenous groups within the Nordic states, being Sweden, Norway and Finland (and to a certain extent, Russia). This transnational cooperation ensures that decision making impacting Indigenous peoples is being discussed, given the delineation of Indigenous groups with respect to international state borders.

⁶⁵ Professor Claire Charters, Te Kaunihera Maori o Aotearoa, New Zealand Maori Council, *Committee Hansard*, Canberra, 31 March 2023, p.24

- 1.202 Importantly, the decisions of the Sami Parliament are not binding on the Finnish government. Instead, as Mr Juuso, President of the Sami Parliament, told the current inquiry, “[t]he Sami Parliament’s role is to represent the Sami independently of the government. The government has an obligation to negotiate in all far-reaching matters that might touch on the Sami, and those specificities have been set down in the Sami Parliament Act.”⁶⁶
- 1.203 Finland voted in favour of the adaptation of the United Nations Declaration on the Rights of Indigenous Peoples and in 2014 reaffirmed its commitment to pursue the objectives of the Declaration by adopting the outcome document of the World Conference on Indigenous Peoples, without any reservations.
- 1.204 The Sami Parliament has, however, urged Finland to develop, in collaboration with the Sami Parliament, a National Action Plan for implementation of the Declaration. This includes discussion and definition of Self-determination and Free, Prior and Informed Consent.
- 1.205 As Mr Tuomas Aslak Juuso, President, Sami Parliament, Finland, stated to the current inquiry:
- In this kind of context, our initial plan has been that specific paragraphs of the declaration would be looked at together with the government of Finland, in order to find out where we are actually implementing the declaration and where we still have challenges. Especially, maybe in the last 10 years, the right to self-determination, which is the core element in the declaration, has been one of those priority discussions here on the Finnish side: how it is implemented or if there has been a lack of implementation.⁶⁷
- 1.206 He also stated:
- Free, prior and informed consent is considered to be identified in the process of the Sami Parliament negotiating together with the government, but there are also some matters that perhaps may not be in the most recent interpretations of ‘free, prior and informed consent’ or at least may not be in line with that.⁶⁸
- 1.207 Ms Johanna Suurpaa, Director General, Department for Democracy and Public Law, Finland, also told the Committee:

⁶⁶ Mr Tuomas Aslak Juuso, President, Sami Parliament, Finland, *Committee Hansard*, Canberra, 10 February 2023, p.25

⁶⁷ Ibid. p.24

⁶⁸ Ibid. p.25

consensus and to have the approval of the Sami Parliament before moving forward. So that is the idea; it is very much based on the UNDRIP, the declaration [...] So it's a lens through which we interpret our current legislation; shall I put it this way. Because it's not more concrete than this, I do not have a specific answer to how we measure the economic and social rights impacts.⁶⁹

- 1.208 The request for preparation of a National Action Plan has so far not been heeded, and is a clear example of the shortfalls of relying solely on representative bodies limited to providing non-binding advice. Even the advice of preparing a National Action Plan has been disregarded, undermining the very concept of First Peoples' right to Self-determination and further underlining the advantages of ensuring implementation of the UNDRIP via a legislative approach.

6. Lessons learnt

a. Political Will

- 1.209 It is clear from the international and domestic experience with the UNDRIP – since inception – that government accountability has not been subject to international obligations that the Declaration imposes, but the will of the colonial state government to enact it in some legislative (or other) form.
- 1.210 The Australian Human Rights Commission noted this with frankness in their submission to the original inquiry:
- The primary barrier against the enactment of the Declaration in Australia to date has not been any unassailable legal or constitutional issues associated with domestic implementation, it has been a lack of political will.⁷⁰
- 1.211 As such, it is the irony of international law—especially that impacting marginalised and criminalised peoples such as First Peoples in Australia and abroad—that it is the government who is both the regular breacher of rights but yet tasked with the responsibility of upholding and implementing those same rights; it is like asking the jailkeeper to grant one's freedom.
- 1.212 That so-called Australia's engagement with the UNDRIP has been subject to political will – and not bipartisan international obligation – is evidenced by the original non-commitment of the Howard Government to sign, alongside Labor's inaction on the Declaration during its intermittent tenures since signing in 2009.
- 1.213 The process of implementing the UNDRIP in Canada, Aotearoa/ New Zealand and Finland have all been evidently subject to the same impetus (or lack thereof) of their colonial governments.

⁶⁹ Ms Johanna Suurpaa, Director General, Department for Democracy and Public Law, Finland, *Committee Hansard*, Canberra, 10 February 2023, p.32

⁷⁰ Australian Human Rights Commission, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 53*, p.13

1.214 This is the same in this very country. Successive governments in so-called Australia's recent history have ignored multiple reports, royal commissions, inquiries and recommendations with the net result of the ongoing inequality and oppression experienced by First Peoples, as evidence in the soaring incarceration of our people, ongoing intergenerational trauma, multigenerational carceral experiences, poor health and low life expectancy and endemic poverty and discrimination.

1.215 Some of these key reports that have been ignored by successive Commonwealth and State governments are:

- The Royal Commission into Aboriginal Deaths in Custody (1991, 339 recommendations)
- Bringing Them Home: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997, 54 recommendations)
- Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017, 227 recommendations)
- Australian Law Reform Commission - Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples - Report 133 (2018, 35 recommendations)
- A Way Forward. Final report into the destruction of Indigenous heritage sites at Juukan Gorge (2021, 8 recommendations)

There are, of course, many, many more.

1.216 As Ms Kacey Teerman, Associate Campaigner, Indigenous Rights, Amnesty International Australia, stated to the current inquiry:

“First Nations people need to lead this work. They were instrumental in making UNDRIP. When you don't let First Nations people lead work about our own communities, it fails. You can see that across every single area—health, education, everything. For the government to do this properly, it needs to be led by First Nations people. They need to be assured that it will be implemented in a meaningful way that isn't at the whim of government.”⁷¹

1.217 As such, the greatest barrier to legislatively enshrining the UNDRIP – and therefore, bestowing the benefits of the Declaration on First Nations peoples – ultimately rests with the government. As such, along with many submitters and witnesses to both inquiries concerning this matter, I once again call for action on the proposed 2022 Bill.

1.218 While legislating the UNDRIP into Commonwealth law is the first step, there is also a requirement and commitment from governments to follow up with the actions required UNDRIP and any related responsibilities this confers.

⁷¹ Ms Kacey Teerman, Associate Campaigner, Indigenous Rights, Amnesty International Australia, *Committee Hansard*, Canberra, 19 May 2023, p.23

b. Legislative Commitment

1.219 The international experience also demonstrates the contested discourse around the legislative commitment of the UNDRIP. It is worth clarifying the intent of Canada's federal example, being the *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* (Canada):

This Act requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to:

- Take all measures necessary to ensure the laws of Canada are consistent with the UN Declaration
- Prepare and implement an action plan to achieve the objectives of the UN Declaration
- Develop annual reports on progress and submit them to Parliament.⁷²

1.220 Noting here – and similar to the provincial legislation in British Columbia, and the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022, the UNDRIP in and of itself is not legislated. Instead, it is the requirement of government to assess and review legislation (both prospective and past) as to the consistency with the UNDRIP, develop Actions Plans and annual progress reports.

1.221 In this way, the legislative implementation of the UNDRIP is not as threatening as may first be perceived.

1.222 In fact, the legislative implementation would confer responsibilities that are similar to Australian jurisdictions such as Victoria, ACT and Queensland, which have Human Rights Charters by which prospective legislation must be measured (in Victoria, for example, by the Scrutiny of Acts and Regulations Committee) and signed by the relevant Minister.

1.223 While Aotearoa/ New Zealand and Finland have also yet to legislate UNDRIP's implementation, the example that Canada provides prompted positive feedback from witnesses to the current inquiry.

1.224 For example, The Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada stated:

Starting in 2017, every single ministry of our government committed to take certain actions to achieve the lofty goals of the declaration. We consider it a framework. We consider it to be central. Let me just tell you a little bit about that. It's not a long statute. Our drafting convention is to incorporate as a schedule the declaration itself as part of our law. The number of sections that actually precede that are few in number, but one of the key ones is section three of our statute.

⁷² Government of Canada, 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act, <https://www.justice.gc.ca/eng/declaration/index.html> [accessed 11 July 2023]

That mandates the government to take, 'all measures necessary to ensure the laws of British Columbia are consistent with the declaration'.⁷³

1.225 And Dr Sheryl Lightfoot also added:

[I]t is in behaviour and expectations where I see the biggest change. I can't even emphasise the profound shift that has occurred over these past eight years. Government now just knows they need to speak with us before they move forward. Sometimes I would say they verge on over-consultation—more than indigenous peoples have capacity for—but I would prefer that to ignoring us completely, because we can participate as we have capacity, and we can spread the responsibility around [...] We have more conversation and more dialogue than ever before.⁷⁴

c. Justiciability

1.226 In both instances of Canada and Aotearoa/ New Zealand, neither has enacted justiciable pathways with respect to implementing the UNDRIP. Meaning, there are no legal remedies equivalent to the courts, which could hold the right to remedy if a person or group had alleged that their rights as per the UNDRIP were violated.

1.227 In Canada, The Federal government has implemented the UNDRIP into legislation to ensure laws uphold the rights enshrined in the Declaration and have also begun assessing pre-dated legislation. As such, the Declaration itself is not legally binding in Canada.

1.228 In Aotearoa/ New Zealand, the government has yet to legislate the UNDRIP, as further discussions continue. However, noting that in both jurisdictions, legal action on the UNDRIP sits within the context of the Declaration being a 'framework' for legislative consideration, consultation and review, and not a justiciable law unto itself.

1.229 Dr Sheryl Lightfoot from Canada stated to the current inquiry:

To sum it up, I would say: [legislative implementation of the UNDRIP is] the beginnings of a successful model. The legislation sets out a framework—and the federal legislation mirrors very much our provincial legislation, because our provincial one came first in time, and, at the federal level, it took several rounds of attempts before we actually got there. It sets out a pathway for implementation and cooperation between government and indigenous peoples, and I think it's the

⁷³ Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada, *Committee Hansard*, Canberra, 31 March 2023, p.1

⁷⁴ Dr Sheryl Lightfoot, Senior Adviser to the President on Indigenous Affairs, University of British Columbia; Associate Professor, School of Public Policy and Global Affairs, Department of Political Science, University of British Columbia; Faculty Associate, Institute for Critical Indigenous Studies, University of British Columbia; Vice Chair and Member from North America, United Nations Expert Mechanism on the Rights of Indigenous Peoples, *Committee Hansard*, Canberra, 8 June 2023, p.11

cooperation and the improved communication and a changed relationship, actually, where I see the most traction right now.⁷⁵

- 1.230 The Federation of Victorian Traditional Owner Corporations notes the following regarding justiciability of the UNDRIP if implemented in the Australian context:

Whether the entirety of the UNDRIP could be adopted as justiciable, or whether it is more appropriate to only adopt some specific rights is a matter for negotiations. However, by way of example, a treaty could include provisions stating that Traditional Owner groups have a positive and justiciable right to:

- self-determination;
- self-government;
- free prior and informed consent;
- practice and revitalise cultural traditions and customs; and
- maintain and strengthen distinct political, legal, economic, social and cultural institutions.

If these rights were adopted in this manner, it would mean that the government had an obligation to ensure their implementation. If they failed to adequately act to meet this obligation, they could be taken to court, and an order made forcing them to carry out the appropriate actions.⁷⁶

d. Interaction with Prior Treaties and Legislation

- 1.231 In both the Canadian and Aotearoa/ New Zealand contexts, pre-existing treaties and legislative recognition played a part in affirming support for the implementation of the UNDRIP domestically. Both nations have pre-existing treaties between First Peoples and the colonial government, while Canada has had existing federal acknowledgement of First Peoples (as outlined above) in s 35 of the Constitution.
- 1.232 In Aotearoa/ New Zealand, Te Tiriti o Waitangi (Treaty of Waitangi) plays an important role via the Waitangi Tribunal – and also philosophically and constitutionally. In this regard - similar to Canada – historical and contemporary treaty obligations already play a large part in determining the relationship between First Peoples and government, with or without legal recognition of the UNDRIP.
- 1.233 However, Te Tiriti o Waitangi also allows for Sovereignty and Self-determination; however, these aspects are not recognised by government (the Māori language version has been contested in this regard). It is also not constitutionally enshrined, so while a fundamental document, is constantly breached, often without legal remedy.
- 1.234 As such, while both nations have pre-existing treaties and other forms of recognition, these are not considered to be substitutes for the implementation of the UNDRIP.

⁷⁵ Ibid.

⁷⁶ Federation of Victorian Traditional Owner Corporations, *Submission 36*, p.39

- 1.235 Ms Koren Marriot, Acting Director and General Counsel, Legislative and International Policy Unit, Aboriginal Law Centre, Department of Justice, Canada, stated to the current committee:

In Canada, we have a bit of an advantage in that self-determination has been part of the conversation in negotiating modern treaties, so we already have that in our framework a little bit.⁷⁷

- 1.236 Mr Mark Smith, General Counsel and Director of Process, British Columbia Treaty Commission stated:

"I would say that having UNDRIP in Canada has had quicker progress, more progress, in terms of change with the relationship with indigenous peoples here. I think our constitution, from 1982, has a specific section, section 35, around aboriginal rights. Although that's a very positive part of our constitution, I would say things have moved much quicker since the adoption of the UN declaration and in the legislation in Canada and in British Columbia. I think it's a valuable mechanism to advance rights and keep everyone focused on these important issues."⁷⁸

e. Free, Prior and Informed Consent (FPIC)

- 1.237 The Australian National University notes that there have been concerns around the implications of enacting the UNDRIP, frequently driven by the idea that the Declaration provides Indigenous peoples with rights that other people do not also enjoy. Of particular concern is the inclusion of a requirement for 'Free, Prior and Informed Consent' of Indigenous peoples in relation to a number of provisions in the Declaration.

- 1.238 One such example is Article 19:

States shall consult and cooperate in good faith with the Indigenous people concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

- 1.239 This provision has been criticised as establishing a 'veto' power, particularly over resource development projects.

- 1.240 Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, told the current inquiry:

When we were advocating for UNDRIP implementation, there were myths that stood in the way as obstacles. For example, in the declaration, there is 'free, prior and informed consent' and there were a lot of myths surrounding that: 'What does

⁷⁷ Ms Koren Marriot, Acting Director and General Counsel, Legislative and International Policy Unit, Aboriginal Law Centre, Department of Justice, Canada, *Committee Hansard*, Canberra, 10 February 2023, p.12

⁷⁸ Mr Mark Smith, General Counsel and Director of Process, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p.17

that look like?' or 'Oh, my goodness, resource development is going to be obstructed now,' and that sort of thing. There's a lot to 'free, prior and informed consent' and I love talking about it; but, essentially, at the end of the day, it just means that indigenous peoples, like anyone else in the world, can say 'yes', 'no' or 'yes, with conditions' when it comes to their land.⁷⁹

1.241 However, it has been identified in the Canadian context as analogous to other types of relations we see between governments, who work together through a range of mechanisms in order to ensure that the autonomy of both governments is respected.

1.242 Article 19 is, like all other provisions in the Declaration, subject to the same balancing provisions and must be interpreted in this light. In this way, FPIC encapsulates First Peoples' inherent right to Self-determination.

1.243 Ms Lisa Smith also stated:

I think [free, prior and informed content is] a live concern to opponents of UNDRIP. I haven't been plugged into that sort of opposition since the bill has been passed, but prior to the bill being passed I heard it loud and clear. And obviously that's free, prior and informed consent. I'll tell you one myth. I think people who were opposing UNDRIP were afraid of FPIC—the myth being that they invented a word that you don't see in UNDRIP anywhere. They kept saying, 'It's a veto. It's a veto.' They kept using that word over and over again. I think it caused some panic in the public. I would often say, 'Look, "veto" doesn't appear anywhere in UNDRIP.' It was like a scare tactic⁸⁰

1.244 Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission also stated to the committee:

One of the substantive changes that has transpired, particularly in the provincial legislation—so the BC the government legislation—is the notion of how to obtain and reach consent. We have new models of consent agreement for resource development that is specifically enshrined in the provincial UN declaration legislation. I think that's a really important factor. When we're looking at the conversation and the responsibilities under free, prior and informed consent, this is how they're legislating and ensuring that there are proper mechanisms for that relationship and partnership to be built so we can have sustainable economic development transpiring in indigenous communities.⁸¹

1.245 FPIC is indeed one of the core principles of the UNDRIP and essential to the right to Self-determination. It is questionable how governments can proclaim supporting Self-determination without at the same time committing to FPIC.

⁷⁹ Ms Lisa Smith, Interim Adviser to the President, Native Women's Association of Canada, *Committee Hansard*, Canberra, 10 February 2023, pp.1 - 2

⁸⁰ Ibid. p.4

⁸¹ Ms Celeste Haldane, Chief Commissioner, British Columbia Treaty Commission, *Committee Hansard*, Canberra, 10 February 2023, p.17

- 1.246 How FPIC is being implemented, however, has taken many forms and there are various approaches. The Declaration does not specifically spell out what it looks like, and neither does my Private Senator's Bill. This is specifically intended so as not to scare the government off from implementing the UNDRIP and provide the space for it and the practices to fulfill it to be established in a process guided by First Nations people, in close engagement with the government, guided by the very principle itself.

7. Why enshrine the UNDRIP into law?

a. Uphold International Obligations

- 1.247 Both the original inquiry into legislating the UNDRIP, and the current inquiry have drawn widespread support from First Nations' communities and organisations, and non-Indigenous legal experts, for implementing the UNDRIP in legislation.
- 1.248 As proposed in the 2022 Bill, this would, in short, confer legal responsibility on the Commonwealth Government to:
- 1 Take measures to ensure consistency between Commonwealth laws and the Declaration; and
 - 2 Prepare and implement an action plan to achieve the objectives of the Declaration.
- 1.249 With a further responsibility for the Prime Minister to, each financial year, present a report to each House of the Parliament on the progress of those actions.⁸²
- 1.250 This proposal is almost identical to that which has been implemented in Canada.
- 1.251 As has been discussed elsewhere, upholding international law – whether a declaration or convention – is a fundamental responsibility of signatory states.
- 1.252 As stated within the Declaration itself:
- States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration (Article 38).⁸³
- 1.253 It has been repeatedly made clear by the deluge of submissions made to both inquiries on this matter that consecutive governments have failed to implement even the most basic principles of the UNDRIP.
- 1.254 As Terri Janke and Company submitted to the current inquiry:
- Despite the increasing recognition of and compliance with UNDRIP principles and standards across government and business sectors in Australia, the Federal

⁸² United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) s 5

⁸³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, Article 38, A/RES/61/295*, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 10 July 2023]

Government has failed other than in a piecemeal way to implement these rights into Australian law thus denying Indigenous peoples clear and binding recognition and remedies. This must change as a matter of priority.⁸⁴

1.255 And as highlighted by the Australian National University First Nations Portfolio:

The Declaration's very existence is in direct response to the failing of the international system of nation-states to sufficiently protect and promote the rights of Indigenous peoples. It is a tool to change the nature of the relationship between Indigenous peoples and states and to put it on a more equal footing.⁸⁵

1.256 Legislating the UNDRIP at a Commonwealth level would bring Australia in line with other comparative jurisdiction as per its responsibilities to uphold and protect the rights of Indigenous peoples, as well as act upon repeated criticism and recommendations from the international community to uphold its obligations therein.

1.257 As further stated by the Australian National University First Nations Portfolio:

"The UNDRIP is a direct challenge to the marginalisation of Indigenous peoples. Its implementation into Australian law must therefore be aimed at changing the status quo and at making meaningful space for the protection and advancement of the rights of Indigenous peoples. It is a critical matter in the pursuit of a more equitable and harmonious Australia."⁸⁶

1.258 It is my strong belief in this instance that legislating the UNDRIP is not optional for this colonial government, but an international and domestic responsibility.

b. Guidance for Government

1.259 As has been outlined previously in this report, the UNDRIP is more than an 'aspirational' declaration and if legislated, can provide government agencies and the public sector with a defined methodology of respecting First Peoples' rights, cultures and values.

1.260 The Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada, in the current inquiry, spoke about the importance of the legislative requirement of the UNDRIP in Canada:

Starting in 2017, every single ministry of our government committed to take certain actions to achieve the lofty goals of the declaration. We consider it a framework. We consider it to be central.⁸⁷

1.261 He further stated:

⁸⁴ Terri Janke and Company, *Submission 10*, p.2

⁸⁵ Australian National University First Nations Portfolio, *Submission 31*, p.8

⁸⁶ Ibid.

⁸⁷ Hon. Murray Rankin, Minister of Indigenous Relations and Reconciliation, Government of British Columbia, Canada, *Committee Hansard*, Canberra, 31 March 2023, p.1

For example, would we bring in enabling legislation that would contemplate a global approach to legislation that would be changed to change the statutory decision-makers or make space for indigenous leadership to share in decision making or to have a consent based decision-making process. This is something that is engaging us as we speak”⁸⁸

1.262 Submissions to both inquiries also highlighted the need for government to better understand, and engage with, the UNDRIP as an underlying principle for legislative development and policy creation, in particular with respect to First Peoples’ right of self-determination at all levels of government.

1.263 Mr Rodney Dillon, Indigenous Rights Adviser, Amnesty International Australia, stated:

We've got problems with the three levels of government not even understanding what the declaration is even about. I dare say that there would be very few councillors at the local council level who would even have heard of the UNDRIP. I think we have a lot of education to do at a state level and at a local level [...] I think that is an area that this group needs to look at—how we educate the three levels of government when they are making law to look at the declaration and see what they can do that is in there, be it self-determination or free prior and informed consent.⁸⁹

1.264 This necessity is no more exemplified than by the example of Closing the Gap, which as discussed previously in this report, rather than being an example of Self-determination – as touted by various government agencies – is exactly the opposite. Closing the Gap – along with other government-led policy disasters such as the Northern Territory Intervention and Labour’s thinly disguised iteration of the same ‘Stronger Futures’ has been repeatedly criticised for undermining Indigenous Self-determination, widely cited as the basis for their repeated failure.

c. Clarity of Free, Prior and Informed Consent

1.265 Further, rather than granting First Peoples new rights or the right to veto, legislative implementation of the UNDRIP would instead clarify and establish a framework for contested areas such as FPIC, in particular with regard to resource extraction and the inadequacy of current Native Title legislation.

1.266 Ms Anyupa Butcher, First Nations Justice Senior Campaigner at GetUp!, stated to the current inquiry:

Our laws are inadequate to deal with free prior and informed consent. There's a principle under international law that Indigenous people should have the right to

⁸⁸ Ibid. p.3

⁸⁹ Mr Rodney Dillon, Indigenous Rights Adviser, Amnesty International Australia, *Committee Hansard*, Canberra, 19 May 2023, p.19

consent or refuse consent to resource the development of their land. There are various international clan pools where this principle has been adopted. The absence of a veto right at the production phase of any onshore shale gas development means that Australia's land rights act falls short of implementing the principles of free prior and informed consent.⁹⁰ =

...

An RMIT university study published in March 2021 found that numerous top mining companies failed to implement international human rights conventions when negotiating with First Nations people over land use and have failed to adequately obtain consent from traditional owners for some projects. The report concludes that they are able to do so because Australia's native title and land rights laws don't require companies to gain free prior and informed consent from traditional land owners. We believe that we need a review of the Native Title Act and ensure that any new cultural heritage laws are underpinned by the principle of free prior and informed consent and veto powers.⁹¹

- 1.267 The Victorian Aboriginal Legal Service (VALS) notes three aspects of FPIC that should be utilised to craft a definition:

Free – consent sought must be free from coercion, intimidation and manipulation. Prior – consent must be sought sufficiently in advance of any authorisation or commencement of the relevant activity. Respect must be shown to time requirements of Indigenous consulting and consensus. Informed – the provision of information to Indigenous communities covers a range of aspects. This includes the nature and scope of any proposed project or activity, the purpose and duration of the project or activity, what will be affected by the project or activity, an assessment of the impacts and potential risks, and procedures the project or activity may entail.⁹²

- 1.268 In their submission to the current inquiry, even Woodside Energy, as a potential major project proponent, supports both the legislative implementation of the UNDRIP and subsequent clarity with respect to FPIC in their submission to the current inquiry.

“Woodside supports greater clarity in Australian law to support the implementation of the principles of UNDRIP and, in particular the application of, Free Prior and Informed Consent (FPIC) processes [...] Legal clarity on this matter is necessary to ensure communities understand their rights and companies understand and demonstrate compliance with their obligations under UNDRIP [...] In Woodside's view, the scope of the application of UNDRIP in Australia would benefit from additional clarity in the following key areas:

⁹⁰ Ms Anyupa Butcher, First Nations Justice Senior Campaigner, GetUp!, *Committee Hansard*, Canberra, 19 May 2023, p.12

⁹¹ Ibid.

⁹² Victorian Aboriginal Legal Service, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission* 66, p.5

- Definition of consent and how it might be evidenced.
- Consideration of the enduring nature of consent and any circumstances in which this might change.
- Defining who provides consent where native title does not exist or is yet to be determined.
- The level of reasonable technical detail that is needed to meet the threshold for informed decision-making.
- How free consent is considered in the context of agreement benefits and compensation payments that are received by Indigenous parties.”⁹³

d. Address Inequality

- 1.269 As has been outlined in numerous submissions to both inquiries and summarised elsewhere in this report, the UNDRIP provides the principles with which to address the inequalities experienced by First Peoples that are a direct result of ongoing colonisation.
- 1.270 Successive government-led policies such as Closing the Gap, and the complete refusal to amend criminal justice laws such as raising the age of criminal responsibility, have exacerbated these inequalities, along with the persistent societal and structural racism and prejudice experienced by First Peoples on a daily basis.
- 1.271 The UNDRIP highlights the necessity to address these inequalities, stating:
- Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind, Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.
- 1.272 The principles of the UNDRIP - developed by First Peoples internationally, often with similar experiences - are therefore designed to provide a platform to combat these inequalities. For example, the right to Self-determination and FPIC, and the right to maintain and practice culture.
- 1.273 These are not simply ‘aspirational’ principles, but when fully supported, are proven to have beneficial outcomes for First Peoples and thereby society as a whole.

e. Protect and Promote Culture

- 1.274 The UNDRIP cites numerous articles relating to the promotion and protection of the diverse cultures of First Peoples. This is both with respect to the contemporary manifestation of cultural practices, values and responsibilities, but also with

⁹³ Woodside Energy, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 24*, p.2

consideration to the attempted destruction and eradication of First Peoples' cultures due to colonial legislation, policies and practices.

- 1.275 The impacts of colonisation on First Peoples' cultures within so-called Australia are still being felt. Whether it is with respect to the lack of Indigenous languages that are spoken on a daily basis – around 150 down from an estimated 700 prior to colonisation – to the denial of access to family, culture and cultural responsibilities experienced by adults, children and young people who are incarcerated, the threat of cultural decimation is still a reality for First Peoples.
- 1.276 For example, Article 8.1 of the UNDRIP states that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”⁹⁴
- 1.277 These ongoing connections have been further severed with the destruction of consecutive assimilation policies, which aimed to bring about the destruction of First Peoples' identities and deep family connections. The impacts of this are still being felt through intergenerational trauma and multi-generational child removals.
- 1.278 Article 13 states:
- 1 Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
 - 2 States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.⁹⁵
- 1.279 Further, the severing of our children, young people and adults from their families, cultures and spiritual connections due to incarceration is also a threat to First Peoples' cultural rights. This denies our people access to culture which also serves as a protective factor from recidivism.
- 1.280 The Western Australian Commissioner for Children and Young People highlighted this in their submission to the original inquiry, noting this is also addressed in the UNDRIP Articles 9, 12, 13 and 14. They stated:
- Culture is fundamental to the lives of Aboriginal children and young people, and central to their wellbeing. There is significant evidence that highlights the positive association between culture and wellbeing amongst Aboriginal people¹ including

⁹⁴ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 8.1, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 13 July 2023]

⁹⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 13.1 and 13.2 available at: <https://www.refworld.org/docid/471355a82.html> [accessed 13 July 2023]

across areas such as health, education and employment. Aboriginal children and young people who have a strong sense of identity and can make positive statements about themselves are better equipped to learn life skills and are more likely to experience positive wellbeing. Culture can also act as a protective factor that can reduce exposure to, and the effects of, risks to personal wellbeing. Aboriginal people have commonly identified their culture as a factor that builds resilience, moderates the impact of stressful circumstances and supports recovery from adversity.⁹⁶

- 1.281 The ACT Human Rights Commission also stated in their submission to the same inquiry:

[The] value and significance of Aboriginal cultural rights is well documented. The Expert Mechanism on the Rights of Indigenous Peoples highlighted in its Study on the role of languages and cultures in the promotion and protection of the rights and identity of Indigenous peoples that 'languages and cultures will only flourish in environments when they are more broadly respected in their own right and for their contribution to an understanding of humanity'.⁹⁷

- 1.282 Cultural values and connections to land are also threatened by ongoing resource extraction and land use, as evidenced with the disastrous destruction of the Juukan Gorge Caves and attempts to store nuclear waste on our lands. These are, of course, not new colonial excursions; the acquisition of our lands and waters has been a key objective driving ongoing colonisation, whether it be the false declaration of terra nullius in an attempt to justify the Crown pilfering an entire continent to nuclear testing that occurred on the lands of the Maralinga Tjarutja (MT) and Anangu Pitjantjatjara Yunkunytjatjara (APY). The forcible acquisition of First Peoples' lands has in many cases meant a severing of our cultural and spiritual connections.

- 1.283 Article 25 states:

"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."⁹⁸

- 1.284 In this regard, the Australian Nuclear Free Alliance submission to the original inquiry stated:

The cards are heavily stacked against concerned Aboriginal people who would prefer to see no uranium mining on their country. The inequity found in the

⁹⁶ WA Commissioner for Children and Young People, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 10*, p.2

⁹⁷ ACT Human Rights Commission, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 5*, p.4

⁹⁸ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 25 available at: <https://www.refworld.org/docid/471355a82.html> [accessed 13 July 2023]

relationship between mining companies and Indigenous communities is further compounded by the limited rights afforded to Aboriginal people in relation to developments on traditional lands and estate.”⁹⁹

- 1.285 The UNDRIP aims to address these impacts, and ensure that such cultural attacks are discontinued, alleviated and redressed. These cultural rights are not fully protected under current Australian legislation – neither state nor Commonwealth – which provides further impetus for the UNDRIP to be legislated.

8. Complementing the UNDRIP

a. Legislative incorporation of UNDRIP must be led by First Peoples

- 1.286 As mentioned previously, almost all submissions to both the current and previous inquiry advocated that the UNDRIP be implemented into legislation as per my 2022 Bill.
- 1.287 Almost all submissions supported the governmental requirement as per the Bill to develop an Action Plan and for legal onus to be placed upon successive governments for annual reporting.
- 1.288 For example, the University of New South Wales Law Society supports the 2022 Bill, stating:
- “There is wide scope for UNDRIP to be enacted in Australia. A promising means of doing so is by passing the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (the Bill), introduced by Senator Lidia Thorpe on 29 March 2022. The Bill provides a framework for implementing UNDRIP into domestic law. If passed, the Bill would compel the Federal Government to take measures to ensure consistency between Commonwealth laws and UNDRIP, and prepare and implement a national action plan to achieve the obligations prescribed by UNDRIP. In addition, the Prime Minister would be obligated to present an annual report to each House of Parliament on the progress of these actions. In essence, this Bill would impose more stringent requirements on the Commonwealth Government regarding its law and policy approach to meeting its obligations under UNDRIP.”¹⁰⁰
- 1.289 In particular, a number of submissions highlighted that, as per the principles of the UNDRIP itself, this process should be led by First Peoples.
- 1.290 For example, the Victorian Aboriginal Child Care Agency stated in their submission to the original inquiry:

⁹⁹ Australian Nuclear Free Alliance, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 2*, p.2

¹⁰⁰ University of New South Wales Law Society, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 4*, p.9

“VACCA calls on state and federal governments in Australia to commit to the meaningful implementation of UNDRIP into legislation and policy, through a process designed and monitored by Aboriginal communities.”¹⁰¹

1.291 Further, the Victorian Aboriginal Legal Service stated in the original inquiry that:

“The Federal Government should pass legislation to implement UNDRIP in Australia. Legislation implementing UNDRIP must:

- a) Enshrine the right of Aboriginal and Torres Strait Islander peoples and communities to self-determination, as defined under UNDRIP
- b) Establish a clear pathway for implementing UNDRIP in Australia, including through a National Action Plan that is developed with Aboriginal communities and Aboriginal Community Controlled Organisations (ACCOs).¹⁰²

b. Legislative Review

1.292 Many submissions noted the requirement for a legislative review (or audit) of all state, territory and federal legislation as per the principles of the UNDRIP, with particular emphasis on legislation relating directly to, and impacting, First Nations communities.

1.293 Change the Record, for example, highlighted that:

“[A] comprehensive audit should be undertaken of the non/compliance of federal legislation and legislative instruments, policy and federal department and agency practices with the rights contained in UNDRIP. The audit should identify inconsistencies with UNDRIP that give rise to human rights breaches, gaps in legislative and policy frameworks resulting in inadequate protection of the individual and collective rights of First Nations peoples, and priorities for reform.”¹⁰³

1.294 Change the Record also note that this approach was taken in Victoria with respect to the Charter of Human Rights and Responsibilities, and the United Kingdom, prior to implementing their Human Rights Act.¹⁰⁴

1.295 The Western Australian Commissioner for Children and Young People supports this proposal, stating:

¹⁰¹ Victorian Aboriginal Child Care Agency, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 54*, p.14

¹⁰² Victorian Aboriginal Legal Service, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 66*, p.5

¹⁰³ Change the Record, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 16*, p.6

¹⁰⁴ Ibid.

I strongly encourage governments to undertake an evaluation of the current extent to which UNDRIP articles have been implemented in their jurisdiction, develop actions plans to address identified shortcomings, and commit the necessary resources to fulfilling the requirements of the Declaration.¹⁰⁵

1.296 The Castan Centre for Human Rights Law noted the following priority areas for legislative review, stating that the following Commonwealth legislation “demands urgent attention with reference to UNDRIP principles.”:

- a) Northern Territory Intervention
- b) Cashless Welfare Card
- c) Native Title Act 1993 (Cth)
- d) Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
- e) Environment and Biodiversity Conservation Act 1999 (Cth)

And also State legislation concerning the following matters:

- Child protection legislation
- Age of incarceration
- Bail, sentencing and detention, especially juvenile detention
- Legislation concerning Aboriginal and Torres Strait Islander land titles (in whatever form)
- State heritage legislation¹⁰⁶

1.297 Many submissions highlighted that a legislative review should be a matter of priority for government, and should be conducted whether the UNDRIP is legislated domestically or not.

1.298 For example, Emeritus Professor Jon Altman from the Australian National University stated that there should be a “requirement that Indigenous-specific and other laws that impact disproportionately on First Nations people in Australia are UNDRIP compliant” noting that this “might see the pendulum swing to address collective rights alongside historical legacy that can be a key explanator of disadvantage.”¹⁰⁷

1.299 Further, Dr. Shelly Bielefeld, Senior Lecturer of Griffith Law School, also stated that “all Federal, State and Territory laws, policies, programs be assessed for compliance with UNDRIP with non-compliance remedied as swiftly as possible” and that “all punitive mandatory measures pertaining to social security for First Nations Peoples

¹⁰⁵ The Western Australian Commissioner for Children and Young People, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 10*, p.7

¹⁰⁶ Castan Centre for Human Rights Law, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 33*, pp.5-6

¹⁰⁷ Emeritus Professor Jon Altman School of Regulation and Global Governance, the Australian National University, Canberra, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 44*, p.9

be revoked swiftly and replaced with laws, policies and programs that are community led with 'bottom up' policy design with specific attention paid to the voices of those who would be on such programs.”¹⁰⁸

c. Inclusion of UNDRIP in Human Rights (Parliamentary Scrutiny) Act 2011

1.300 It is my view that along with legislating the UNDRIP directly into domestic Commonwealth law – as per the proposed 2022 Bill – the Declaration should also be incorporated into the existing framework of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and I very much welcome the committee having come to the same conclusion.

1.301 Noting that the Act aims to examine existing legislation for compliance with the seven core human rights treaties to which Australia is a party¹⁰⁹, and given the immense direct relevance the UNDRIP has to the Australian legal, social, political and cultural landscape, this too should be incorporated.

1.302 The ACT Human Rights Commission supports this recommendation, stating in their submission to the original inquiry:

Ideally the new Federal Government would pick up work started with the National Human Rights Consultation to introduce a national bill of rights for Australia that could incorporate direct protections not only of the rights realised in UNDRIP but other civil, political, economic, social and cultural rights set out in treaties to which Australia is a party. In the interim, amending the definition of ‘human rights’ to incorporate the UNDRIP under the Human Rights (Parliamentary Scrutiny) Act 2011 would be one simple way of realising UNDRIP through the scrutiny of federal Australian laws.¹¹⁰

1.303 Emeritus Professor Jon Altman from the School of Regulation and Global Governance at the Australian National University, supports this proposal in their submission to the original inquiry, stating:

As an early first step the Human Rights (Parliamentary Scrutiny) Act 2011 should be amended by adding UNDRIP in its definition of human rights. This proposal is consistent with a recommendation already made by the Australian Human Rights

¹⁰⁸ Dr. Shelly Bielefeld, Senior Lecturer of Griffith Law School, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 29*, p.6

¹⁰⁹ International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

¹¹⁰ ACT Human Rights Commission, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 5*, p.8

Commission in late 2021 as an element of Australia's third Universal Periodic Review.¹¹¹

- 1.304 As noted by Altman above, the Australian Human Rights Commission has previously endorsed the proposal to include the UNDRIP in the Parliamentary Scrutiny Act. The AHRC stated:

When new legislation is introduced to federal Parliament, it must have a statement of compatibility with human rights – defined as the rights in the 7 instruments that Australia has ratified. This does not include reference to compliance with the UNDRIP.¹¹²

- 1.305 The AHRC also noted the past failure of the Closing the Gap policy to adequately implement the UNDRIP, although noting the revised efforts to do so:

Australia has identified the Closing the Gap Strategy as its key policy platform to give effect to the Declaration. To date, this process has been government led without significant engagement of indigenous communities in setting priorities or in delivery. Australian Governments have committed to address this through the 2019 National Partnership Agreement on Closing the Gap which involves the Coalition of Aboriginal and Torres Strait Islander Peak Bodies as partners and decision makers.¹¹³

- 1.306 However, despite this, the AHRC recommends that:

"[The Australian] Government develop a national program to implement UNDRIP and schedule it to the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)."¹¹⁴

d. EMRIP Engagement

- 1.307 I note that the Aotearoa/ New Zealand example demonstrates direct engagement with the UN Expert Mechanism on the Rights of Indigenous Peoples, in particular on the development of a National Plan of Action to better implement and act upon the UNDRIP.

- 1.308 Professor Claire Charters, Te Kaunihera Maori o Aotearoa, New Zealand Maori Council stated to the joint committee:

The biggest development in Aotearoa has been the decision by the New Zealand government, in around 2018, to develop a national plan of action to implement

¹¹¹ Emeritus Professor Jon Altman School of Regulation and Global Governance, the Australian National University, Canberra, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 44*, p.9

¹¹² Australian Human Rights Commission, 'Implementing UNDRIP', Australia's third UPR (2021) https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf [accessed 14 July 2023]

¹¹³ Ibid.

¹¹⁴ Ibid.

the declaration. That process has now been paused but went on for a number of years. It included bringing the UN Expert Mechanism on the Rights of Indigenous Peoples out to Aotearoa, New Zealand, to provide guidance in the early days on how to go about developing the national plan of action. It included the establishment of an expert working group to provide advice to the government and then it included the negotiations, on the national plan of action itself, proper.¹¹⁵

1.309 I am disappointed that, while the committee acknowledges the value of the involvement of EMRIP in its report, it falls short of recommending it as an action to progress UNDRIP's implementation in this country.

1.310 It is therefore my recommendation that the Australian Government – via the Australian Human Rights Commission – extend a similar invitation to the EMRIP to begin the process of advice and development of implementing UNDRIP into legislation as per the proposed 2022 Bill. This engagement work should be led by First Peoples to ensure the principle of Self-determination as per the UNDRIP is adhered to.

e. Compliance with 2021 UPR Recommendations

1.311 I further recommend that along with the proposed amendments as per the 2022 Bill, the Australian Government comply with international recommendations as per the recent (and previous) Universal Periodic Review(s).

1.312 In 2021, Australia undertook its third UPR during which 122 countries made 344 recommendations.

1.313 A large proportion of these recommendations related directly to First Peoples, and included reform concerning the age of criminal responsibility, incarceration, legislative discrimination, adherence to Self-determination and participation in government.

1.314 The Human Rights Law Centre noted the Australian Government responded to those recommendations, accepting 177 but not accepting 167, stating that “[r]aising the age of criminal responsibility was a standout issue in the review, however the Australian Government rejected recommendations from 30 countries to raise the age above 10.”¹¹⁶

¹¹⁵ Professor Claire Charters, Te Kaunihera Maori o Aotearoa, New Zealand Maori Council, *Committee Hansard*, Canberra, 31 March 2023, p.24

¹¹⁶ Human Rights Law Centre, ‘Australian government ignores key recommendations from major UN human rights review’ (8 July 2021)

1.315 With direct reference to the terms of this report, the Australian Government noted recommendations to incorporate the UNDRIP into domestic legislation but stated it “will not consider further at this time” (being January 2021).¹¹⁷

1.316 These recommendations were:

- Develop, in consultation with the Aboriginal and Torres Strait Islander peak organizations, a national action plan in order to implement the relevant Declaration (Bangladesh)¹¹⁸
- Develop a national action plan to implement the principles in the United Nations Declaration on the Rights of Indigenous Peoples (Namibia)¹¹⁹
- Incorporate the United Nations Declaration on the Rights of Indigenous Peoples into domestic law, establish an independent body to oversee its implementation in consultation with Aboriginal and Torres Strait Islander peoples, and include the Declaration in the Human Rights (Parliamentary Scrutiny) Act (Netherlands)¹²⁰

1.317 The Australian Government also stated it “will not consider further at this time”¹²¹ a recommendation to establish regulations concerning the Free, Prior and Informed Consent of First Peoples:

- Establish regulations that incorporate the principle of free, prior and informed consent of indigenous communities, in relation to projects with A/HRC/47/8 24 potential impacts on their territories and ancestral ways of life, in accordance with Sustainable Development Goals 10 and 16 (Paraguay);¹²²

1.318 It is my view that the Australian Government should reconsider its position on these recommendations in light of the substantial support demonstrated in both the original and current inquiries.

f. Legislate a Human Rights Act

1.319 Alongside the legislative implementation of the UNDRIP, t a comprehensive Human Rights Act should be implemented in Commonwealth law. This would follow and

¹¹⁷ UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’, 24 March 2021, A/HRC/47/8/Add.1, p.3

¹¹⁸ UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia’, 24 March 2021, A/HRC/47/8, Recommendation 146.272, p.23

¹¹⁹ UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia’, 24 March 2021, A/HRC/47/8, Recommendation 146.285, p.23

¹²⁰ UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia’, 24 March 2021, A/HRC/47/8, Recommendation 146.286, p.23

¹²¹ UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’, 24 March 2021, A/HRC/47/8/Add.1, p.3

¹²² UN General Assembly, ‘Report of the Working Group on the Universal Periodic Review: Australia’, 24 March 2021, A/HRC/47/8, Recommendation 146.288, pp.23-24

reflect recent state initiatives in Victoria¹²³, the ACT¹²⁴ and Queensland¹²⁵, all who have introduced human rights law in some form in recent years.

- 1.320 These Acts protect the cultural and other rights of First Peoples, among the suite of legislation pertaining to all other citizens.
- 1.321 A comprehensive Commonwealth Human Rights Act would complement the legislative introduction of the UNDRIP and would also serve as a mechanism to protect human rights more broadly, many of which would intersect with the principles of the UNDRIP.
- 1.322 The University of New South Wales Law Society notes the lack of protection of human rights more generally within Australian legislation, and also specifically for First Nations peoples, stating in their submission to the original inquiry:
- In the absence of a comprehensive and legally binding Bill of Rights, the upholding of human rights in Australia is limited to legislation and a narrow and inadequate set of constitutional provisions. Within the Australian Constitution, there are a mere five human rights that are expressly enshrined, none of which sufficiently protect First Nations freedoms and interests.¹²⁶
- 1.323 The Australian Human Rights Commission recently released a proposed model for such an Act, noting that “Australia is the only liberal democracy that does not have an act or charter of rights at the national level, and there are currently very few legal protections for the fundamental rights of Australians.”¹²⁷
- 1.324 The Commission further stated that the “Human Rights Act proposal is detailed in a comprehensive position paper. In this model, people with human rights complaints could endeavour to reach a solution through conciliation or administrative appeal, supported by the Commission, and then refer the matter to the Federal Court.”¹²⁸
- 1.325 I strongly believe a justiciable Human Rights Act would complement the legislative implementation of the UNDRIP and possibly provide a framework by which alleged breaches of rights as per the Declaration could seek legal remedy. As such, I support the introduction of the proposed Act as a complimentary – not substitute – piece of legislation alongside my proposed Private Senator’s Bill.

g. Justiciability

- 1.326 Submissions to the inquiries raised the issue of justiciability of implementation of UNDRIP into legislation.

¹²³ *The Charter of Human Rights and Responsibilities Act 2006* (Vic)

¹²⁴ *Human Rights Act 2004* (ACT)

¹²⁵ *Human Rights Act 2019* (Qld)

¹²⁶ University of New South Wales Law Society, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 5*, p.17

¹²⁷ Australian Human Rights Commission, ‘Commission launches model for an Australian Human Rights Act’ (9 March 2023)

¹²⁸ *Ibid.*

1.327 For example, the University of NSW Law Society stated:

In light of Australia's historical failures in upholding First Nations rights and in applying UNDRIP, it is necessary that an independent statutory body is created to ensure current and future compliance. This will allow for present laws and policies to be placed under objective scrutiny and critique, as well as for the continued development of new initiatives to improve Australia's observance of UNDRIP. The effectiveness of this approach is well exemplified by existing independent agencies like the Independent Commission Against Corruption (ICAC) in NSW, which has seen great success in ensuring compliance with anti-corruption laws. A similar commission responsible for overseeing the upholding of First Nations rights, if granted coercive power and federal jurisdiction, would likely see significant improvements in Australia's adherence to the principles of UNDRIP.¹²⁹

1.328 Furthermore, Dr. Shelly Bielefeld, Senior Lecturer, Griffith Law School, recommended that "the Federal Government allow remedies for violations of UNDRIP to be awarded by Australian Courts - including reparation for laws, policies and programs that have been found to violate the principle of 'free, prior and informed consent' under article 19."¹³⁰

1.329 It is my view that any legislative implementation of the UNDRIP should be complemented with a process by which alleged breaches could seek remedy and there be an oversight mechanism that ensures governmental and other compliance with the principles and obligations that the UNDRIP would confer on relevant government ministries and related apparatus and institutions, such as police, criminal justice institutions, education, health and welfare.

h. Treaty

1.330 Our people have long fought for a nationwide Treaty process between the government and First Peoples as a matter of urgency priority and the only real pathway for society to move forward. A comprehensive Treaty would complement the legislative implementation of the UNDRIP and further enshrine the principles contained therein within Treaty negotiations and agreements.

1.331 The Federation of Victorian Traditional Owner Corporations supports the view of Treaty being complementary to legislative implementation of the UNDRIP, and notes that such a process would also ensure a mechanism for justiciability.

1.332 They recommended that UNDRIP rights should be included as enforceable and justiciable rights within future treaties, "with the treaty terms (particularly those that

¹²⁹ University of New South Wales Law Society, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 4*, p.17

¹³⁰ Dr. Shelly Bielefeld, Senior Lecturer of Griffith Law School, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 29*, p.6

transfer decision making and revenue generating power) as the minimum obligations of the Government.”¹³¹

1.333 In their submission to the original inquiry, the Federation state that:

“[B]y way of example, a treaty could include provisions stating that Traditional Owner groups have a positive and justiciable right to:

- • self-determination;
- • self-government;
- • free prior and informed consent;
- • practice and revitalise cultural traditions and customs; and
- • maintain and strengthen distinct political, legal, economic, social and cultural institutions.

If these rights were adopted in this manner, it would mean that the government had an obligation to ensure their implementation. If they failed to adequately act to meet this obligation, they could be taken to court, and an order made forcing them to carry out the appropriate actions.”¹³²

1.334 Treaty and the UNDRIP are complementary. They are not mutually exclusive, nor are they an either/or option, but together make up a rights-based approach that would ensure greater protection of our rights to First Peoples, and begin to redress the ongoing impacts of colonisation.

9. Key areas requiring reform to comply with UNDRIP

1.335 While submissions and testimonies to both inquiries expectedly had diverse views on priority reforms, some key areas were highlighted as being of particular concern. A short summary of these includes, but is not limited to, the following:

a. Self-determination

1.336 The right to Self-determination was highlighted in the majority of submissions and testimonies. One of the key underlying principles of the UNDRIP (in particular, Articles 3, 4 and 5), the right to Self-determination was recognised as being key to ensuring rights-based equality for First Peoples, as well as for guiding successful, community-led initiatives.

1.337 The Victorian Aboriginal Legal Service, in their submission to the original inquiry, notes the following definition of Self-determination. They state:

“Many experts, in Australia and internationally, agree that there are three key elements of self-determination:

¹³¹ Federation of Victorian Traditional Owner Corporations, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 65*, p.34

¹³² Ibid. p.32

- Choice – Indigenous peoples have a choice regarding how their lives are governed and what their development paths are.
- Participation – Indigenous peoples have a right to participate in decision making and the development of instruments and programs that relate to them and impact upon their lives.
- Control – Indigenous peoples have control over their lives and futures, including a right to control economic, social and cultural development.”¹³³

1.338 Change the Record also noted the importance of Self-determination in redressing historical and contemporary injustices, stating:

Incorporating UNDRIP into domestic law would go some way to addressing and redressing these injustices and preventing similar injustices in the future. It would require governments to recognise the foundational importance of self-determination to the rights of First Nations peoples, and to actively promote and support self-determination when developing and implementing policy and law.¹³⁴

1.339 They further stated that:

The lack of government support for self-determination in development, implementation and evaluation of policy affecting Aboriginal and Torres Strait Islander peoples. First Nations peoples in Australia are systematically denied the decision-making power and resources needed to collectively determine their own affairs and futures.¹³⁵

1.340 The Victorian Aboriginal Child Care Agency also noted the link between Self-determination and better outcomes for First Peoples, particularly within the area of rights and justice:

“The existing political and legal structures will continue to limit what might be possible in protecting the right to self-determination in Australia and will require a transformation of existing power structures resulting in a more equitable power sharing between Aboriginal peoples and the state. At both Commonwealth and State levels of government substantive constitutional and legislative change is needed, along with policy initiatives to reduce levels of disadvantage and strengthen the capacity of Aboriginal peoples to participate as self-determining peoples. Cultural and legislative changes are also needed to reduce the limitations inherent in the judicial system to increase the capacity of the courts to address the rights of Aboriginal people.”¹³⁶

¹³³ Victorian Aboriginal Legal Service, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 66*, p.8

¹³⁴ Change the Record, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 16*, p.3

¹³⁵ Ibid. pp.1-2

¹³⁶ Victorian Aboriginal Child Care Agency, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 54*, p.14

1.341 Yet many submissions noted the lack of recognition of Self-determination by government with the acute observation that legislative implementation of the UNDRIP would address this damaging oversight.

1.342 The WA Commissioner for Children and Young People stated:

Rather than Aboriginal communities being 'engaged' or 'consulted' as 'advisors' or 'codesigners' of services and policies, they must be authorised and empowered to own, direct and make strategic decisions about policies, funding and allocation of resources, program and service design, implementation and evaluation." Governments must therefore begin a process of decentralising power and transferring responsibility to Aboriginal people and communities. This will enable Aboriginal children and young people, their families and their communities to lead the development and implementation of fit-for-purpose, culturally appropriate solutions and build the capacity of local communities to improve the wellbeing of Aboriginal children and young people.¹³⁷

1.343 An important factor in ensuring Self-determination is complied with is the adherence to FPIC.

1.344 The VALS submission noted:

There are three elements of FPIC:

- Free – consent sought must be free from coercion, intimidation and manipulation.
- Prior – consent must be sought sufficiently in advance of any authorisation or commencement of the relevant activity. Respect must be shown to time requirements of Indigenous consulting and consensus.
- Informed – the provision of information to Indigenous communities covers a range of aspects. This includes the nature and scope of any proposed project or activity, the purpose and duration of the project or activity, what will be affected by the project or activity, an assessment of the impacts and potential risks, and procedures the project or activity may entail."¹³⁸

1.345 In particular, this was highlighted with respect to mining and resources extraction, as well as dumping of nuclear waste.

1.346 Emeritus Professor Jon Altman from Australian National University noted:

Proper adherence to UNDRIP principles would see FPIC rights incorporated in the Native Title Act 1993 and (re-)strengthened in the Aboriginal Land Rights (NT) Act 1976 as well as in State land rights laws (especially in South Australia in regional land rights laws over the extensive Pitjantjatjara and Maralinga lands).

¹³⁷ WA Commissioner for Children and Young People, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 10*, p.7

¹³⁸ Ibid. p.15

Such adherence would not only provide landowners greater control over development of their lands and territories, but also a more equitable bargaining position in dealing with more powerful commercial and state interests. An issue that would require resolution is how FPIC rights would be exercised on lands where non-exclusive native title has been determined.¹³⁹

1.347 Further to this, it was noted on numerous occasions that Native Title legislation currently does not adequately protect the right to Free, Prior and Informed consent.

1.348 The National Native Title Council noted in this respect:

Substantial reforms are needed to the native title system to bring it in line with the Declaration and the central right of self-determination. Various features of the native title system currently undermine this fundamental right by failing to put native title holders on an equal footing with government and the private sector.¹⁴⁰

1.349 They NNTC further noted:

“The requirement of FPIC should be central to all native title agreements and negotiations and needs to be legislated into the NTA and other related legislation. FPIC is a key part of the Declaration and is contained in no less than six articles, the strongest articulation being in Article 32 which states that governments must obtain the free and informed consent of Indigenous peoples prior to the approval of any project that affects their lands or territories and other resources.”¹⁴¹

b. Criminal Justice and Child Removals

1.350 Submissions also highlighted the ongoing criminalisation of First Peoples, in particular their incarceration rates being the highest of any people in the world. Many submissions noted the continued human rights breaches criminalised and incarcerated First Nations people experienced, including (but not limited to) solitary confinement amounting to torture, the psychological impacts on children and young people, cultural disconnections exacerbated by experiences of incarceration, and deaths in custody.

¹³⁹ Emeritus Professor Jon Altman, School of Regulation and Global Governance, The Australian National University, Canberra, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 44*, p.6

¹⁴⁰ National Native Title Council, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 63*, p.4

¹⁴¹ *Ibid.* p.5

1.351 Change the Record noted that:

“First Nations peoples’ social, economic and cultural rights under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are not being upheld or protected by Commonwealth, state or territory law and systems.

Evidence of this is widespread in:

- The continent-wide mass incarceration of First Nations children and adults;
- First Nations peoples’ disproportionate experience of child removal and family violence;
- The systemic discrimination First Nations peoples face when attempting to access justice and in legal systems;
- Implementation of government policy which fundamentally impacts the lives of First Nations peoples without consultation or consent.”¹⁴²

1.352 Many submissions noted that the legislative implementation of the UNDRIP would provide protective factors and create the impetus for a self-determined, rights-based approach to developing solutions in the criminal justice sector that are based on justice reinvestment, rehabilitation, and cultural connections as opposed to the continuation of the colonial model of punitive and traumatic punishment as the primary form of ‘criminal justice.’

1.353 Amnesty International Australia in particular noted its support for the implementation of the UNDRIP, specifically with regard to the context of adult and youth incarceration, out-of-home care and raising the age of criminal responsibility.

1.354 Their submission outlines the links between the principles and articles of the UNDRIP and the ways in which the above impacts on First Peoples could be alleviated if (for example) the youth ‘justice’ system were to be reformed with the UNDRIP underlying the implementation of self-determined justice solutions that were aimed at healing and not punishment.

1.355 Amnesty International Australia also affirmed their support in amending the criminal justice system to be underpinned by the principles enshrined in the UNDRIP, stating that governments should:

Afford autonomy and the right to govern to First Nations communities to support vulnerable children through evidence-based Justice Reinvestment initiatives that are led by the communities. Instead of failed punitive approaches, these initiatives embrace therapeutic and rehabilitative methods like diversion programs that address the underlying causes of problematic behaviour in children.¹⁴³

¹⁴² Change the Record, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 16*, pp.1-2

¹⁴³ Amnesty International, Inquiry into the UN Declaration on the Rights of Indigenous People, *Submission 25*, p.9

- 1.356 AIA also recognised the intersection of other international human rights treaties and implementation tools such as OPCAT that coincide with the UNDRIP as well as the necessity for Australia to raise the age of criminal responsibility in line with United Nations' recommendations, stating there should be "a consistent, national approach to raise the minimum age of criminal responsibility to at least 14 years old in all jurisdictions, without carve-outs for children under this age."¹⁴⁴

c. Cultural Rights

- 1.357 Many submissions noted the need to uphold cultural rights as an underlying principle as enshrined in the UNDRIP. This included across a number of themes, including the need for increased access to language programs, greater recognition of cultural rights as part of land rights and resource negotiations, and the important role of access to culture for children and young people experiencing detention and/ or out-of-home care.

- 1.358 The Western Australian Commissioner for Children and Young People noted in their submission to the original inquiry:

Culture is fundamental to the lives of Aboriginal children and young people, and central to their wellbeing. There is significant evidence that highlights the positive associations between culture and wellbeing amongst Aboriginal people including across areas such as health, education and employment. Aboriginal children and young people who have a strong sense of identity and can make positive statements about themselves are better equipped to learn life skills and are more likely to experience positive wellbeing. Culture can also act as a protective factor that can reduce exposure to, and the effects of, risks to personal wellbeing. Aboriginal people have commonly identified their culture as a factor that builds resilience, moderates the impact of stressful circumstances and supports recovery from adversity.¹⁴⁵

- 1.359 They further noted:

A critical issue impacting Western Australian Aboriginal children and young people is a lack of sustainable Aboriginal-led solutions. The over-representation of Aboriginal children in all indicators of disadvantage continues to highlight the need for more effective ways of working to address the underpinning issues and improve the wellbeing of Aboriginal children and young people across the State.¹⁴⁶

¹⁴⁴ Ibid.

¹⁴⁵ The Western Australian Commissioner for Children and Young People, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 10*, p.2

¹⁴⁶ Ibid. p.7

- 1.360 Noting that cultural rights are a central right underpinning the UNDRIP, submissions also highlighted the protective factors strong culture has for First Peoples experiencing marginalisation and criminalisation. Implementation of, and adherence to, the cultural rights as per the UNDRIP would be of benefit to redressing the inequalities experienced by Aboriginal and Torres Strait Islander peoples across a range of social indicators.
- 1.361 First Languages Australia highlighted the importance of language in their submission to the original inquiry:
- Having one's mother tongue gives social, emotional, employment, cognitive and health advantages. Bilingualism provides yet another layer of advantage for minority language speakers. Keeping the mother tongue and then mastering English for example, provides minority language speakers with the advantage of being able to operate in different contexts. This increases their life chances and employment options. To achieve these benefits it is imperative that the revival, maintenance and development of Aboriginal and Torres Strait Islander languages is supported.¹⁴⁷

Addendum: Implementing the UNDRIP - Case Study - Children's Ground

- 1.362 As highlighted in these additional comments, two of the fundamental principles of the rights enshrined in the UNDRIP are Self-determination and the prioritisation, promotion and protection of Indigenous cultures and cultural practices.
- 1.363 While these are emphasised as fundamental rights within the paradigm of international law, these are also highlighted as operating in interaction with each other because of the evidence that, when First Peoples are afforded the capacity for self-determined solutions, successful outcomes are achieved.
- 1.364 Self-determination and cultural capacity are not simply 'aspirational' rights, but concrete principles which lead to positive outcomes.
- 1.365 This was highlighted in the Australian Government Productivity Commission's report 'Overcoming Indigenous Disadvantage' in 2020:
- Connection to culture is a key element of many Aboriginal and Torres Strait Islander people's identities. As such, cultures are a key source of strength and a foundation on which the wellbeing of Aboriginal and Torres Strait Islander people can continue to be built.¹⁴⁸

¹⁴⁷ First Languages Australia, Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, *Submission 28*, p.6

¹⁴⁸ Australian Government Productivity Commission 'Overcoming Indigenous Disadvantage' (2020) p.3.2

1.366 The report further stated that:

Improving outcomes for Aboriginal and Torres Strait Islander people requires enabling Aboriginal and Torres Strait Islander people to share in making decisions on things that affect them. Aboriginal and Torres Strait Islander community involvement in policy, program and service design, and decision-making — a ‘bottom-up’ rather than ‘top-down’ approach — is important to ‘drive real change on the ground’, and close the gap in life outcomes between Aboriginal and Torres Strait Islander people and non-Indigenous people. When [Indigenous people] make their own decisions about what development approaches to take, they consistently out-perform [non-Indigenous] decision makers.¹⁴⁹

1.367 The case study of Children’s Ground exemplifies the effectiveness of First Peoples’-led solutions based on the principles of the UNDRIP.

Children’s Ground is a “First Nations systems solution to empower children and communities to achieve social, cultural and economic agency and lifelong wellbeing”¹⁵⁰ that operate on the principles of prioritising First Peoples’ Self-determination and culture.

1.368 They state:

Children’s Ground was created to change the status quo - to implement a system that recognises First Nations governance, solutions and systems of knowledge. First Nations community leaders know these solutions but hold little political power.¹⁵¹

1.369 Children’s Ground specifically cites the UNDRIP as an underlying principle for their education program engagement with children.

1.370 For example, the organisation seeks to “provide the space for Elders and cultural leaders to revitalise and re-establish learning, language and cultural knowledge systems within and outside of formal early learning sessions. This is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).”¹⁵²

¹⁴⁹ Ibid. p.3.8

¹⁵⁰ Children’s Ground, ‘Evaluation of Ampe-kenhe Ahelhe: Children’s Ground in Central Australia Summary of key findings,’ (2021) p.5

¹⁵¹ Children’s Ground, ‘Annual Report,’ (2020) p.9

¹⁵² Children’s Ground, ‘Evaluation of Ampe-kenhe Ahelhe: Children’s Ground in Central Australia Summary of key findings,’ (2021) p.8

1.371 M.K. Turner, OAM, Arrernte Professor, Elder and Law Woman Ampe-kenhe Ahelhe Director Children's Ground, highlights the importance of self-governance in the organisation's recent annual report:

We've been following government nearly all our lives – this is a new beginning. We are following a new path, our own path as First Nations people for the future of our children. At Children's Ground, the community is taking the lead. We are very proud of that. We are the government of ourselves.¹⁵³

1.372 This approach, underscored by the principles of the UNDRIP, has seen recent success in tackling key indicators of health, educational engagement, and community and cultural wellbeing:

- 82% of children (0-5 years A brief overview of a three-year evaluation of Ampe-kenhe Ahelhe (Children's Ground Central Australia) found that:
- across four communities engaged in early-years learning (223 children). Before Children's Ground, only 14% had previously engaged in early learning.
- 89% of families reported that children's physical health (their body and nutrition) and emotional health (their mind and behaviour) was better or much better.
- 100% of families reported that families are 'walking alongside their children' more or a lot more. People who previously lived with chronic unemployment are working.
- 84% of First Nations staff were not working when they started at Children's Ground and 34% had never worked.
- 63% of families and staff reported feeling safe, comfortable or free at Children's Ground (without being directly asked about feelings of safety).¹⁵⁴

1.373 This evaluation has had ethics approval from the Central Australian Human Research Ethics committee, and is oversighted by a national Research Advisory Group, consisting of experts in academic, community and systems research and evaluation.

1.374 The evaluation highlighted that "the key drivers of engagement in Children's Ground are the visible respect for and privileging of first language and culture and community empowerment [...] the strengths-based implementation and First Nations culture, governance and employment in design and delivery changed the relationship that people previously had with services – from one of being a recipient to one of being in control."¹⁵⁵

¹⁵³ Ibid. p.23

¹⁵⁴ Children's Ground <https://childrensground.org.au/evidence/>

¹⁵⁵ Children's Ground, 'Evaluation of Ampe-kenhe Ahelhe: Children's Ground in Central Australia Summary of key findings,' (2021) p.20

- 1.375 The success of community-led, self-determined approaches like this cement my view that self-determination and cultural capacity – among the many other rights conferred by the UNDRIP - should not simply be ‘principles’ that are enshrined in a policy agreement, but instead these fundamental human rights should be enshrined in law to protect and prioritise our rights as First Peoples for future generations.

Senator Lidia Thorpe

Member

Senator for Victoria

21 November 2023



A. Submissions

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

The following submissions were received between 2 August 2022 and 15 September 2023 by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDIRP) in Australia.

1. Name Withheld
2. The Sámi Parliament in Norway
3. Kimberley Aboriginal Law and Culture Centre
 - 3.1. Supplementary to submission 3
 - 3.2. Supplementary to submission 3
4. Torres Shire Council
5. Dr Anita Mackay
6. Australian Christian Lobby
7. Department of Foreign Affairs and Trade
 - 7.1. Supplementary to submission 7
8. Economic Justice Australia
9. National Indigenous Australians Agency
 - 9.1. Supplementary to submission 9
10. Terri Janke and Company
 - 10.1. Supplementary to submission 10
11. Minerals Council of Australia
12. Indigenous Allied Health Australia

13. Foundation for Aboriginal and Islander Research Action
14. Castan Centre for Human Rights Law
 - 14.1 Supplementary to submission 14
15. Environmental Justice Australia
16. Supply Nation
17. Accountable Income Management Network
18. UnitingCare Australia
19. Australian Conservation Foundation
20. National Health Leadership Forum
21. Jennifer Keene-McCann
22. Kimberley Land Council
 - 22.1. Supplementary to submission 22
23. Townsville Aboriginal and Islander Health Service
24. Woodside Energy
25. Amnesty International
26. UNSW Indigenous Law Centre
27. Indigenous Business Australia
 - 27.1. Supplementary to submission 27
 - 27.2. Supplementary to submission 27
28. Queensland Government
29. Mr Ian Patrick Goss
30. Dominic WY Kanak
31. The Australian National University First Nations Portfolio
 - 31.1 Supplementary to submission 31
32. Confidential
33. Confidential

34. Healing Foundation
35. Indigenous Land and Sea Corporation
36. Federation of Victorian Traditional Owner Corporations
37. Academic Roundtable Participants
38. Centre for Law and Social Justice, University of Newcastle
39. Lillian Ireland, Dr Nina Lansbury, Adjunct Professor Sandra Creamer AM and Dr Vinnitta Mosby
40. GetUp!
41. Kimberley Community Legal Service
- 41.1 Supplementary to submission 41
42. Attorney-General's Department
43. Dr Sheryl Lightfoot
44. National Aboriginal and Torres Strait Islander Higher Education Consortium
45. Australian Council of Trade Unions
46. University of Tasmania
47. ACT Government
48. NT Government
49. SA Government
50. WA Government

Senate Standing Committee on Legal and Constitutional Affairs

The following submissions were received between 29 March 2022 and 23 June 2022 to by Senate Standing Committee on Legal and Constitutional Affairs inquiry into the application of UNDRIP in Australia.

1. HESTA
2. Australian Nuclear Free Alliance
3. Save the Children Australia
4. UNSW Law Society
5. ACT Human Rights Commission
6. ANU Law Reform and Social Justice Research Hub
7. Life Without Barriers
8. Maurice Blackburn Lawyers
9. Voices of Influence Australia
10. Commissioner for Children and Young People Western Australia
11. Australian Greens First Nations Network
12. Dr Adam Heaton
13. Mr Benjamin Cronshaw
14. Mr Ganur Maynard
15. Barngarla Determination Aboriginal Corporation
16. Change the Record
17. Dr Alice Taylor and Assistant Professor Narelle Bedford
18. Friends of the Earth Australia
19. Liberty Victoria
20. Responsible Investment Association Australasia
21. Australian Council of Superannuation Investors
22. Dr Harry Hobbs

23. Mr David Noonan
24. President of Norfolk Island People for Democracy
25. Mr Peter Remta
26. Australian Food Sovereignty Alliance
27. Ms Janet Donnelly
28. First Languages Australia
29. Dr Shelley Bielefeld
30. NSW Council for Civil Liberties
31. Conservation Council
32. Kimberley Community Legal Services
33. Castan Centre for Human Rights Law
34. Nunkuwarrin Yunti of South Australia Inc.
35. Ms Lydia McGrady
36. Centre for Law and Social Justice, University of Newcastle
37. Josephite SA Reconciliation Circle
38. Name Withheld
39. Confidential
40. Confidential
41. Gudanji For Country
42. Australians for Native Title and Reconciliation
43. Edmund Rice Centre for Justice and Community Education
44. Emeritus Professor Jon Altman
45. Mr Dominic WY Kanak
46. Environmental Justice Australia
47. North Australian Aboriginal Justice Agency
48. Accountable Income Management Network

49. NSW Aboriginal Land Council
50. Ms Tara Ali, Ms Monica Dalton and Professor Asmi Wood
51. Mr Yingiya Guyula MLA
52. National Association of Aboriginal and Torres Strait Islander Health Workers and Practitioners
53. Australian Human Rights Commission
54. Victorian Aboriginal Child Care Agency
55. Ibbai Waggan-Wiradjuri People
56. South Australia Aboriginal Community Controlled Organisation Network
57. Storey & Ward Lawyers
58. Australian Lawyers Alliance
59. Economic Justice Australia
60. Law Council of Australia
61. Australian Indigenous Doctors' Association
62. Close the Gap
63. National Native Title Council
64. Aboriginal and Torres Strait Islander Legal Services (QLD)
65. Federation of Victoria Traditional Owner Corporations
66. Victorian Aboriginal Legal Service
67. Aboriginal Peak Organisations of the Northern Territory
68. Coalition of Peaks
69. Climate and Health Alliance
70. Partnership for Justice in Health
71. Lowitja Institute
72. National Aboriginal and Torres Strait Islander Housing Association
73. The Wilderness Society

74. Amnesty International
75. Dr Ed Wensing and Jason Field
76. Darwin Community Legal Service
77. WWF Australia
78. Solar Citizens
79. Central Land Council
80. Dr James Ingram
81. World Vision Australia
82. Ms Gillian King
83. South Australian Native Title Services
84. Victorian Aboriginal Corporation for Languages
85. National Aboriginal Community Controlled Health Organisation
86. First Peoples' Assembly of Victoria
87. Djirra
88. Koorie Youth Council
89. Conservation Council SA
90. Mr Travis Harbour
91. Mr Jim Hill
92. Indigenous Peoples' Organization—Oxfam Australia



B. Public hearings

Wednesday, 26 October 2022

Canberra

Department of Foreign Affairs and Trade

- Ms Tanya Bennett, Assistant Secretary, First Nations Taskforce, Multilateral Policy and Human Rights Division
- Ms Natasha Smith, First Assistant Secretary, Multilateral Policy and Human Rights Division

National Indigenous Australians Agency

- Mr Ian Bartholomew, Branch Manager, Closing the Gap
- Ms Jody Broun, Chief Executive Officer
- Ms Deb Fulton, Acting Group Manager, Economic Policy and Programs
- Mr Simon Gordon, Branch Manager, Constitutional Recognition
- Ms Julie-Ann Guivarra, Group Manager, Empowerment and Recognition Group,
- Ms Andrea Kelly, Acting Group Manager, Truth-Telling Taskforce
- Ms Rachel Kerrigan, Branch Manager, Land Branch
- Mr Jeremy Mickle, Acting Branch Manager, Culture and Heritage Branch
- Dr John Walker, Branch Manager, Voice

Wednesday, 30 November 2022

Canberra

Indigenous Land and Sea Corporation

- Ms Rebecca Hayden, General Manager, Policy, Strategy and Performance
- Mr Joseph (Joe) Morrison, Group Chief Executive Officer

Indigenous Business Australia

- Ms Stella De Cos, Director, Community and Customer Experience
- Mr Justin Vaughan, Senior Manager, Policy and Research

Friday, 10 February 2023

Canberra

Native Women's Association of Canada

- Ms Lisa Smith, Interim Adviser to the President

Department of Justice, Canada

- Ms Koren Marriott, Acting Director and General Counsel, Legislative and International Policy Unit, Aboriginal Law Centre
- Mr Keith Smith, Director General, United Nations Declaration Act Implementation Secretariat

British Columbia Treaty Commission, Canada

- Ms Celeste Haldane, Chief Commissioner
- Ms Sashia Leung, Director of Communications and International Relations
- Mr Mark Smith, General Counsel and Director of Process

Sámi Parliament, Finland

- Mr Tuomas Aslak Juuso, President

Department of Democracy and Public Law, Finland

- Ms Johanna Suurpaa, Director General

Friday, 10 March 2023

Canberra

Foundation for Aboriginal and Islander Research Action (FAIRA) Aboriginal Corporation

- Mr Robert Leslie (Les) Malezer, Chairperson

North Australian Aboriginal Justice Agency

- Dr John Paterson, Acting Chief Executive Officer

The Fred Hollows Foundation

- Ms Jacqueline (Jaki) Adams, Director, Social Justice and Regional Engagement, Office of the Chief Executive Officer
- Dr Edward (Ed) Wensing, Associate and Special Adviser from SGS Economics and Planning

Australian National University

- Ms Nabeela Maricar, Student, Law Reform and Social Justice Hub
- Ms Kimberley Slapp, Researcher, Law Reform and Social Justice Hub
- Mr Thomas Snowdon, Senior Policy and Research Advisor, First Nations Portfolio
- Mr Peter Yu, Vice-President, First Nations Portfolio

Castan Centre for Human Rights Law, Monash University

- Professor Melissa Castan, Director
- Dr Kate Galloway, Affiliated Academic Member
- Dr Katie O'Bryan, Academic Member

Centre for Law and Social Justice, University of Newcastle

- Beth Butchers, Associate Lecturer
- Dr Amy Maguire, Director

Friday, 31 March 2023

Canberra

Government of the Province British Columbia, Canada

- Hon Murray Rankin, Minister of Indigenous Relations and Reconciliation
- Ms Ann Marie Sam, Assistant Deputy Minister, Government of British Columbia, Canada
- Ms Jessica Wood (Si Sityaawks), Associate Deputy Minister of the Declaration Act Secretariat

Australian Capital Territory Human Rights Commission

- Dr Helen Watchirs OAM, President and Human Rights Commissioner
- Ms Karen Flick, Aboriginal and Torres Strait Islander Cultural Adviser
- Mr Alexander Jorgensen-Hull, Human Rights Legal Adviser

Australian Human Rights Commission

- Mr Nick Devereaux, Director, Aboriginal and Torres Strait Islander Social Justice
- Mr Darren Dick, Senior Policy Executive, Human Rights and Strategy

Te Kaunihera Māori o Aotearoa, Māori Council

- Sir Taihakurei Durie KNZM
- Dr Betsan Martin
- Ms Donna Hall
- Mr Owen Lloyd
- Professor Claire Charters

Dr Hannah McGlade

Friday, 19 May 2023

Canberra

Reconciliation Australia

- Ms Karen Mundine, Chief Executive Officer
- Peter Morris, General Manager, Reconciliation Action Plan Program

Australian Native Title and Reconciliation (ANTaR)

- Mr Michael Andersen, Operations and Development Manager

GetUp

- Ms Anyupa Butcher, First Nations Justice Senior Campaigner
- Ms Roj Amedi, Chief Campaigns Officer

Amnesty International Australia

- Ms Sam Klintworth, National Director
- Ms Kacey Teerman, Indigenous Campaigns Associate
- Mr Rodney Dillion, Indigenous Campaigns Advisor

Sámediggi Sametinget, Sámi Parliament, Norway

- Mrs Silje Karine Muotka, President

Department of Indigenous and Minority Affairs, Government of Norway

- Mr Bjørn Olav Megard, Director General

Thursday, 8 June 2023

Canberra

Attorney-General's Department

- Ms Victoria Bennett, Acting Assistant Secretary Human Rights Branch, International Law and Human Rights Division
- Ms Ursula Carolyn, Assistant Secretary, Criminal Justice Reform Taskforce, First Nations Justice Policy Division
- Mr David Lewis, General Counsel (Constitutional), Office of Constitutional Law
- Mr Marc Roberts, Director, Native Title and Priority Reforms Branch, First Nations Justice Policy Division
- Ms Anne Sheehan, First Assistant Secretary, International Law and Human Rights Division
- Ms Julie Zezovska, Acting Assistant Secretary, Criminal Justice Reform Taskforce, First Nations Justice Policy Division

Dr Sheryl Lightfoot

Terri Janke and Company

- Mr Adam Broughton, Solicitor
- Ms Neane Carter, Solicitor

Dr Tony McAvoy SC

Kimberley Aboriginal Law and Cultural Centre

- Mr Wayne Barker, Festival and Cultural Events Coordinator
- Mr Wes Morris, Coordinator

Kimberley Community Legal Service

- Ms Grace Dudley, Systemic Change Advocate
- Ms Christine Robinson, Chief Executive Officer

C. United Nations human rights bodies and mechanisms structure

Within the United Nations (UN) system, there are treaty-based and charter-based human rights monitoring mechanisms. The treaty-based bodies, reporting to the Economic and Social Council, consist of ten independent expert committees, monitoring the implementation of international human rights treaties. The charter-based bodies include the United Nations Human Rights Council (UNHRC), the Special Procedures of the UNHRC (independent human rights experts, including the Special Rapporteur on the rights of Indigenous peoples)¹, the Universal Periodic Review and Independent Investigations.² The Expert Mechanism on the Rights of Indigenous Peoples submits annual thematic studies and annual reports to the UNHRC.³

The Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council.⁴



¹ United Nations (UN) 2022, *Directory of Special Procedures Mandate Holders*, viewed 22 May 2023, <https://www.ohchr.org/en/documents/procedural-documents/directory-special-procedures-mandate-holders>, pages 3–4.

² UN 2023, 'Instruments & mechanisms', viewed 22 May 2023, <https://www.ohchr.org/en/instruments-and-mechanisms>.

³ UN 2023, 'Annual reports: Expert Mechanism on the Rights of Indigenous Peoples', viewed 22 May 2023, <https://www.ohchr.org/en/hrc-subsiaries/expert-mechanism-on-indigenous-peoples/annual-reports>.

⁴ UN n.d., 'Permanent Forum on Indigenous Issues', viewed 22 May 2023, <https://www.un.org/development/desa/indigenouspeoples/about-us/permanent-forum-on-indigenous-issues.html>.



D. United Nations Declaration on the Rights of Indigenous Peoples

'The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of

Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess

collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁴ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - b. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - c. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - d. Any form of forced assimilation or integration;
 - e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

2. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

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.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. Article 44 All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.¹

¹ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295, 13 September 2007.