



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].