



***Submission: The application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia***

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**With thanks:**

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**About ANTaR**

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy, and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including anti-racism campaigns, native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health, and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee, and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

*“It is using the Declaration that breathes life into it.”*

*Mick Gooda, former Social Justice Commissioner<sup>1</sup>*

## **Introduction**

Thank you for the opportunity to provide comments to inform the Senate Select Committee’s consideration of the ***‘application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.’***

The *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’ or ‘the Declaration’) is an important declaration that articulates the rights of Indigenous peoples across the globe, rights to preserve and maintain control of their cultural heritage, and to pursue their own priorities for their development.<sup>2</sup> The Declaration establishes a standard for the dignity and survival of Indigenous peoples of the world. The UNDRIP draws on existing international laws and conventions such as the Universal Declaration of Human Rights and relates the rights contained in these international instruments to Indigenous peoples across the globe. The rights cultivated by the UNDRIP include rights to self-determination, culture, identity, land, language, health, and education and employment.

For the last 13 years, Aboriginal and Torres Strait Islander peoples, communities, peak organisations and the social justice campaigns they lead, have been using UNDRIP as a key measure for Australia’s approach to Indigenous Affairs. Sadly, Federal and State governments have largely failed to honour or adhere to the articles of the Declaration and Australia is poorer for it.

As the Australian Human Rights Commission’s 2010 Declarations Community Guide states, ‘Self-determination is the central right of the Declaration. All other rights help to achieve

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<sup>1</sup> Australian Human Rights Commission - <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/un-declaration-rights>

<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (‘UNDRIP’), art 43.

self-determination. All Indigenous peoples are entitled to this right.<sup>3</sup> Specifically, **Article 3** of UNDRIP states<sup>4</sup>:

‘Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

In 2022, we are 17 years since the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and four years since the defunding and subsequent closure of the National Congress of Australia’s First Nations Peoples. These are just two examples of the many failures and missed opportunities of Australian governments to live up to UNDRIP – particularly in terms of self-determination. Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO, said in 2021 that:

‘The declaration affirms our rights to make our own decisions, to control our own organisations, to put in place governance bodies grounded in our culture, and to restore our societal and cultural structures, practices and knowledge systems, to emancipate ourselves from the inequalities we face.’<sup>5</sup>

The 2017 *Uluru Statement from the Heart* and its call for a constitutionally enshrined First Nations ‘Voice’ to Parliament, complemented with a Makarata Commission to drive agreement making (treaty) and Truth-telling processes, are offering a new chance to apply the principles and articles of the Declaration at the core of our Commonwealth. The emergence of State and Territory based treaty processes, particularly the process underway in Victoria, are exciting developments that enliven the Declaration for those jurisdictions.

The Declaration has also been a primary starting point of the Human Rights based, Aboriginal and Torres Strait Islander led social campaigns, such as the Close the Gap and Change the Record. Drawing on other international rights instruments, declarations,

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<sup>3</sup> The Community Guide to the Declaration on the Rights of Indigenous Peoples (2010) - AHRC and National Congress of Australia’s First Peoples -

[https://humanrights.gov.au/sites/default/files/document/publication/declaration\\_community\\_guide.pdf](https://humanrights.gov.au/sites/default/files/document/publication/declaration_community_guide.pdf)

<sup>4</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007) -

[https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

<sup>5</sup> June Oscar AO (2021) ‘Incorporating UNDRIP into Australian Law would kickstart important progress’ -

<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>

covenants and conventions, the Declaration synthesises the way human rights should be realised and enjoyed by Indigenous peoples. Aboriginal and Torres Strait Islander leaders and peak organisations (along with their allies) have been asserting their rights in the negotiation of the *National Agreement on Closing the Gap* with Australian governments.<sup>6</sup> This offers some hope for how governments might be increasingly open to being informed and influenced by the UNDRIP as advocated for by First Nations peoples. However, the social and economic disparities experienced by Aboriginal and Torres Strait Islander communities, compared to their fellow non-Indigenous Australians in areas such as health, justice, housing, education and employment, show that the application of UNDRIP for fundamental reform remains acute in Australia.

### **History of Australia's support for and application of the UNDRIP**

The UNDRIP was adopted in September 2007 by the UN General Assembly, with only four states voting against the Declaration, consisting Australia, along with Canada, New Zealand and the United States. In 2009, under the Rudd Labor Government, Australia officially endorsed the UNDRIP, committing to take action to implement the Declaration in multiple international forums.<sup>7</sup> Although this endorsement of the UNDRIP eventually came, Australia is yet to implement its obligations under the Declaration into domestic law, policy and practice and therefore the impetus for application has been lacking from governments. The UNDRIP does not create legally binding obligations as it is not a treaty, however many of its provisions have been accepted in international customary law. By accepting UNDRIP, Australia has acknowledged the Declaration as a framework for protecting and recognising the rights of Aboriginal and Torres Strait Islander peoples in Australia – now it is time to move from acknowledgement to embedding the principles in policy and implementation.

Since accepting the UNDRIP in 2009, progress has been slow to implement the principles into domestic law. Since 2007, Australian laws and policies have been criticised in international forums for going against the fundamental right of self-determination for Indigenous peoples, as well as other key rights contained in the UNDRIP.<sup>8</sup> The UN Human Rights Council's Universal Periodic Review (UPR) has considered Australia's (non)

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<sup>6</sup> National Agreement on Closing the Gap (2020) - <https://www.closingthegap.gov.au/national-agreement>

<sup>7</sup> Australian Human Rights Commission, 'Implementing UNDRIP', Australia's third UPR 2021.

<sup>8</sup> Kishaya Delaney, Amy Maguire, and Fiona McGaughey, 'Australia's Commitment to 'Advance the Human Rights of Indigenous Peoples Around the Globe' on the United Nations Human Rights Council', *Adelaide Law Review* (2020) 41(2), 368.

implementation of the UNDRIP in two successive reports (2015 and 2021).<sup>9</sup> In 2015, the UPR was delivered to Australia, with recommendations from 104 countries. These recommendations included the call for full implementation of the UNDRIP in Australia. In the 2021 UPR, the need for Australia to adopt a national action plan for implementation of the UNDRIP was again highlighted throughout the recommendations.<sup>10</sup>

While there have been some improvements in Australian policy in relation to issues faced by Aboriginal and Torres Strait Islander peoples and communities,<sup>11</sup> there are still significant gaps in Australian law and policy which need to be addressed. It was highlighted in the 2021 UPR that most of the recommendations from the 2015 UPR in relation to Aboriginal and Torres Strait Islander peoples were not implemented by Australia, noting that only two of the seven Close the Gap targets were met by Australia during this period (2015-2020). Similarly, the rejection by the Australian Government of the *Uluru Statement from the Heart* call for a Makarrata Commission was also raised by the UPR as a significant departure from the recommendations of the UPR.<sup>12</sup>

### **The potential to enact the UNDRIP in Australia**

The last ten years of the Federal government has felt like a wasted decade for the implementation of the Declaration. Beginning with the Rudd-Gillard Labor government's continuation of the 'Intervention' in the Northern Territory, the failure of consecutive governments (Labor and Coalition) to make meaningful gains against the Closing the Gap targets, the Turnbull-Morrison governments' undermining of representative bodies such as the National Congress of Australia's First Nations Peoples, the imposition of the 'Cashless Debit Card' largely on Aboriginal communities<sup>13</sup>, and rejection of the *Uluru Statement from the Heart* – it has often seemed that government has gone out of its way to reject the tenets of the Declaration.

There is a significant list of priorities that have been provided by Aboriginal and Torres Strait Islander peoples and communities through their leaders, peak organisations and social justice campaigns. Rather than try to capture them all in detail, we refer to the following

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<sup>9</sup> Universal Periodic Review Working Group, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016).

<sup>10</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 47th sess, Agenda Item 6, UN Doc A/HRC47/8 (21 June 2021) 9, [87].

<sup>11</sup> *Ibid*, 10-12.

<sup>12</sup> *Ibid*, 9, [82].

<sup>13</sup> Cashless Debit Card - ANTaR resource - <https://antar.org.au/cashless-debit-card>

reports (and their recommendations) that should be considered by the Senate Select Committee in its enquiry into how to apply UNDRIP in Australia:

- The Close the Gap Campaign's 2022 Report,<sup>14</sup> covering recommendations that address:
  - How to make Structural reforms;
  - Innovation driven by cultural intellect and cultural safety; and
  - Empowering communities to improve health and wellbeing through equal access.
- The Change the Record Campaign's updated (2022) Blueprint<sup>15</sup> for Change, including recommendations that address:
  - Investing in communities, not prisons;
  - Support community conceived, led and implemented solutions for justice;
  - Recognise the driving factors of imprisonment and violence;
  - Safety for women and children;
  - Services for community rather than arbitrary and mandatory sentencing; and
  - Adopting community justice approaches.
- The Aboriginal and Torres Strait Islander Social Justice Commissioner's (2020) Wiyi Yani U Thangani (Women's Voices) Report<sup>16</sup>, including overarching recommendations covering:
  - A National Action Plan on advancing the wellbeing of Aboriginal and Torres Strait Islander women and girls;
  - Conducting a National Summit and establishment of a National Aboriginal and Torres Strait Islander Women and Girls Advisory Body;
  - Empowering women's leadership on the ground;
  - Protecting, supporting, and reviving Aboriginal and Torres Strait Islander cultural practices and knowledge systems;
  - An urgent focus on healing from intergenerational trauma;
  - National action to eradicate racism; and
  - Local and regional focused engagement; and

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<sup>14</sup> Close the Gap Campaign Report 2022 - <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-2022>

<sup>15</sup> Change the Record Campaign's (2022) Blueprint for Change - <https://www.changetherecord.org.au/policy-framework>

<sup>16</sup> Wiyi Yani U Thangani (Women's Voices) Report (2020) Australian Human Rights Commission - <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yani-u-thangani>

- The *Uluru Statement from the Heart* and Referendum Council Final Report (2017)<sup>17</sup>, including the calls for:
  - A constitutionally enshrined First Nations ‘Voice’ to Parliament;
  - Through a Makarata Commission, a process for agreement-making (treaty), and
  - A national Truth Telling process.

This is not an exhaustive list but the proper resourcing and implementation of the solutions and policies contained in these reports and seminal documents will be a solid start for any government committed to applying the Declaration in policy and operation.

We would also join the other stakeholders that would be calling for a legislated commitment to the Declarations implementation and refer to the Canadian experience in the next section as an example.

Finally, regarding the commitments that governments have made that would enliven the Declaration in Australia – namely the *National Agreement on Closing the Gap* in 2020 – these standing agreements and commitments must be adequately resourced to make possible their proper implementation. The National Agreement is a promising opportunity to improve on past attempts but to date there has been no meaningful funding or resources quarantined for implementation. Without funding, these good intentions become meaningless and repeat the mistakes of the past.<sup>18</sup>

### **International experience of enacting and enforcing the UNDRIP**

There is much to be learnt from international jurisdictions which have enacted and enforced the UNDRIP. The international experience is important for Australia to consider when determining the appropriate methods for implementation of the UNDRIP in domestic law and policy. There are two jurisdictions that will be the focus of this section, namely Canada and Norway. Canada and Norway have both taken constructive steps to enact and enforce the UNDRIP in their domestic laws since formal acceptance.

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<sup>17</sup> Referendum Council Final Report & Uluru Statement from the Heart (2017) - [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf)

<sup>18</sup> Close the Gap Campaign ‘10 Year Review’ Report (2018) - <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-10-year-review>

Canada was one of the four nations, along with Australia, to vote against the UNDRIP in 2007. However in 2016, Canada officially adopted the UNDRIP and stated its intention to implement the Declaration within Canadian domestic legislation. In 2020, the Canadian (Federal) Government introduced a Bill which was passed in June 2021 with Royal Assent. The *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* was passed for the purpose of developing the implementation of the UNDRIP in Canada. The Act affirms the Canadian Government's commitment to the Declaration and provides Canada with a framework to advance the implementation of the Declaration at a federal level.

The Canadian Government engaged with multiple national Indigenous organisations and Indigenous stakeholders to help shape the development of the Act. Consultation and cooperation with Canadian First Nations peoples is an important principle which is embedded in the legislation, the Act requires the Canadian Government to consult and collaborate with First Nations peoples to implement a national action plan to achieve the objectives of the UNDRIP. The Act requires the national action plan to include measures to address injustices, eliminate all forms of violence, racism and discrimination, and to combat prejudice against Indigenous peoples. An important qualification to this goal of a national action plan is the requirement in the Act for the national action plan to include measures for monitoring and implementing the plan itself within Canada. Monitoring and assessing progress is an important step in the process to ensure full implementation of the UNDRIP, the Act requires annual reporting on progress on the action plan and the progress of aligning the laws of Canada to the UNDRIP principles. This Act will help strengthen relations between the First Nations peoples of Canada and the Canadian Government, it represents a shared road map for all stakeholders to work together in the implementation of the UNDRIP within a settler State, a jurisdiction relatively similar to Australia.

Norway was an early adopter of the UNDRIP, endorsing its adoption in 2007. Contrasting Australia's initial rejection of the UNDRIP, Norway was a driving force in the process for the adoption of the Declaration by the UN General Assembly. Prior to the UNDRIP being adopted by the UN General Assembly in 2007, Norway had already had a long history with established laws and mechanisms protecting the rights of the Indigenous peoples in Norway. The Sami Parliament was established in 1989 and the function of the Sami Parliament requires the Norwegian government to consult with officially elected constituents on political issues relevant to the Sami people. Since the adoption of the UNDRIP by Norway, the UNDRIP has been affirmed by the Nesseby Case in the Supreme Court of Norway,

enshrining the principle of free, prior and informed consent in Norwegian law and further cementing the principles in the Declaration in international customary law.<sup>19</sup>

### **Key Australian legislation affected by adherence to the principles of the UNDRIP**

A key principle of the UNDRIP is the concept of free, prior and informed consent (FPIC), held specifically in article 19 and 32 of the Declaration:

#### **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 32(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, utilisation or exploitation of mineral, water or other resources.

The principle of FPIC is a core principle of the UNDRIP, adopting this core principle will be key to Australia's implementation of the UNDRIP. The FPIC principle is a specific right that establishes the right for Indigenous peoples to give or withhold consent to laws, policies, and projects which may affect them, their community or their lands. The principle gives Indigenous peoples the right to negotiate conditions under which projects, laws and measures are designed, implemented, evaluated and progress monitored. The principle of FPIC is closely aligned to the right to self-determination, also a core principle of the UNDRIP.

Considering the principle of FPIC, many Aboriginal and Torres Strait Islander cultural heritage legislation will be affected by the implementation of the UNDRIP in Australia. The following key cultural heritage legislation would likely be impacted by adopting the UNDRIP principle of FPIC into Australian domestic legislation:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth);

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<sup>19</sup> Oyvind Ravna, 'The Duty to Consult the Sami in Norwegian Law', *Arctic Review on Law and Politics* (2020); Norwegian Supreme Court HR-2018-456-P (Nesseby).

- *The Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth);
- *Native Title Act 1993* (Cth);
- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); and
- *Protection of Movable Cultural Heritage Act 1986* (Cth).

Arguably, all future Australian legislation that impacts Aboriginal and Torres Strait Islander peoples in Australia could also be affected by adherence to the principles of the UNDRIP including the principle of FPIC, as well as self-determination.<sup>20</sup> Implementing the UNDRIP will affect the passing of legislation, regulations and policies which impact Aboriginal and Torres Strait Islander lands, territories, health, housing, economic and social outcomes as the Australian government will need to consult First Nations stakeholders before passing legislation or policies. The *Uluru Statement from the Heart* calls for a Voice to Parliament, a consultative body to Parliament enshrined in the Constitution. This presents an opportunity to ensure that the principles of the UNDRIP are implemented and adhered to in Australia at the centre of Parliamentary deliberations.

### **The Human Rights (Parliamentary Scrutiny) Act 2011**

As a foundational member of the Change the Record Campaign, we note the Campaign's commentary in their submission to this enquiry regarding the *Human Rights (Parliamentary Scrutiny) Act 2011* (*the Act*) first implemented by the Gillard Labor government. The Act requires that new Bills and disallowable legislative instruments be accompanied by a Statement of Compatibility with relevant human rights treaties ratified by Australia.<sup>21</sup>

ANTaR endorses the Campaign's view that 'the Act and Parliamentary Joint Committee on Human Rights' have failed to properly scrutinise breaches of human rights as per Australia's commitments. And specifically, the failure to include UNDRIP as one of the key international commitments has meant and the parliamentary scrutiny that could have been directly applied has impacted First Nations peoples.

### **Conclusion**

Thank you again for the opportunity to provide a submission on this highly important enquiry. It is our hope that governments and communities across Australia honour our endorsement of the Declaration by fully implementing the principles and articles contained therein. The

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<sup>20</sup> UNDRIP art 3, 4, 19, 32.

<sup>21</sup> Commonwealth Attorney-General's Department, International human rights system, website

newly elected Albanese Labor Government has made commitments to facilitate a referendum on the enshrinement of a First Nations Voice to Parliament in the Constitution. Should the Government follow through on this commitment and the Australian people subsequently vote yes for Voice, this will be a significant development for Australia's application of the UNDRIP.

The State and Territory governments that are already pursuing, or have made commitments to begin processes with the Aboriginal and Torres Strait Islander peoples in their jurisdictions offer the other potential driver for the widespread implementation of the Declaration. To date the track record of government has not been good but the greenshoots through the avenues of constitutional reform and treaty are encouraging.

In the absence of government leadership, Aboriginal and Torres Strait Islander communities, and their community controlled and peak organisations, have continued to assert their rights and see the Declaration's principles and articles applied. As in the Declaration's negotiated drafting, we look to Aboriginal and Torres Strait Islander peoples across Australia to continue to assert their rights, and with our support, see the UNDRIP applied throughout Australia's institutions, services and representations.

Thank you again for this opportunity to submit, ANTaR would welcome the opportunity to meet with the Senate Select Committee to discuss any points raised in our submission.

Sincerely

**Paul Wright**

National Director, ANTaR