



**Law Council**  
OF AUSTRALIA

# **Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia**

**Senate Legal and Constitutional Affairs References Committee**

**24 June 2022**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000<sup>1</sup> lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

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<sup>1</sup> Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

## Acknowledgement

The Law Council is grateful to its Indigenous Legal Issues Committee, National Human Rights Committee and the Constitutional Law Committee of its Federal Litigation and Dispute Resolution Section, as well as the Law Society of New South Wales, for assistance in the preparation of this submission.

## Executive Summary

1. The Law Council of Australia (**the Law Council**) thanks the Senate Legal and Constitutional Affairs References Committee (**the Senate Committee**) for the opportunity to respond to the inquiry into the application of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>2</sup> in Australia (**the Inquiry**).
2. The Law Council strongly supports consideration of how the UNDRIP might be better applied domestically in Australia. Its *Policy Statement on Indigenous Australians and the Legal Profession*, released in 2010, commits the Law Council, working in partnership with First Nations peoples, to promoting implementation of this international instrument and awareness of its provisions amongst the Australian legal profession and community.<sup>3</sup>
3. At this stage, given the high level of generality of the present Inquiry, the Law Council makes the following recommendations as preliminary suggestions for pursuing domestic application of the UNDRIP.
  - A referendum for a First Nations Voice to Parliament enshrined in the Australian Constitution should be pursued as a matter of priority. Such a Voice would be a manifestation of the right to self-determination, which is the fundamental principle underpinning the UNDRIP.
  - Further consideration should be given to the development of a national action plan for domestic application of the UNDRIP, which might:
    - audit or review existing legislation and policies for consistency and conformity with the UNDRIP;
    - consult on, or engage with existing consultations on, the content of key principles of the UNDRIP such as ‘free, prior and informed consent’, based in international formulations and applied to the domestic context including in the provisions of new cultural heritage legislation, the *Native Title Act 1993 (Cth)*, and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*; and
    - consult on options for comprehensive domestic implementation of the UNDRIP, either in a Federal Human Rights Act or in standalone legislation.
  - The definition of ‘human rights’ under the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* should be amended to explicitly include the UNDRIP as an instrument for which the Parliamentary Joint Committee on Human Rights (**PJCHR**) has reporting functions.
  - The UNDRIP should be declared a ‘relevant international instrument’ within the definition of ‘human rights’ in the *Australian Human Rights Commission Act 1986 (Cth)* (or otherwise explicitly included in the definition), in order that the rights declared by the UNDRIP come within the inquiry and complaints function of the Australian Human Rights Commission (**AHRC**).

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<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) (**UNDRIP**).

<sup>3</sup> Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) [16] <<https://www.lawcouncil.asn.au/publicassets/f56b7bd7-e1d6-e611-80d2-005056be66b1/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>>.

## Introduction and Background

4. Aboriginal and Torres Strait Islander peoples have been subject to colonisation, dispossession, discrimination, marginalisation, and significant breaches of human rights across multiple areas, historically and in contemporary Australia, not least in the protection of cultural heritage and land rights and in the treatment of persons in contact with the criminal justice and child protection systems. The practices and impacts of colonisation continue in the present day, including through the policies of governments and public institutions, as well as the actions of private corporations and individuals, extending cycles of intergenerational trauma, disrespect and injustice, and contributing to broader political, economic, social and cultural disadvantage and barriers to wellbeing.
5. The Law Council considers the UNDRIP as foundational to addressing this state of affairs. Given the systemic nature of the issues facing First Nations peoples, comprehensive legal and policy reform across all federal, state and territory jurisdictions is required. Without a legal and policy framework based in human rights, breaches of human rights in Australia, particularly of marginalised groups, are likely to remain 'disturbingly routine'.<sup>4</sup>
6. The UNDRIP is the authoritative international standard informing the way governments across the globe should engage with and protect the rights of indigenous peoples.<sup>5</sup>
7. Australia formally announced its support for the UNDRIP on 3 April 2009, but, more than a decade on, Australian governments and parliaments are yet to recognise and implement its standards and protections domestically in a formal and comprehensive, as opposed to piecemeal, manner.
8. While the UNDRIP is not a treaty and therefore does not itself create legally binding obligations, many of its articles have been recognised as reflecting customary international law.<sup>6</sup> Its articles also echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on indigenous peoples.<sup>7</sup> Insofar as the UNDRIP relies on and elaborates well-established human rights obligations in international treaty and customary law, it is binding on Australia.
9. As the United Nations Human Rights Council has explained:

*The 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. The product of a protracted drafting process involving the demands voiced*

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<sup>4</sup> Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) 16, quoting George Williams and Daniel Reynolds, 'Out on a Limb: Australia's Troubling Exceptionalism on Human Rights' (2017) 38 *Law Society Journal* 40, 40.

<sup>5</sup> Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet', *Rights and Protections* (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-antidiscrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

<sup>6</sup> International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.

<sup>7</sup> Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

*by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No 169 and other relevant instruments and processes.*

*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.<sup>8</sup>*

10. The Law Council endorses the importance of the UNDRIP, and particularly emphasises the significance of the right to self-determination, which is explicitly provided for in article 3, and is the fundamental principle underpinning the instrument as a whole.<sup>9</sup> As the Expert Mechanism on the Rights of Indigenous Peoples (**the Expert Mechanism**) asserts in its recent report:

*All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination. The exercise of self-determination is therefore indispensable for indigenous peoples' enjoyment of all their other rights, including, importantly, land rights (arts 25-28, 30 and 32) and political participation (arts 18-20 and 34).<sup>10</sup>*

11. The right to self-determination is also reflected more broadly in common article 1 of both the *International Covenant on Civil and Political Rights (ICCPR)*<sup>11</sup> and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>12</sup>.
12. While the full scope and content of the right to self-determination is not defined in the UNDRIP, it has been articulated as involving and protecting, at a minimum, an 'ongoing process of choice' for indigenous peoples,<sup>13</sup> who are entitled to have control over their destiny and be treated respectfully.<sup>14</sup>
13. Davis has previously explained the significance of self-determination in terms of the context of the relations between state entities and indigenous populations as follows:

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<sup>8</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

<sup>9</sup> UNDRIP, art 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.'

<sup>10</sup> Report of the Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, UN Doc A/HRC/48/75 (4 August 2021) <<https://undocs.org/A/HRC/48/75>> 5.

<sup>11</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**').

<sup>12</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**').

<sup>13</sup> Australian Human Rights Commission, 'Right to Self-Determination' (website, 30 April 2013) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>>.

<sup>14</sup> Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

*The right to self-determination, expressed as the right to determine their own economic, social, cultural and political destinies, came to represent the fundamental principle underpinning indigenous peoples' advocacy. Almost universally, indigenous peoples had been institutionalised to the extent that every aspect of their lives was controlled by the state. ... [Self-determination reflects] the idea that indigenous people should have some control over the decisions that are made about their lives.*<sup>15</sup>

14. Members of the Law Council's expert advisory Indigenous Legal Issues Committee have suggested that, notwithstanding this significance, there is little evidence that self-determination is well understood or recognised across Australian governments and parliaments generally.
15. Incorporating the rights contained in the UNDRIP, in all the ways First Nations peoples encounter the political, economic, social and cultural apparatus of the State, would provide a principled framework in which to approach the national task of resetting relations and acknowledging and addressing the impact of colonisation in this country. It would assist, at a practical legal and policy level, in ensuring that First Nations peoples have effective access to their collective and individual rights and to remedies for breaches of these rights.

## Overview of Domestic Application to Date

16. To date, the Law Council considers that successive Australian Governments have missed significant opportunities to implement indigenous rights norms and, more broadly, to advance the tripartite themes of recognition, reparation and reconciliation, which the Expert Mechanism has characterised as 'foundational to the interpretation and application' of the UNDRIP, given it has both a 'remedial' and 'ongoing' function.<sup>16</sup>
17. Australia's application of the UNDRIP has been urged across multiple international fora, including in relation to treaty body reporting. In its 2017 concluding observations on the periodic reports of Australia, the Committee on the Elimination of Racial Discrimination recommended that Australia 'respect and apply' the principles enshrined in the UNDRIP, and 'consider adopting a national plan of action to implement these principles'.<sup>17</sup> As one example, it urged that the principle of free, prior and informed consent be incorporated into the *Native Title Act 1993* (Cth), and this legislation amended with a view to lowering the standard of proof and simplifying the applicable procedures.<sup>18</sup> More broadly, it recommended that Australia 'accelerate its efforts to implement Indigenous Peoples' self-determination demands, as set out in the Uluru Statement from the Heart'.<sup>19</sup> The Committee on Economic, Social and Cultural Rights also made substantively similar recommendations in the same year as part of its concluding observations to Australia.<sup>20</sup>

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<sup>15</sup> Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

<sup>16</sup> United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [2].

<sup>17</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20 (8 December 2017) <[https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD\\_C\\_AUS\\_CO\\_18-20\\_29700\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD_C_AUS_CO_18-20_29700_E.pdf)> [22].

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, [20].

<sup>20</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (11 July 2017)



18. Australia has also been singled out in comments of the Expert Mechanism in both positive and negative terms.
19. In 2019, the Expert Mechanism characterised the Australian Parliament's formal apology to the Stolen Generations in 2008 as an 'example' of 'measures of satisfaction', these 'being processes or mechanisms for reconciliation' that are 'in addition to truth and reconciliation commissions' and 'meaningful but also symbolic in nature'.<sup>21</sup> It went on to state that 'while apologies and other measures of satisfaction are to be commended, they should translate into tangible changes in terms of respect for and protection of the rights of indigenous peoples'.<sup>22</sup>
20. At the same time, the Expert Mechanism noted with respect to Australia that:

*At the national level, in Australia, the Native Title Act (1993) has provided a framework, however flawed, for the limited recognition of indigenous peoples' rights to their lands, territories and resources, as well as for the recognition of their traditional laws and customs. It also serves as a mechanism for payment of limited compensation. Most recently, the High Court issued a landmark decision in a matter brought forward by the Ngaliwuru and Nungali traditional owners in the town of Timber Creek in the Northern Territory. The Court awarded approximately 2.5 million Australian dollars in compensation to the traditional owners for the impact of 53 land grants and public works on their native title rights. The case, beyond its significance in and of itself, also creates a precedent for compensation in other native title cases. However, it should be noted that the Commonwealth routinely funds challenges to native title. The Australian states that challenged the Timber Creek decision from the lower courts to the highest court fought the compensation. This highlights the complexity of the recognition of indigenous rights and reparation. In Australia, it has flowed from protracted litigation that Aboriginal people can ill afford, and for many indigenous people's [sic] calls into question the State's commitment to reconciliation.*<sup>23</sup>

21. Recent efforts in respect of recognition, reparation and reconciliation have been conducted in Australia, generally at a state and territory level, and still in a piecemeal manner.
22. In 2019, the First Peoples' Assembly of Victoria was established for the purpose of negotiating a Treaty between First Peoples and the Government of Victoria,<sup>24</sup> with one of its first acts being to call on the State to establish a Stolen Generations Redress

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<[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/AUS/CO/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/AUS/CO/5&Lang=en)> [16].

<sup>21</sup> United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [57]-[58].

<sup>22</sup> *Ibid*, [85].

<sup>23</sup> *Ibid*, [69]. For further recent examples of responses on indigenous rights issues interacting across the Courts, Legislature and Executive, see, eg, *Love v Commonwealth of Australia*; *Thoms v Commonwealth of Australia* [2020] HCA 3; *Citizenship, Migrant Services and Multicultural Affairs & Anor v Montgomery* [2022] HCATrans 52 (7 April 2022); *Binsaris v Northern Territory* [2020] HCA 22; Karen Michelmore, 'Mistreated NT youth secure \$35 million settlement', *NITV News SBS* (online, 28 July 2021); *Personal Injuries (Liabilities and Damages) Amendment Act 2022* (NT); Rachael Knowles, 'Class action cap could hurt NT stolen wages case', *National Indigenous Times* (online, 2 July 2021).

<sup>24</sup> First Peoples' Assembly of Victoria, *Home* (website, undated) <<https://www.firstpeoplesvic.org/>>.

Scheme.<sup>25</sup> All members of the Assembly are Traditional Owners.<sup>26</sup> The Yoorrook Justice Commission began hearing evidence in Victoria in March 2022 as agreed between the Assembly and the Victorian Government, making it Australia's first truth-telling mechanism.<sup>27</sup> At time of writing, a bill establishing an independent authority to oversee Treaty negotiations between the Government and Traditional Owners is also set to be introduced into the Victorian Parliament.<sup>28</sup>

23. Treaty progress is also underway in Queensland, the Northern Territory, the Australian Capital Territory, Tasmania and South Australia, albeit at different stages, and, in Western Australia, the Noongar people have negotiated the South West Native Title Settlement.<sup>29</sup> Work of the Acting Treaty Commissioner began in the Northern Territory in January 2022, with a final report to the Northern Territory Government on the best path forward for treaty to be issued in 2023.<sup>30</sup> The 'Tracks to Treaty' initiative began in Queensland in July 2019, with the Queensland Government then in August 2020 accepting or accepting in principle the Eminent Panel recommendations and committing to both 'a treaty making process' and 'exploring options to establish an independent body to lead the Path to Treaty process including a truth-telling and healing process'.<sup>31</sup> The Expert Mechanism has noted, however, the 'vulnerability' of state and territory processes, such as 'treaties to being overridden by the Federal Government'.<sup>32</sup>
24. At a federal and national level, the former Australian Government announced in 2021 that it would establish a Territories Stolen Generations Redress Scheme in the

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<sup>25</sup> First Peoples' Assembly of Victoria, *The Treaty Journey So Far* (website, undated) <<https://www.firstpeoplesvic.org/about/the-treaty-journey-so-far/>>. See also Victorian Government, *Stolen Generations Reparation Package* (website, 26 April 2022) <<https://www.vic.gov.au/stolen-generations-reparations-package>>.

<sup>26</sup> First Peoples' Assembly of Victoria, *Home* (website, undated) <<https://www.firstpeoplesvic.org/>>.

<sup>27</sup> See, eg, Bridget Brennan, 'Yoorrook truth-telling commission begins to examine 'brutal ugliness' of Australia's treatment of Aboriginal people', *ABC News* (online, 24 March 2022) <<https://www.abc.net.au/news/2022-03-24/oorrook-justice-commission-truth-telling-aboriginal-people/100936120>>.

<sup>28</sup> Benita Kolovos, "'Decolonisation in action": Victorian treaty negotiations to be overseen by independent authority', *Guardian* (online, 7 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/07/decolonisation-in-action-victorian-treaty-negotiations-to-be-overseen-by-independent-authority>>.

<sup>29</sup> See, eg, Ashurst, 'Treaty update: Progress in State based Treaty negotiations and proposals for a national Indigenous Voice', *Native Title Year in Review 2020* (online, 1 April 2021) <<https://www.ashurst.com/en/news-and-insights/insights/treaty-update-progress-in-state-based-treaty-negotiations-and-proposals/>>. For the South Australian context, see eg, Giovanni Torre, 'Treaty a key goal for South Australia's first Aboriginal Attorney General', *National Indigenous Times* (online, 8 April 2022) <<https://www.nit.com.au/treaty-a-key-goal-for-south-australias-first-aboriginal-attorney-general/>>; ANTaR, *Treaty in South Australia* (online, 2019) <[https://antar.org.au/sites/default/files/treaty\\_in\\_south\\_australia.pdf](https://antar.org.au/sites/default/files/treaty_in_south_australia.pdf)>. For the Western Australian context, see eg, Australian Government, Department of the Prime Minister and Cabinet, *Empowering Noongar people to realise benefits of the South West Native Title Settlement* (media release, 11 March 2022) <<https://ministers.pmc.gov.au/wyatt/2022/empowering-noongar-people-realise-benefits-south-west-native-title-settlement>>; Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law* (online, 24 October 2018) <<https://www.auspublaw.org/blog/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia>>; ANTaR, *Treaty in Western Australia* (website) <<https://antar.org.au/stories/treaty-western-australia>>. For treaty-making in Australia generally, see Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' [2018] 40 *Sydney Law Review* 1 <<http://classic.austlii.edu.au/au/journals/SydLawRw/2018/1.html>>.

<sup>30</sup> See, eg, Matt Garrick, 'Barrister Tony McAvoy SC sworn in as the Northern Territory's Acting Treaty Commissioner', *ABC News* (online, 8 December 2021) <<https://www.abc.net.au/news/2021-12-08/nt-new-treaty-commissioner-tony-mcavoy/100681550>>.

<sup>31</sup> Queensland Government, *Treaty Statement of Commitment and response to recommendation of the Eminent Panel* (August 2020) <<https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2020/5620T1358.pdf>>.

<sup>32</sup> United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, UN Doc A/HRC/48/75 (4 August 2021) [49].

Northern Territory, Australian Capital Territory and Jervis Bay Territory. The *Territories Stolen Generations Redress Scheme (Facilitation) Act 2021* (Cth) and *Territories Stolen Generations Redress Scheme (Consequential Amendments) Act 2021* (Cth) have since commenced, the final provisions in March 2022.<sup>33</sup> This scheme followed redress schemes in Tasmania, South Australia and New South Wales, and was part of the Commonwealth Implementation Plan<sup>34</sup> made pursuant to the refreshed National Agreement on Closing the Gap.<sup>35</sup> Neither the National Agreement nor the Commonwealth Implementation Plan refer to the UNDRIP, however, though references to self-determination and reconciliation are included in these documents.

25. At the same time, from 2019 to 2021, the then Australian Government pursued an Indigenous Voice Co-Design Process, the terms of reference of which did not respect and were fundamentally inconsistent with proposals put forward through consensus-making processes of First Nations peoples, not least the Uluru Statement from the Heart and recommendations of the Referendum Council.<sup>36</sup> Most notably, the Indigenous Voice Co-Design Process denied key aspects conceived through the process culminating at Uluru that a Voice ought to be to Parliament not Government, constitutionally enshrined to ensure legitimacy and protection against repeal, and be based in the empowerment and aspirations of the individual First Nations.<sup>37</sup> The Law Council notes in this context the view of the Expert Mechanism that: 'Current obstacles to the implementation of the Declaration are often related to the absence or denial of processes of recognition, reparation and reconciliation'.<sup>38</sup> The Law Council has since welcomed the commitment of the Australian Government in 2022 to implementing the Uluru Statement from the Heart, including a referendum as soon as possible on a First Nations Voice to Parliament.<sup>39</sup>
26. While Voice and Treaty would be a manifestation of the rights and objectives of the UNDRIP, the UNDRIP can also guide how the processes toward Voice and Treaty should occur or be undertaken.
27. As the Expert Mechanism has noted:

*The United Nations Declaration on the Rights of Indigenous Peoples should be the main framework for recognition, reconciliation and reparation. Recognition of indigenous peoples, as well as reparation and*

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<sup>33</sup> For further background and analysis see Law Council of Australia, Submission to the Senate Finance and Public Administration Legislation Committee, *Inquiry into the Territories Stolen Generation Redress Scheme Bills* (17 September 2021) <<https://www.lawcouncil.asn.au/publicassets/af79ccc0-fd1b-ec11-9441-005056be13b5/4093%20-%20Inquiry%20into%20the%20Territories%20Stolen%20Generations%20Redress%20Scheme%20Bills.pdf>>;

Law Council of Australia, Supplementary Submission to the Senate Finance and Public Administration Legislation Committee, *Inquiry into the Territories Stolen Generation Redress Scheme Bills* (30 September 2021) <<https://www.lawcouncil.asn.au/publicassets/5f7b31da-9b2c-ec11-9442-005056be13b5/4102%20-%20SS%20-%20Territories%20Stolen%20Generations%20Redress%20Scheme%20Bills%20-%20Response%20to%20QoN.pdf>>.

<sup>34</sup> Australian Government, *Closing the Gap: Commonwealth Implementation Plan* (2021) <<https://www.niaa.gov.au/sites/default/files/publications/commonwealth-implementation-plan-130821.pdf>> 18.

<sup>35</sup> *National Agreement on Closing the Gap* (July 2020) <[https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement\\_apr-21.pdf](https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf)>.

<sup>36</sup> See Law Council of Australia, Submission to the National Indigenous Australians Agency, Indigenous Voice Co-Design Process (30 April 2021) <<https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>>.

<sup>37</sup> *Ibid.*

<sup>38</sup> United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [6].

<sup>39</sup> Law Council of Australia, '47<sup>th</sup> Parliament must move swiftly toward referendum on Voice to Parliament' (media release, 26 May 2022) <<https://www.lawcouncil.asn.au/media/media-releases/47th-parliament-must-move-swiftly-toward-referendum-on-voice-to-parliament>>.

*reconciliation relating to past and current injustices, are essential elements for the effective implementation of the Declaration. Likewise, the Declaration itself is an instrument to pursue recognition, reparations and reconciliation.*<sup>40</sup>

28. It is not only the legal or policy outcome, but the processes leading to that outcome, which should comply with the standards contained in the UNDRIP, such as, in accordance with article 19, that states shall consult and cooperate in good faith and obtain the free, prior and informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.
29. It may be that recognition of the importance of the standards set out in the UNDRIP have gained greater traction recently in the domestic law reform context. The Law Council emphasised the importance of reforming cultural heritage legislation consistent with the UNDRIP in its submissions to the parliamentary inquiry into the destruction of the caves at Juukan Gorge,<sup>41</sup> and national consultations relating to such reforms are currently being undertaken.
30. At the same time as this is occurring, however, there are ongoing and urgent concerns as to the adequate protection of cultural heritage rights in multiple contexts.<sup>42</sup> In late 2021, Western Australian Traditional Owners requested the Committee on the Elimination of Racial Discrimination review the draft Aboriginal Cultural Heritage Bill 2020 (WA) on the basis that the draft bill, in providing insufficient protection for cultural heritage rights and self-determinative processes, is a continuation of racial discrimination and therefore incompatible with the *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*.<sup>43</sup> This request evidences, like the treaty body reporting discussed above, that failing to implement the UNDRIP also risks laws and policies being found inconsistent with Australia's broader and binding treaty obligations, such as those arising under the CERD.
31. Members of the Law Council's Indigenous Legal Issues Committee have also noted that the announcement of the decision of the Western Australian Government to establish an 'Aboriginal Empowerment Unit within the Department of Mines, Industry Regulation and Safety'<sup>44</sup> does not reference consultation with First Nations peoples, while consideration of 'a new statutory office to ... advocate for Aboriginal people's

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<sup>40</sup> United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [71].

<sup>41</sup> See, eg, Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of caves at Juukan Gorge* (21 August 2020) <<https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>>.

<sup>42</sup> See, eg, Richard Crabtree, Hamish Cole and Xanthe Gregory, 'Mungo Man, Mungo Lady reburials postponed as elders challenge treatment of ancient remains', *ABC News* (online, 24 May 2022) <<https://www.abc.net.au/news/2022-05-24/mungo-man-reburial-stopped/101093462>>; Nino Bucci, 'Tanya Plibersek urged to protect Indigenous rock art up to 50,000 years old by blocking fertiliser plant', *Guardian* (online, 7 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/07/tanya-plibersek-urged-to-protect-indigenous-rock-art-up-to-50000-year-old-by-blocking-45bn-wa-fertiliser-plant>> .

<sup>43</sup> See Environmental Defenders Office, *UN Scrutiny for WA Cultural Heritage Bill after First Nations Referral* (online, 10 September 2021) <<https://www.edo.org.au/2021/09/10/un-scrutiny-for-wa-cultural-heritage-bill-after-first-nations-referral/>>.

<sup>44</sup> See Government of Western Australia, '\$14.6 million to create Aboriginal Empowerment Unit' (media statement, 5 May 2022) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/14-6-million-dollars-to-create-Aboriginal-Empowerment-Unit.aspx>>.

interests in Government policy and performance',<sup>45</sup> begun in 2018, appears to have stalled following constructive community feedback.

32. There have been several recent reviews of legislative frameworks including in relation to the *Native Title Act 1993* (Cth),<sup>46</sup> the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth),<sup>47</sup> intellectual property,<sup>48</sup> and the implementation of the successor plan to the National Framework for Protecting Australia's Children,<sup>49</sup> where rights declared in the UNDRIP are engaged, and have to different extents been considered, but that the lack of an overarching framework for application of the UNDRIP risks such law reform efforts being ad hoc or short lived. Other emergent legal and policy areas in which the rights and processes set out in the UNDRIP are likely to be influential include the consideration of corporate due diligence requirements in the business and human rights context, as well as in relation to efforts grappling with the implications of climate change.<sup>50</sup>
33. In the opinion of the Law Council, the examples discussed above highlight the mixed, and, at times, fraught, nature of indigenous rights protection in Australia, and suggest Australia would benefit from the development of a formal, overarching approach to application of the UNDRIP.

## Options for Domestic Application

34. The Law Council considers that multiple avenues may exist for more comprehensive application of the UNDRIP in the Australian context. Several of these options are canvassed below, including, where appropriate, by reference to international examples.

### Constitutional enshrinement

35. As the Senate Committee is aware, the Australian Constitution is the pre-eminent law in Australia, in that it overrides all other laws and can only be altered if a proposal put forward in a constitution alteration bill is submitted to a referendum and approved both by a majority of voters nationwide and by a majority of voters in a majority of states.<sup>51</sup>

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<sup>45</sup> See Government of Western Australia, Department of the Premier and Cabinet, *Strengthening accountability and advocacy in Aboriginal affairs* (website, 28 January 2021) <<https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/strengthening-accountability-and-advocacy-aboriginal-affairs>>.

<sup>46</sup> See, eg, Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Legislation Amendment Bill 2019* (5 December 2019) <<https://www.lawcouncil.asn.au/publicassets/2c7e19d4-5137-ea11-9403-005056be13b5/3721%20-%20Native%20Title%20Legislation%20Amendment%20Bill%202019.pdf>>.

<sup>47</sup> See, eg, Law Council of Australia, Submission to the National Indigenous Australians Agency, *Phase 2 of the Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (1 October 2020) <<https://www.lawcouncil.asn.au/publicassets/4fc09979-7e0e-eb11-9435-005056be13b5/3894%20-%20Review%20of%20the%20CATSI%20Act%20Phase%202.pdf>>.

<sup>48</sup> See, eg, Law Council of Australia, Submission to IP Australia, *Enhance and Enable – Indigenous Knowledge Consultation 2021* (3 June 2021) <<https://www.lawcouncil.asn.au/publicassets/7addc363-39c7-eb11-943c-005056be13b5/4012%20-%20Enhance%20and%20Enable%20-%20Indigenous%20Knowledge%20Consultations%202021.pdf>>.

<sup>49</sup> See, eg, Law Council of Australia, Submission to the Department of Social Services, *Implementing the successor plan to the National Framework for Protecting Australia's Children* (26 July 2021) <<https://www.lawcouncil.asn.au/publicassets/28eac612-fef3-eb11-943f-005056be13b5/4050%20-%20National%20Framework%20for%20Protecting%20Australia's%20Children.pdf>>.

<sup>50</sup> See, eg, Law Council of Australia, *Climate Change Policy* (27 November 2021) <<https://www.lawcouncil.asn.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2011%2027%20-%20P%20-%20Climate%20Change%20Policy.pdf>>.

<sup>51</sup> See, eg, Parliament of Australia, *Infosheet 13 – The Constitution* (online) <[https://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_](https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_)

Matters enshrined in the Constitution have great legitimacy and protection due to this legal status and process.

36. It is conceivable that UNDRIP rights and principles could be considered appropriate matters to enshrine in the Constitution. The Law Council has long supported including guarantees of human rights in the Constitution, noting that 'Australia is the only democratic nation to not have a constitutional or statutory bill or charter of rights' (see below).<sup>52</sup> There are international examples of states having embedded or read parts of the UNDRIP directly into their constitutions to ensure protection of such rights as self-determination and self-government, such as Bolivia, Colombia, Peru and Ecuador.<sup>53</sup>
37. In Australia, the Law Council is not aware of a proposal specifically focused on the constitutional enshrinement directly of the rights and principles set out in the UNDRIP. There is, however, strong consensus and momentum across Australia for a First Nations Voice to Parliament to be enshrined in the Constitution, and pursuing this through referendum as a matter of priority has been strongly supported by the Law Council since its inception.<sup>54</sup>
38. The Law Council has previously highlighted that the proposal that a First Nations Voice to Parliament be enshrined in the Constitution can be contextualised as consistent with – indeed, a manifestation of – the right to self-determination,<sup>55</sup> and, in this respect, considered an avenue of applying and enlivening the principles and rights of the UNDRIP.
39. As the Senate Committee is aware, a proposal for a Voice was outlined in the Uluru Statement from the Heart and included as the primary recommendation of the

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[Infosheets/Infosheet 13 - The Constitution#:~:text=The%20Constitution%20of%20Australia%20has,is%2C%20it%20overrides%20oth%20laws.&text=How%20was%20the%20Australian%20Constitution,of%20the%20then%20British%20Empire.>](#).

<sup>52</sup> Law Council of Australia, *Federal Human Rights Charter Policy Position* (November 2020)

<<https://www.lawcouncil.asn.au/files/pdf/policy-statement/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>> 2.

<sup>53</sup> See, eg, Amnesty International, '10 Years Since the UN Declaration on the Rights of Indigenous Peoples', *What's New* (14 September 2017) <<https://www.amnesty.org.au/10-years-since-undrip/>>: 'Australia could learn a lot from some South American states, such as Bolivia, which have embedded parts of the Declaration directly into their Constitution to ensure protection of such rights as self-government and self-determination. Colombia, Peru, and Ecuador have also made similar changes. Similarly, in Africa, the Republic of Congo passed a law in 2011 protecting the Babongo and Baaka peoples, enshrining many of the provisions of the Declaration.' See also Claudia Iseli, 'The Operationalization of the Principle of Free, Prior and Informed Consent: A Duty to Obtain Consent or Simply a Duty to Consult?' (2020) 38:2 *Journal of Environmental Law* 259, 267.

<[https://escholarship.org/content/qt25w7d11q/qt25w7d11q\\_noSplash\\_e92e5d5a1fd3c66ee5fb22801c496d22.pdf?t=qhkvd7](https://escholarship.org/content/qt25w7d11q/qt25w7d11q_noSplash_e92e5d5a1fd3c66ee5fb22801c496d22.pdf?t=qhkvd7)>.

<sup>54</sup> See, eg, Law Council of Australia, '47<sup>th</sup> Parliament must move swiftly toward referendum on Voice to Parliament' (media release, 26 May 2022) <<https://www.lawcouncil.asn.au/media/media-releases/47th-parliament-must-move-swiftly-toward-referendum-on-voice-to-parliament>>.

<sup>55</sup> See, eg, Law Council of Australia, Submission to the National Indigenous Australians Agency, Indigenous Voice Co-Design Process (30 April 2021) <<https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>> 9-10; Law Council of Australia, 'Law Council throws support behind referendum on the creation of new Indigenous representative body' (media release, 24 October 2017) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-throws-support-behind-referendum-on-the-creation-of-new-indigenous-representative-body>>; Law Council of Australia, 'Time to enshrine a First Nations Voice to Parliament' (media release, 10 December 2021) <<https://www.lawcouncil.asn.au/media/news/time-to-enshrine-a-first-nations-voice-to-parliament>>; Law Council of Australia, '47<sup>th</sup> Parliament must move swiftly toward referendum on Voice to Parliament' (media release, 26 May 2022) <<https://www.lawcouncil.asn.au/media/media-releases/47th-parliament-must-move-swiftly-toward-referendum-on-voice-to-parliament>>.

Referendum Council's Final Report to the Prime Minister and Leader of the Opposition on 30 June 2017 (**the Referendum Council Final Report**), which read as follows:

*The Council recommends ... That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. ... In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament.*<sup>56</sup>

40. The Referendum Council's First Nations Regional Dialogues leading to the Uluru Statement from the Heart (**the Referendum Council Dialogues**) occurred with unprecedented representation of Aboriginal and Torres Strait Islander peoples. The dialogue process engaged:

*1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples.*<sup>57</sup>

41. Further under the dialogue process:

*Delegates to each regional dialogue were selected according to the following criteria: 60% from First Nations/traditional owner groups, 20% from community organisations and 20% involving key individuals.*<sup>58</sup>

42. Stakeholders involved in the dialogue process explained the level of importance placed in ensuring representation from the ground up to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples in 2019:

*It was an Indigenous-designed and Indigenous-led model of community deliberation that offered genuine participation and informed participation, and that resulted in strong ownership of the outcome.*<sup>59</sup>

*We tried to ensure that peak organisations that have ongoing access to parliament, parliamentarians and other entities with skin in the game were restricted in dialogues to ensure those who do not normally have a voice in communities could participate fully.*<sup>60</sup>

*[An earlier consultation process in 2009 that led to the establishment of the National Congress of Australia's First Peoples] was dominated by many people involved in peak organisations, universities and bureaucratic*

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<sup>56</sup> Referendum Council, *Final Report of the Referendum Council* (30 June 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)> 2.

<sup>57</sup> *Ibid* 10.

<sup>58</sup> *Ibid*.

<sup>59</sup> Commonwealth of Australia, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024213/toc\\_pdf/Finalreport.pdf.fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024213/toc_pdf/Finalreport.pdf.fileType=application%2Fpdf)> 67, quoting Dr Gabrielle Appleby, Proof Committee Hansard, Canberra, 11 September 2018, 3.

<sup>60</sup> *Ibid* 66, quoting Ms Patricia Anderson AO, Proof Committee Hansard, Canberra, 11 September 2018, 2-3.

*structures. To that end, I think you can distinguish the dialogue process which engaged local communities to identify those people.*<sup>61</sup>

43. The manifest link between a First Nations Voice to Parliament enshrined in the Constitution and the right to self-determination that underpins the entirety of the UNDRIP (see above) is also explicitly articulated in the Guiding Principle – distilled from the Referendum Council Dialogues and recorded in the Referendum Council Final Report – that:

*... an option should only proceed if it: ... Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.*<sup>62</sup>

44. The Law Council continues to urge bipartisan support for a path to a successful referendum on a First Nations Voice to Parliament enshrined in the Constitution as a manifestation of the right to self-determination.<sup>63</sup>

### **Treaty**

45. As noted above, treaty processes are underway across several jurisdictions, though none currently at the federal level, and it is conceivable that First Nations might choose to negotiate for incorporation of UNDRIP rights and principles within the terms of any agreements they make with government during this process, including any legislation setting up process mechanisms, but also within the final terms of the treaty document.<sup>64</sup> This is ultimately a matter for First Nations to freely pursue with government through their chosen representatives and in accordance with their own procedures, priorities and aspirations.

### **Federal human rights act**

46. Another option is for comprehensive human rights protection, which includes UNDRIP rights and principles, to be legislated at the federal level.
47. The Law Council has previously outlined its position that renewed leadership is necessary to foster a culture of human rights for all Australians.<sup>65</sup> It has advocated for a proactive approach to human rights protection, whereby human rights are recognised and protected through a robust legal and policy framework, which might best be pursued through a Federal Human Rights Act.<sup>66</sup>

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<sup>61</sup> Ibid 71, quoting Professor Megan Davis, Proof Committee Hansard, Canberra, 11 September 2018, 6.

<sup>62</sup> Referendum Council, *Final Report of the Referendum Council* (30 June 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)> 22.

<sup>63</sup> See, eg, Law Council of Australia, '47<sup>th</sup> Parliament must move swiftly toward referendum on Voice to Parliament' (media release, 26 May 2022) <<https://www.lawcouncil.asn.au/media/media-releases/47th-parliament-must-move-swiftly-toward-referendum-on-voice-to-parliament>>.

<sup>64</sup> See, eg, Federation of Victorian Traditional Owner Corporations, *UNDRIP and Enshrining Aboriginal Rights: Discussion Paper 3* (2020) <<https://apo.org.au/sites/default/files/resource-files/2021-02/apo-nid311229.pdf>>.

<sup>65</sup> See, eg, Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019)

<<https://www.lawcouncil.asn.au/publicassets/01171551-eb0b-ea11-9400-005056be13b5/3712%20-%20Free%20and%20equal%20An%20Australian%20conversation%20on%20human%20rights.pdf>>; Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (11 February 2022) <<https://www.lawcouncil.asn.au/publicassets/cfca9115-2295-ec11-944b-005056be13b5/4170%20-%20AHRC%20Concept%20Paper%20for%20a%20National%20Anti-Racism%20Framework.pdf>>.

<sup>66</sup> Ibid.



48. In the Law Council's 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.<sup>67</sup> 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) (**RDA**).<sup>68</sup>
49. The Law Council considers the experiences of First Nations peoples to be an area of acute concern exemplifying the gap between the promise and implementation of human rights protections in Australia.<sup>69</sup> It asserts the strength of human rights legislation to assist in closing this 'implementation gap' by comprehensively translating international human rights obligations into national law and practice, and that, for indigenous peoples, the UNDRIP is foundational to such a human rights framework.<sup>70</sup>
50. Further consideration would, however, need to be given to key details in this respect, most significantly the views of First Nations peoples in terms of support for pursuing human rights protections in a consolidated manner rather than a manner specific to the UNDRIP.
51. Particular attention ought to be paid to the unique history, background and purpose of the UNDRIP, including that it was considered a necessary mechanism for recognising and affirming that indigenous peoples are entitled without discrimination to all human rights existing in international law; for elaborating on those rights as they apply to the specific situation of indigenous peoples; for the articulation of collective rights, whereas other international instruments have focused on individual rights; and that indigenous peoples led and were directly involved in its beginnings, development and drafting.<sup>71</sup>
52. Other key issues would include consulting on exact details of how the UNDRIP ought to be incorporated into such legislation (see also below discussion on potential legislative complexities), for example:
- through an overarching provision to uphold and achieve the objectives of the instrument (and, if so, the appropriate wording); and/or
  - through reproducing specific articles of the instrument as specific provisions (and, if so, which specific articles and whether in their original terms or adapted).
53. The Law Council notes the preference of the Law Society of New South Wales for including rights set out in the UNDRIP within consolidated human rights legislation, as opposed to enacting a standalone piece of legislation (discussed below). This preference is provided on the basis of avoiding issues of fragmentation and conflicting interpretations between different pieces of legislation.
54. The Law Council is also aware that the AHRC will, in due course, release its second position paper of *Free and Equal: An Australian Conversation on Human Rights*, focusing on the development of 'a principled, comprehensive and enforceable federal

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> See UNDRIP. See also United Nations Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples* (website) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

Human Rights Act',<sup>72</sup> and looks forward to understanding its views on the extent to which the provisions of such an instrument might draw from the UNDRIP.

55. The present position of the Law Council, as set out in its formal policy released in 2020, is that a Federal Human Rights Act should be primarily based on Australia's obligations under the ICCPR, ICESCR, *Convention on the Rights of the Child (CRC)*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, CERD, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, and the *Convention on the Rights of Persons with Disabilities (CRPD)*, these being the core human rights treaties to which Australia is a party. In relation to the UNDRIP:

*The Law Council would also support the inclusion of the rights in the United Nations Declaration on the Rights of Indigenous Peoples, if Indigenous peoples support such an inclusion. The starting-point for the Act should be the international formulation of those rights, adapted as appropriate to the Australian context.*<sup>73</sup>

56. The Law Council's formal policy emphasises its longstanding position that 'guarantees of human rights should be included in the Commonwealth Constitution, as this would provide more effective protection against legislative infringement of those rights'.<sup>74</sup> However, in the short term the Law Council supports statutory protection of human rights through the enactment of a Federal Human Rights Act, noting this may help pave the way towards eventual constitutional enshrinement.<sup>75</sup> This aligns with the position of the AHRC, which has stated that 'the strongest legal protection would be through a constitutional bill of rights', but that 'another option, supported by the Commission' is a federal statute.<sup>76</sup> In this context, the difficulties and costs faced by any campaign to amend the Constitution are relevant. As noted above, the Law Council urges that a referendum to enshrine a First Nations Voice to Parliament be pursued as a matter of priority.<sup>77</sup>

### **National action plan**

57. A national action plan to prioritise domestic implementation of the UNDRIP is another option that might also be considered. As discussed above, this has been recommended to Australia by multiple United Nations human rights treaty bodies.
58. While a national action plan is a government strategy or policy, not legislation, and therefore does not itself provide Australians with legal rights or remedies, it can have the effect of committing the government to a public agenda, raising the priority status of an issue and promoting understanding and implementation in a whole-of-government manner.

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<sup>72</sup> Australian Human Rights Commission, *Discussion paper: A model for positive human rights reform* (online, 29 August 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform-2019>>.

<sup>73</sup> Law Council of Australia, *Federal Human Rights Charter Policy Position* (November 2020) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>> 2-3.

<sup>74</sup> *Ibid* 2.

<sup>75</sup> *Ibid*.

<sup>76</sup> Australian Human Rights Commission, *Discussion paper: A model for positive human rights reform* (online, 29 August 2019) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform-2019>>.

<sup>77</sup> See, eg, Law Council of Australia, '47<sup>th</sup> Parliament must move swiftly toward referendum on Voice to Parliament' (media release, 26 May 2022) <<https://www.lawcouncil.asn.au/media/media-releases/47th-parliament-must-move-swiftly-toward-referendum-on-voice-to-parliament>>.

59. The Law Council emphasises that, for a national action plan to be effective, particular regard should be had to ensuring a legitimate and appropriate consultation process leading to its development, which process must prioritise consultation and cooperation with First Nations peoples, and to the strength of the commitments and outcomes agreed upon. Ensuring accountability for progress under a national action plan might be enhanced through data collection and analysis, public reporting and a regular timeline for review.
60. At minimum, as an example of tangible commitments and accountability mechanisms, the Law Council suggests that a national action plan in its first iteration might commit the Australian Government to conducting an audit of legislation and policies for consistency with the standards of the UNDRIP; to developing, through consultation, a path for more comprehensive domestic application, canvassing in further detail the issues raised in this submission, particularly with respect to the specific form of legislative enactment and drafting complexities; and to tabling an annual report on the progress made under the national action plan in parliament.
61. Regard might be had to the processes underway in both New Zealand and Canada for relevant learnings.<sup>78</sup> In 2019, the New Zealand Cabinet agreed that the Māori Development Minister would ‘establish a technical working group including non-governmental experts on human and indigenous rights’, to provide recommendations on:

*the form and content of a Declaration plan that focuses the government’s priority activities into actions representing the mutual priorities of government and Māori, that contribute to the progressive realisation of the Declaration;*

*an engagement process with iwi, hapū, whānau that embodies New Zealand’s best practice under Te Tiriti o Waitangi and the Declaration.<sup>79</sup>*

62. Feedback from ‘targeted engagement with iwi, hapū, whānau and Māori organisations’ has since been provided in a report to the New Zealand Cabinet, which is publicly available and includes a commitment by the Minister to further ‘report back to Cabinet in June 2022 with the draft Declaration plan and a proposal for wider public consultation’.<sup>80</sup>
63. Canada has, in contrast, pursued specific legislation (see below), which commits the Government to ensuring the consistency of the laws of Canada with the UNDRIP and to developing an action plan to achieve the objectives of the UNDRIP.<sup>81</sup> That is, it did not consider it necessary for a national action plan to predate a legislative commitment, and, indeed, preferred legislating in the first instance to make the

<sup>78</sup> See, eg, Ministry of Māori Development, ‘UN Declaration on the Rights of Indigenous Peoples’ (website, 19 September 2019) <<https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>>.

<sup>79</sup> Cabinet Māori Crown Relations – Te Arawhiti Committee, *New Zealand’s Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of National Plan*, Minute of Decision MCR-19-MIN-0003, 5 March 2019, available at Ministry of Māori Development, ‘Developing a plan on New Zealand’s progress on the UNDRIP’ (website, 2019) <<https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/develop-plan-on-nz-progress-un>>.

<sup>80</sup> Office of Te Minita Whanaketanga, *Update on the development of the Declaration Plan*, available at Ministry of Māori Development, *United Nations Declaration on the Rights of Indigenous peoples: Update on the development of the Declaration Plan* (website, 2022) <<https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/united-nations-declaration-on-the-rights-of-indige>>.

<sup>81</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 <<https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#docCont>>.

development of a national action plan a binding legal obligation on government, as opposed to a voluntary action of government.

### Standalone legislation

64. Standalone legislation directed at giving domestic legal effect to the rights declared in the UNDRIP is an option that might be pursued in different forms at different stages of the application process.
65. The Law Council notes that the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) (**the UNDRIP Bill 2022 (Cth)**) was introduced as a private member's bill into the Australian Senate in March 2022, prior to the federal election.<sup>82</sup>
66. Under proposed section 8, this bill would require the Prime Minister, in consultation and cooperation with the AHRC, and with the leadership, consultation, cooperation and free, prior and informed consent of Indigenous peoples, to 'prepare and implement an action plan to achieve the objectives of the Declaration'.<sup>83</sup> Further, proposed section 7 would require the Commonwealth Government, in consultation and cooperation with Indigenous peoples, to 'take all measures necessary to ensure that the laws of the Commonwealth are consistent with the Declaration'.<sup>84</sup> Proposed sections 9 and 10 provide that an annual report on the measures taken under proposed sections 7 and 8 must be prepared by the Prime Minister, published and tabled in Parliament, then reviewed by the AHRC and the Productivity Commission, which must each in turn provide and publish a written report back to the Prime Minister, within set timeframes.<sup>85</sup>
67. The key requirements proposed in the UNDRIP Bill 2022 (Cth) are substantially similar to those contained in the Canadian statute that commenced in June 2021 (see above). This Canadian legislation provides:
  - 'The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration';<sup>86</sup> and
  - 'The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration';<sup>87</sup> and
  - 'The Minister must, in consultation and cooperation with Indigenous peoples, prepare a report' on the measures taken in respect of the above, and table in parliament.<sup>88</sup>
68. 'As per the Act, the Government of Canada must fulfil three inter-related legal obligations in consultation and cooperation with Indigenous peoples'.<sup>89</sup> At the same

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<sup>82</sup> United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1341](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1341)>.

<sup>83</sup> Ibid s 8.

<sup>84</sup> Ibid s 7.

<sup>85</sup> Ibid ss 9 and 10.

<sup>86</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 5 <<https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#docCont>>.

<sup>87</sup> Ibid s 6.

<sup>88</sup> Ibid s 7.

<sup>89</sup> Government of Canada, Department of Justice Canada, *Government of Canada advances implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (website, 10 December 2021) <<https://www.canada.ca/en/departement-justice/news/2021/12/government-of-canada-advances-implementation-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-act.html>>.

time, this legislation has been characterised as 'a road map'.<sup>90</sup> Beyond these three legal obligations, it does not itself provide additional legal rights, remedies or duties, nor does it provide legislative guidance as to what might constitute, for example, 'all measures necessary to ensure' consistency between the domestic law and the international instrument. The detail is left to be decided through the required consultation and national action plan development.<sup>91</sup>

69. Another path would be to develop more extensive standalone legislation, which might further specify for example:<sup>92</sup>
- interpretive clauses – eg that legislation should be interpreted, so far as is reasonably possible, in a manner that is consistent with the UNDRIP (with provision for taking into account in interpretation relevant international materials);
  - additional duties – eg explicit duties on public authorities to act compatibly with the UNDRIP, and to give proper consideration to its rights in the development of policy and the making of decisions;
  - a direct and independent right of action where a First Nations person or collective entity alleges that they have been the victim of a violation of the rights guaranteed under the UNDRIP;
  - the availability of an effective remedy where a violation of a right is established; and
  - a timeline for independent statutory review.
70. The Law Council emphasises that this is a preliminary suggestion to illustrate the potential options that may exist and further careful consideration would be required (see also discussion of federal human rights act above and discussion of potential complexities below).

#### Complexities in interpretation of principles

71. The Law Council notes that key principles such as 'self-determination' and 'free, prior and informed consent' are not exhaustively defined in the UNDRIP, and the understanding and implementation of these principles and rights domestically will require further interpretation.
72. In related contexts, the Law Council has considered that the starting point for legislating human rights 'should be the international formulation of those rights, adapted as appropriate to the Australian context'.<sup>93</sup>
73. It has also suggested that, when governments are considering drafting specific legislative provisions that engage UNDRIP rights and principles, guidance as to the content of these rights and principles might be sought from international material – such as the Expert Mechanism report on the content of 'free, prior and informed

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<sup>90</sup> Ibid.

<sup>91</sup> See, eg, Government of Canada, Department of Justice Canada, *Next Steps* (website, 6 March 2022) <<https://www.justice.gc.ca/eng/declaration/engagement/index.html>>; Government of Canada, Department of Justice Canada, *United Nations Declaration on the Rights of Indigenous Peoples Act – Guiding Questions* (website, 6 March 2022) <<https://www.justice.gc.ca/eng/declaration/questions.html>>.

<sup>92</sup> See, eg, Law Council of Australia, *Federal Human Rights Charter Policy Position* (November 2020) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>> for a comparable example of legislating for human rights protections.

<sup>93</sup> See, eg, *ibid* 3: 'the starting-point for the Act should be the international formulation of those rights, adapted as appropriate to the Australian context'.

consent’,<sup>94</sup> which the Law Council raised within the context of ongoing national consultations on cultural heritage law reforms.

74. Relevant to this discussion, the Law Council notes that the UNDRIP Bill 2022 (Cth) refers to an external document, namely, to ‘matters set out in Appendix 4’ of ‘the document published by the Australian Human Rights Commission titled “Social Justice Report 2010”’, in an attempt to provide content to the term ‘free, prior and informed consent’.<sup>95</sup> Appendix 4 of the AHRC’s Social Justice Report 2010 is, in turn, an extract from a 2005 report of the United Nations Permanent Forum on Indigenous Issues.<sup>96</sup> While the Law Council has not consulted with its constituent bodies, committees and sections in relation to the UNDRIP Bill 2022 (Cth), it takes the preliminary view that legislation should ensure reference to international materials is permitted whenever concepts in the UNDRIP are used in the legislation.<sup>97</sup>

#### Complexities related to Constitutional heads of power

75. The Law Council notes that enacting the rights declared in the UNDRIP in federal legislation – whether this is a human rights act or a separate statute – requires a relevant ‘head of power’.
76. Under section 51 of the Constitution, the Commonwealth Parliament has the power to make laws with respect to, among other things, ‘(xxvi) the people of any race for whom it is deemed necessary to make special laws’ (**the races power**) and ‘(xxix) external affairs’ (**the external affairs power**). The Law Council suggests that further consideration may need to be given to confirming that the scope of one or both of these heads of power would support enactment of the rights declared in the UNDRIP.

#### *External affairs power:*

77. It seems that Australian courts have settled the scope of the external affairs power as it extends to implementing standards found in treaties, but not as it extends to implementing standards found in customary international law or in other international instruments. As noted above, the UNDRIP is not a treaty.
78. In *R v Burgess* (1936) 55 CLR 608, Chief Justice Latham included the following statement:

*The plan of giving Australia full control of her external affairs is further carried out by the provisions in sec. 51 (xxix.) that the Commonwealth Parliament can make laws with respect to external affairs. The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose. (See Walker v Baird (1), which settles the principle that, at least as a general rule, a*

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<sup>94</sup> United Nations Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, UN Doc A/HRC/39/62 (10 August 2018) <<https://www.ohchr.org/en/calls-for-input/reports/2018/free-prior-and-informed-consent-report>>.

<sup>95</sup> United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) s 8(3) <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1341](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1341)>.

<sup>96</sup> See Australian Human Rights Commission, *Social Justice Report 2010* <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-0>> 151-152.

<sup>97</sup> See, eg, Law Council of Australia, *Federal Human Rights Charter Policy Position* (November 2020) <<https://www.lawcouncil.asn.au/files/pdf/policy-statement/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>> 3: ‘the starting-point for the Act should be the international formulation of those rights, adapted as appropriate to the Australian context’.

*treaty cannot affect the private rights under municipal law of British subjects, so that often legislation is required to implement a treaty.)*<sup>98</sup>

79. It is clear that Parliament has the ability, under the external affairs power, to implement Australia's treaty obligations into domestic law through legislation. But it may be argued that statements such as this indicate a general line of reasoning, which takes treaties as only one specific example; in other words, that the High Court has not to date explicitly or implicitly confined the scope of the external affairs power to treaties.
80. Indeed, in *R v Burgess*, Justices Evatt and McTiernan expressly held that the external affairs power extends to implementing the recommendations of international organisations:

*It is not to be assumed the legislative power over "external affairs" is limited to the execution of treaties or conventions ... the Parliament may well be deemed competent to legislate for the carrying out of the "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.*<sup>99</sup>

81. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, Justice Mason provided the following commentary on the external affairs power and the authoritative decision in *R v Burgess*:

*It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. ... To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute. Section 51(xxix) arms the Commonwealth Parliament with a necessary power to bring this about. So much was unanimously decided by the Court in *R v Burgess*; *Ex parte Henry*.*<sup>100</sup>

82. Most important to present purposes, however, Justice Mason also stated:

*I should not wish it to be thought from what I have said that the existence of a treaty is an essential prerequisite to the exercise of the power. That is certainly not my view. ... Moreover, as Professor Zines points out in *The High Court and the Constitution* (1981), p. 230, "the reasoning in *Burgess's* case and *Airlines* [No. 2] would support an Australian law giving effect to an obligation arising under rules of customary international law". Further, it seems to me that a matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it.*<sup>101</sup>

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<sup>98</sup> *R v Burgess* (1936) 55 CLR 608, 644. See also *Walker v Baird* (1892) AC 491.

<sup>99</sup> *R v Burgess* (1936) 55 CLR 608, 687.

<sup>100</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224-225.

<sup>101</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 234.

83. Similar views were expressed by Stephen and Murphy JJ.<sup>102</sup> There is considerable authority, therefore, supporting the view that the scope of the external affairs power extends beyond treaty obligations.<sup>103</sup>
84. The issue then is how far the scope might extend – whether to customary international law; whether to topics of international discussion or concern – and, therefore, how much of the UNDRIP might come within the scope.
85. Edson notes that ‘several dicta have endorsed the proposition that s 51(xxix) extends not only to obligations derived from treaties, but also from international custom’, emphasising in particular Justice Deane’s statement in the *Tasmanian Dam Case*.<sup>104</sup>
86. The High Court more recently considered the external affairs power in *XYZ v Commonwealth* (2006) 227 ALR 495.<sup>105</sup> While this case was decided on the basis of the concept of geographical externality, the concept of international concern was also explored as obiter dicta. The Court discussed whether the concept of international concern is too broad to be helpful in determining the limits of the external affairs power, raising doubts about its ultimate acceptance. As Murray explains:

*One common theme expressed by the bench was a sense of trepidation regarding the limitless subject matter that could fit under the expanding ‘international concern’ umbrella. Gleeson CJ indicated that the concept of ‘international concern’ had the potential to push Australia’s legislative capacity beyond Australia’s assumed obligations, but that it was questionable whether the raising of an issue at an international forum could, on its own, cast a subject as being of ‘international concern’. Kirby J reflected that there was a risk that it could encompass a ‘diverse multitude of topics lacking any precise definition or meaning’. ... The dissenting judgment of Callinan and Heydon JJ asserted that there was no established authority for the concept of ‘international concern’ and that the existing insubstantial obiter dicta fell short of establishing concrete boundaries for the phrase. ... Their Honours stated that its ‘volatility’ and ‘elusiveness’ ‘strongly suggest that the international concern doctrine does not exist; for if it did, it would operate antithetically to the rule of law.’ Especially problematic was how the existence of sufficient ‘concern’ within the international community could be established, particularly in the context of the ‘fuzzy’ zone where there is no treaty negotiated on the matter.<sup>106</sup>*

<sup>102</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See also Elise Edson, ‘Section 51(xxix) of the Australian Constitution and “Matters of International Concern”: Is There Anything to be Concerned About?’ (2008) 29 *Adelaide Law Review* 269, 277.

<sup>103</sup> See also *Tasmanian Dam Case* (1983) 158 CLR 1.

<sup>104</sup> Elise Edson, ‘Section 51(xxix) of the Australian Constitution and “Matters of International Concern”: Is There Anything to be Concerned About?’ (2008) 29 *Adelaide Law Review* 269, 298.

<sup>105</sup> This case concerned the extraterritorial operation of Part IIIA of the *Crimes Act 1914* (Cth). The High Court was asked to consider whether the relevant provisions targeting sex offences by Australian citizens or residents against a person under 16 years of age while outside Australia were within the scope of the external affairs power. The majority found in the affirmative. While the case was decided on the basis of the concept of geographical externality, the concept of international concern was also explored as obiter dicta. Amongst its other arguments, the Commonwealth submitted that the prevention of child abuse and exploitation amounted to a matter of international concern and therefore brought the relevant provisions within the scope of the external affairs power.

<sup>106</sup> Sarah Murray, ‘Back to ABC after XYZ: Should we be Concerned about “International Concern”?’ (2007) 35(2) *Federal Law Review* 315 quoting *XYZ v Commonwealth* (2006) 227 ALR 495.



87. Murray suggests that this ‘has strengthened the aura of uncertainty surrounding the concept of “international concern” and its role in widening the application of s[ection] 51(xxix)’.<sup>107</sup>
88. The reach of the external affairs power is not finally settled, and comprises a matter for further consideration. Nonetheless, there are several judicial indications that the external affairs power extends to the implementation of international materials such as the General Assembly resolution that adopted UNDRIP.

*Races power:*

89. It appears to be generally thought that the races power would support domestic implementation of the UNDRIP, although the limits of this power have not been firmly settled either. As the Australian Law Reform Commission has summarised:<sup>108</sup>

*It is not yet clear what, if any, limits there are on the content or subject matter of a law based on the races power. Justice Stephen in Koowarta’s Case implied that there are limits. Chief Justice Gibbs stated in Koowarta that the Parliament could make laws prohibiting discrimination against Aboriginal people based on race, and he has expressed the view extrajudicially that the races power would support a bill of rights for the people of a particular race. The subject matter of the legislation in the Tasmanian Dam Case, Aboriginal sites containing relics and artefacts, was such as to attract the ‘races’ power. The Senate Standing Committee on Constitutional and Legal Affairs in its Report, Two Hundred Years Later ..., which considered the feasibility of a compact or ‘Makarrata’ between the Commonwealth and Aboriginal people, concluded that the power extended to:*

*for example, laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with police, the courts or government departments. All such laws would be special laws for the Aboriginal people.*

90. Pritchard has similarly proposed that the continued existence of the races power (or something akin to it) will be important to validly enact legislation beneficial to First Nations peoples, given the uncertainty surrounding the limits of the external affairs power:

*The risk of the removal of section 51(xxvi), without the conferral of a new head of power, is that beneficial laws might no longer be supported ... there is in my view a considerable risk that the external affairs power, used to support the Racial Discrimination Act 1975 (Cth) so as to give effect to ICERD, would not support the range of laws that can currently be enacted in reliance on section 51(xxvi) to benefit Aboriginal and Torres Strait Islander peoples ... ICERD does not enumerate the particular rights of Indigenous peoples, in contrast to the United Nations Declaration on the Rights of Indigenous peoples. Unlike ICERD, the UNDRIP is a declaration of the General Assembly, not a treaty to which Australia is a party. Hence,*

<sup>107</sup> Ibid, 315. See also Elise Edson, ‘Section 51(xxix) of the Australian Constitution and “Matters of International Concern”: Is There Anything to be Concerned About?’ (2008) 29 *Adelaide Law Review* 269, 277.

<sup>108</sup> Australian Law Reform Commission, ‘Scope and Limits of Constitutional Power’, *Australian Government* (website, 18 August 2010) <<https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/38-federal-state-issues/scope-and-limits-of-constitutional-power/>>.

*there are untested questions about the extent to which the external affairs power can be used as a 'hook' in relation to matters of international concern, as opposed to international obligation.*<sup>109</sup>

91. In *Kartinyeri v Commonwealth*, the wide scope of the races power was confirmed. Applying the established scope of the races power, it seems clear that it would support a law implementing UNDRIP. First, such a law would address 'the people of any race' within the meaning of section 51(xxvi), being Aboriginal and Torres Strait Islander peoples. Second, the determination of whether it is 'deemed necessary' to make a law under the races power is for Parliament to make (except possibly in extreme cases not relevant here).<sup>110</sup> Third, a law implementing UNDRIP would be a 'special law' in that it has a differential operation on the people of a particular race.<sup>111</sup>

### **PJCHR reporting function**

92. The Law Council suggests amending the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the UNDRIP, explicitly, as an instrument for which the PJCHR has reporting functions.
93. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth):
- requires federal bills and legislative instruments to be accompanied by a statement, caused to be prepared by the proposed or rule-maker, assessing the compatibility of the legislation with 'human rights'; and
  - provides the PJCHR with the functions of:
    - examining federal bills and legislative instruments for compatibility with 'human rights'; and
    - inquiring into any matter relating to 'human rights' on reference by the Attorney-General, and reporting to Parliament on such matters.
94. Presently, the term 'human rights' in the Act is defined to include the rights and freedoms recognised or declared by a number of international instruments which enshrine Australia's international human rights obligations, but it does not include the UNDRIP.
95. While the PJCHR often takes into account certain principles of the UNDRIP when it considers matters relating to First Nations peoples, in particular, but not limited to, the right to self-determination guaranteed by common article 1 of the ICCPR and ICESCR,<sup>112</sup> the Law Council considers that its work in this regard would be strengthened if the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) was amended to include the UNDRIP. This would also have the benefit of requiring members of Parliament who propose to introduce bills to Parliament and rule-makers (and officials in their respective agencies) to assess the compatibility of the bill or legislative instrument with the rights recognised by the UNDRIP.

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<sup>109</sup> Dr Sarah Pritchard SC, 'The "Race" Power in Section 51(xxvi) of the Constitution' (2011) 15:2 *Australian Indigenous Law Reporter* 44, 52.

<sup>110</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 365 [39] (Gaudron J), 378 [82] (Gummow and Hayne JJ), 392-3 (Kirby J)

<sup>111</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 365 [39] (Gaudron J), 378 [82] (Gummow and Hayne JJ), 392-3 (Kirby J)

<sup>112</sup> Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014) 48.

96. The Law Council notes that such a proposal was previously made by the AHRC in 2015 as part of its submission in relation to Australia's Second Universal Periodic Review.<sup>113</sup>

### AHRC complaints function

97. The Law Council further suggests that the UNDRIP be included within the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth),<sup>114</sup> noting that the AHRC has the power to hear complaints with respect to an act or practice that is inconsistent with 'human rights'.<sup>115</sup>

98. Section 3 of the *Australian Human Rights Commission Act 1986* (Cth) defines 'human rights' as those rights and freedoms:

- 'recognised in the Covenant' – with the Covenant in turn defined as the ICCPR;<sup>116</sup>
- 'declared by the Declarations' – with the Declarations in turn defined as 'the Declaration on the Rights of the Child', 'the Declaration on the Rights of Mentally Retarded Persons' and 'the Declaration on the Rights of Disabled Persons';<sup>117</sup> or
- 'declared by any relevant international instrument' – with 'relevant international instrument' in turn defined as 'an instrument in respect of which a declaration under section 47 is in force'.<sup>118</sup>

99. Section 47 of the *Australian Human Rights Commission Act 1986* (Cth) allows the Minister to declare 'an international instrument', which includes 'a declaration that has been adopted by Australia',<sup>119</sup> to be 'an international instrument relating to human rights and freedoms for the purposes of this Act'. To date, the UNDRIP has not been declared.<sup>120</sup>

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<sup>113</sup> Australian Human Rights Commission, *Australia's Second Universal Periodic Review – Submission by the Australian Human Rights Commission under the Universal Periodic Review Process* (2015) <[https://humanrights.gov.au/our-work/legal/submission/australias-second-universal-periodic-review?\\_ga=2.4355764.681321640.1654634439-386883608.1654634439](https://humanrights.gov.au/our-work/legal/submission/australias-second-universal-periodic-review?_ga=2.4355764.681321640.1654634439-386883608.1654634439)> 6: 'The UN Declaration on the Rights of Indigenous Peoples has yet to be implemented in law, policy and practice. Recommendation: The Commission recommends that Government develop, in partnership with Aboriginal and Torres Strait Islander peoples, a National Strategy to give effect to the Declaration; include the Declaration in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); and review existing legislation, policies and programmes for conformity with the Declaration.'

<sup>114</sup> Note that the Law Council previously suggested scheduling the UNDRIP to this Act in 2011: Law Council of Australia, Submission to the Attorney-General's Department, *Baseline Study for National Human Rights Action Plan* (2 September 2011) 14.

<sup>115</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20(1).

<sup>116</sup> *Ibid* s 3 (definition of 'Convention').

<sup>117</sup> *Ibid* s 3 (definition of 'Declarations').

<sup>118</sup> *Ibid* s 3 (definition of 'relevant international instrument').

<sup>119</sup> *Ibid* s 47(1)(b). The Minister may declare by legislative instrument following consultation with the appropriate Minister of each State.

<sup>120</sup> See Australian Government, *Federal Register of Legislation*, 'Australian Human Rights Commission Act 1986', 'Series', 'Enables' (online) <<https://www.legislation.gov.au/Series/C2004A03366/Enables>>: *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) <<https://www.legislation.gov.au/Details/F2009L02620>>; *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child 1992* (Cth) <<https://www.legislation.gov.au/Details/F2009B00173>>; *Human Rights and Equal Opportunity Commission Act 1986 – Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1993* (Cth) <<https://www.legislation.gov.au/Details/F2009B00174>>. See also Alan Freckelton, *Administrative Decision-Making in Australian Migration Law* (Australian National University, 2015) 160: 'The "relevant international instruments" at present are the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.'

100. The Law Council supports the inclusion of the UNDRIP in the definition of 'human rights', either through such a declaration, or through amending the legislation, in order that the AHRC has the function to inquire into complaints concerning alleged acts inconsistent with the rights declared in the UNDRIP.<sup>121</sup>
101. The Law Council notes that the UNDRIP may be considered in the broader work of the AHRC, with the *Australian Human Rights Commission Act 1986* (Cth) providing, for example, for the appointment of an Aboriginal and Torres Strait Islander Social Justice Commissioner,<sup>122</sup> who, in the performance of their functions,<sup>123</sup> 'must, as appropriate, have regard to ... such other instruments relating to human rights as the Commissioner considers relevant'.<sup>124</sup>

### Role of education

102. As a final consideration, the Law Council highlights the important and potentially transformative role of education in promoting the application of UNDRIP rights and principles in Australia.
103. Establishing a strong basis of knowledge and understanding of indigenous rights should be a key objective of institutions and industries throughout the country, not least the legal and justice sectors.
104. Throughout its Justice Project, the Law Council heard from stakeholders on the need for culturally responsive, informed legal and justice services, noting that when these services lack cultural competency and cultural safety, the impacts on communities are significant, contributing to an ongoing cycle of mistrust and intergenerational trauma.<sup>125</sup> The Justice Project emphasised that cultural competency and cultural safety cannot be left only to specialist services, but must also be incorporated mainstream, and recommended, among other things, that the Law Council consider 'professional development training and other tailored resources available to assist the legal profession to build cultural competence', as well as working with the tertiary sector to 'promote measures to build a stronger undergraduate understanding of the social, economic and cultural context of the law and its operation' with respect to particular cohorts including First Nations peoples.<sup>126</sup>
105. Cubillo has considered the potential for 'educational reform across the board, extending to tertiary and ongoing professional education'.<sup>127</sup> He notes that the Yoorrook Justice Commission (discussed above) will make recommendations to address systemic injustices, 'including recommendations in relation to education', and that, in 2015, the Truth and Reconciliation Commission of Canada made Calls to

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<sup>121</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20(1). See also, Australian Human Rights Commission, *Human Rights Explained: Fact Sheet 1: Defining Human Rights* (online, undated)

<<https://humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-1-defining-human-rights>>: 'The effect of this limited definition is to limit the scope of the functions of the Australian Human Rights Commission that relate to 'human rights' (see section 11 of the AHRC Act).'

<sup>122</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46B.

<sup>123</sup> *Ibid* s 46C(1). These functions being promoting discussion and awareness of, undertaking research and education on, and examining enactments for the recognition and protection of, the human rights of First Nations peoples.

<sup>124</sup> *Ibid* s 46C(4)(b).

<sup>125</sup> Law Council of Australia, *The Justice Project* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

<sup>126</sup> Law Council of Australia, 'Recommendations and Priorities', *The Justice Project* (August 2018) 5 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/03%20-%202018%2009%20-%20Recommendations%20and%20Group%20Priorities.pdf>>.

<sup>127</sup> Dr Eddie Cubillo, 'Hearing the white noise', *Croakey Health Media* (online, 8 June 2022) <<https://www.croakey.org/hearing-the-white-noise/>>.

Action across multiple aspects of society, including, at the intersection of education and justice, the following references to the UNDRIP:<sup>128</sup>

*27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.*

*28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.*<sup>129</sup>

106. Further, the Council of Australian Law Deans has urged ‘all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs’, noting ‘the law’s systemic discrimination and structural bias against First Nations peoples’.<sup>130</sup>
107. There is scope for further consideration as to opportunities for promoting awareness of the provisions of the UNDRIP amongst current and future members of the Australian legal profession, which, in turn, may foster community understanding and contribute positively to the application of the instrument in Australia.

## Conclusion

108. The Law Council notes that the Terms of Reference for the Inquiry were necessarily broad and at a high level of generality, given that formal consideration of and consultation on the issue of domestic application of the UNDRIP is in the preliminary stages in the Australian Parliament. The Law Council would be pleased to contribute views on any specific proposals or details for domestic application pursued at a future point, including through further consultation with its constituent bodies, committees and sections.

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<sup>128</sup> Ibid.

<sup>129</sup> Truth and Reconciliation Commission of Canada, *Calls to Action* (2015)

<[https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls\\_to\\_Action\\_English2.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf)>.

<sup>130</sup> Council of Australia Law Deans, ‘CALD Statement on Australian Law’s Systemic Discrimination and Structural Bias Against First Nations Peoples’ (3 December 2020) <<https://cald.asn.au/blog/category/first-nations-peoples/>>.