



Law Council
OF AUSTRALIA

Office of the President

31 January 2024

Expert Mechanism on the Rights of Indigenous Peoples
Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
CH1211 Geneva 10
SWITZERLAND

By email: ohchr-expertmechanism@un.org

Dear Sir/Madam

Call for inputs on establishing effective mechanisms at the national and regional levels for implementation of United Nations Declaration on the rights of Indigenous Peoples¹

Acknowledgments

The Law Council of Australia thanks the Expert Mechanism for the opportunity to provide input into the Study concerning States' measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).² The Law Council acknowledges the support of its Indigenous Legal Issues Committee in the preparation of this submission.

About the Law Council

The Law Council is the national peak body of the Australian legal profession, representing approximately 90,000 lawyers through its Constituent Bodies: the 16 Australian State and Territory law societies and bar associations, and Law Firms Australia.³ It works to uphold the rule of law, the administration of justice, and the general improvement of the law and justice system for the benefit of the Australian community.

The Law Council is committed to promoting implementation of the UNDRIP and awareness of its provisions across the Australian legal profession and community, working in partnership with Aboriginal and Torres Strait Islander peoples.⁴

Australian Context

The Law Council considers domestic implementation of the UNDRIP as foundational to addressing the inequality faced by Aboriginal and Torres Strait Islander peoples across Australia, including within the justice system.

¹ United Nations Office of the High Commissioner for Human Rights, *Call for Inputs: Study on "Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration"* ([online](#)).

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

³ Law Council of Australia, *About Us* ([online](#), January 2024).

⁴ Law Council of Australia, *Policy Statement on Indigenous Australians and the Legal Profession* ([online](#), February 10) [16].

Aboriginal and Torres Strait Islander peoples have been subject to dispossession, discrimination, and significant breaches of human rights across multiple areas, historically and in contemporary Australia—not least in the protection of cultural heritage, the treatment of persons in contact with the criminal justice and child protection systems, and compulsory management of social security income.

These practices and impacts continue in the present day, including through the policies of governments and public institutions, extending cycles of intergenerational trauma, disrespect, and injustice, and contributing to broader political, economic, social, and cultural disadvantage and barriers to wellbeing and improved life expectancy.⁵

The need for systemic reform is critical and urgent. There is a need for a national shift in perspective that will require national leadership. The UNDRIP provides a principled framework for respecting, protecting, and fulfilling the individual and collective rights of Aboriginal and Torres Strait Islander peoples, and pursuing their full participation and empowerment across the political, economic, social, and cultural apparatus of the State.

Implementation of the UNDRIP in Australia

Australia announced its support for the UNDRIP on 3 April 2009. However, it is yet to implement its standards domestically in a comprehensive—as opposed to piecemeal—manner.

The Law Council canvassed this lack of implementation in a submission in June 2022, in response to an inquiry launched by the Senate Legal and Constitutional Affairs References Committee and later completed by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (**JSCATSIA**) of the Australian Parliament. The Law Council's complete submission is available to view [here](#).⁶

Several of the measures that the Law Council identified in this submission as examples of Australia's piecemeal progress of the principles, rights, and protections in the UNDRIP have since stalled. This includes:

- The referendum proposal to amend the Australian Constitution to provide for an Aboriginal and Torres Strait Islander Voice to the Parliament and the Executive Government, consistent with the Uluru Statement from the Heart and the recommendations of the Referendum Council, was defeated in October 2023. Progress on federal implementation of other aspects of the Uluru Statement—namely, 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'⁷—is presently unclear.⁸

⁵ See Law Council of Australia, Submission to the Productivity Commission, *Draft Report—Review of the National Agreement on Closing the Gap* (online, 27 October 2023); Law Council of Australia, Submission to the Australian Human Rights Commission, *Youth Justice and Child Wellbeing Reform* (online, 24 July 2023); Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (online, 11 February 2022); Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project (Final Report)*, August 2018).

⁶ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (online, 24 June 2022).

⁷ *Uluru Statement from the Heart* (online, 2017).

⁸ Josh Butler, 'Makarrata commission in limbo after failure of Indigenous voice referendum', *The Guardian* (online, 22 December 2023).

- Progress towards treaties has slowed in several Australian states and territories since the referendum defeat. The Victorian Opposition has withdrawn its support for a state-based treaty, ‘ending years of bipartisan support for the process’, although negotiations between the First Peoples’ Assembly of Victoria and the Victorian Government will still commence this year.⁹ In Queensland, the Opposition will contest the state election in October 2024 on a platform that involves repealing the *Path to Treaty Act 2023* (Qld).¹⁰ The New South Wales Government also announced last year that it was reviewing its state treaty consultation plan and timeline, suggesting that it would not implement ‘major changes’ to state law ahead of the 2027 election in that state.¹¹ Treaty will also be an election issue in the Northern Territory: the Territory Government is seeking to revive the treaty process that it first announced in 2018 but has not significantly progressed, while the Opposition has refused to identify treaty as a priority if elected.¹²
- Consultations on reforms to Australia’s national cultural heritage laws paused in mid-2023 and have not resumed. Following the destruction of caves at the Juukan Gorge in the Pilbara region of Western Australia and subsequent parliamentary inquiry into the operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the Australian Government accepted a recommendation to legislate for new and overarching protection of cultural heritage at the national level, ‘within the framework of the UNDRIP, particularly the principle of self-determination’.¹³ While an options paper for reform was circulated in early 2023, the request for input from stakeholders was later cancelled and the current status of the consultations has not been publicly updated.

Given this piecemeal approach, the Law Council’s 2022 submission canvassed several options for formally implementing the UNDRIP in Australia’s legal and policy framework. As a starting point, the Law Council recommended the development of a national action plan, in consultation with Aboriginal and Torres Strait Islander peoples, which could:

- audit existing legislation and policies for consistency with the UNDRIP;
- consider the content of key UNDRIP principles such as ‘free, prior and informed consent’, based in international materials and applied to the domestic context, such as in the provisions of new cultural heritage legislation and the *Native Title Act 1993* (Cth);¹⁴ and
- consider enshrining the Articles of the UNDRIP within Australian law, either in a Federal Human Rights Act or in standalone legislation.¹⁵

⁹ ABC Radio Melbourne, ‘Victorian Coalition withdraws Aboriginal treaty support, citing cultural heritage concerns’, *ABC News* ([online](#), 22 January 2024).

¹⁰ Eden Gillespie and Ben Smees, ‘Queensland LNP abandons support for treaty with First Nations people’, *The Guardian* ([online](#), 19 October 2023): ‘The major backflip comes after all 34 LNP MPs supported legislation for a path to treaty in May, which includes a truth-telling inquiry’.

¹¹ Luke Costin, ‘Minister wants laws to kick-start NSW treaty this term’, *National Indigenous Times* ([online](#), 26 October 2023); Jarred Cross, ‘Motion for treaty action passes NSW upper house’, *National Indigenous Times* ([online](#), 1 December 2023).

¹² Matt Garrick, ‘Election battle lines drawn in the NT bush, as Labor revives its pledge to deliver a treaty’ ([online](#), 21 January 2024); Matt Garrick and Jack Hislop, ‘NT opposition rejects treaty plans, commits to wide-scale reform of remote councils’, *ABC News* ([online](#), 25 October 2023).

¹³ Australian Government, *Australian Government response to the Joint Standing Committee on Northern Australia’s: A Way Forward: Final Report and Never Again: Interim Report into the destruction of Indigenous heritage sites at Juukan Gorge* ([online](#), November 2022).

¹⁴ 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’. As one example, it urged that the principle of free, prior and informed consent be incorporated into the *Native Title Act 1993* (Cth). See Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, CERD/C/AUS/CO/18-20 ([online](#), 8 December 2017) [22].

¹⁵ See also Law Council of Australia, *Federal Human Rights Charter Policy Position* ([online](#), November 2020).

The Law Council also sought the explicit inclusion of the UNDRIP in Australia's human rights scrutiny framework. It recommended that the definition of 'human rights' in both the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) be amended to expressly include the UNDRIP as a relevant instrument, to ensure that UNDRIP rights and protections come formally within the reporting functions of the Parliamentary Joint Committee on Human Rights and the complaints functions of the Australian Human Rights Commission.

The JSCATSIA released its Report on its inquiry on 28 November 2023.¹⁶ The Committee's comments and recommendations reflect the Law Council's abovementioned positions.

The Committee made six recommendations in total,¹⁷ including 'development of a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples, that outlines the approach to implementing the UNDRIP in Australia'.¹⁸ It recommended that this National Action Plan consider both legislative and policy approaches to implementation and assess compliance with the Articles of the UNDRIP across all jurisdictions and all levels of government, including, but not limited to, Closing the Gap initiatives.¹⁹ It also recommended legislative amendment to enable the UNDRIP to be formally considered in parliamentary scrutiny processes.²⁰

The Report (in both Committee and Additional comments) emphasised that implementation must be 'genuine' and 'meaningful', rather than measures being 'announced and then related back to the UNDRIP after the fact'.²¹ The importance of Australia's continued engagement with the Expert Mechanism as well as other United Nations accountability mechanisms and treaty bodies was highlighted as a means of ensuring best practice implementation of international principles and concepts.²² Consistent with the Articles of the UNDRIP, meaningful implementation requires an approach and process that is led by, or pursued in genuine partnership with, Aboriginal and Torres Strait Islander peoples.²³

Notably, the Chair of the Committee characterised Australia as being at a 'crossroad' on Indigenous issues following the unsuccessful referendum on an Aboriginal and Torres Strait Islander Voice, and, in this context, identified the UNDRIP as offering 'a potential blueprint for a renewed relationship between Aboriginal and Torres Strait Islander peoples and the broader Australian nation'.²⁴

The Law Council has publicly endorsed the JSCATSIA's Report and called on the Australian Government to heed the recommendations of the Committee.²⁵ It commends these recommendations to the Expert Mechanism as examples of measures that might be undertaken in Australia towards formal and effective implementation of the UNDRIP.

¹⁶ Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Report on the Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* ([online](#), November 2023).

¹⁷ *Ibid*, xix-xx.

¹⁸ *Ibid*, xix (Recommendation 2).

¹⁹ *Ibid* (Recommendations 1 and 3).

²⁰ *Ibid*, xx (Recommendation 6).

²¹ *Ibid*, 81-83, 102.

²² *Ibid*, 93.

²³ *Ibid*, 81-83.

²⁴ *Ibid*, x.

²⁵ Law Council of Australia, *Upholding human rights of First Nations people vital to Closing the Gap* ([media release](#), 9 December 2023).

Contact

I trust this information assists your Study and thank you again for the opportunity to be involved. Please contact Ms Leonie Campbell, General Manager of Policy at the Law Council Secretariat on [REDACTED], in the first instance, should you require further information or clarification.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'G. McIntyre', is positioned above the printed name.

Greg McIntyre
President