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CENTRE FOR
HUMAN RIGHTS
LAW

Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples

Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Prepared by

Scott Walker
Researcher, Castan Centre for Human Rights Law

Associate Professor Kate Galloway
Senior Lecturer, Griffith University Law School

Professor Melissa Castan
Director, Castan Centre for Human Rights Law

Dr Katie O'Bryan
Academic Member, Castan Centre for Human Rights Law

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Part 1: Background

1.1 About the Castan Centre for Human Rights Law

The [Castan Centre for Human Rights Law](#) (**Castan Centre**), based in the Faculty of Law at Monash University in Australia, is a research, education and policy centre which aims to create a more just world where human rights are respected, protected, and fulfilled, allowing all people to flourish in freedom and dignity.

The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia, and has a strong commitment to research and advocacy on the rights of First Nations peoples. The Castan Centre was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, [Ron Castan AM QC](#). Associate Professor Kate Galloway of Griffith University Law School has collaborated with the Castan Centre as part of our ongoing research and advocacy on the rights of First Nations peoples.

1.2 Terms of Reference

This submission addresses the terms of reference as follows:

1. By reference to the [Castan Centre's previous submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Application of the UNDRIP dated June 2022](#):
 - a. the international experience of implementing the UNDRIP;
 - b. options to improve adherence to the principles of UNDRIP in Australia.
2. In addition, in this document, how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP.

1.4 A Note on Perspective

We are non-Indigenous lawyers and legal academics whose research interests include the law affecting First Nations peoples. We do not purport to speak for First Nations people. Rather, we speak concerning the capacity of the law to deliver justice for First Nations people and rebalance the systemic barriers First Nations people face across all areas of society.

Part 2: UNDRIP Implementation Internationally

2.1 An overview of the UNDRIP

Since its adoption by the United Nations (UN) General Assembly in 2007, the UNDRIP has cemented itself as ‘the most far-reaching comprehensive instrument concerning indigenous peoples, elaborated and approved as a result of a process of nearly three decades of active engagement of indigenous leaders within the United Nations system’.¹ The UNDRIP reaffirms and illuminates international human rights law as it relates to Indigenous peoples and, although not binding international law, its formal endorsement by a majority of Member States of the UN lends it significant normative weight.² The UNDRIP:

- (a) recognises the human rights of collective groups;
- (b) Seeks to repair past injustice through the recognition of rights intended to balance unequal and exploitative relationships;³ and
- (c) is the product of participation by Indigenous peoples alongside States,⁴ and is thus founded on Indigenous peoples’ self-determination and participation. It is these two ‘values that inhere within the Declaration and which ‘create[s] a framework for Indigenous dialogue’ and advocacy with and within States.⁵

The right of Indigenous peoples to self-determination lies at the core of the UNDRIP, which recognises that ‘[b]y virtue of that right [Indigenous peoples] freely determine their political status and freely pursue their economic, social and cultural development’.⁶ The UNDRIP further recognises that, ‘in exercising their right to self-determination, [Indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions’.⁷ Although pre-UNDRIP international human rights law recognises the right to self-determination,⁸ the UNDRIP builds upon this understanding by extending that right to Indigenous peoples as a unique sub-national group.⁹ As Sámi Indigenous rights expert Mattias Åhrén notes, this ‘development cannot be described as anything less than a paradigm shift in international law’.¹⁰

¹ Expert Mechanism on the Rights of Indigenous Peoples, *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned – 2007-2017*, UN Doc A/HRC/36/56 (7 August 2017) para 3.

² Expert Mechanism on the Rights of Indigenous Peoples (n 1) para 9.

³ Andrew Erueti, *The UN Declaration on the Rights of Indigenous Peoples: A New Interpretive Approach* (Oxford University Press, 2022) 2.

⁴ Ibid 3.

⁵ Harry Hobbs, ‘Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1), *The International Journal of Human Rights* 174, 176.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3 (‘UNDRIP’).

⁷ Ibid art 4.

⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1(1). Both of these Conventions create binding international law obligations for Australia.

⁹ Erueti (n 3) 3.

¹⁰ Mattias Åhrén, *Indigenous Peoples’ Status in the International Legal System* (Oxford University Press, 2016) 119.

Indigenous peoples' participation also underpins the UNDRIP. Perhaps nowhere is this more clearly expressed than in the art 19 recognition of the right to free, prior, and informed consent:

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

Thus, the UNDRIP adopts a standard by which States' dealings with Indigenous peoples may be judged. It is the irreducible anterior condition of equal relations between the State and First Peoples.

2.2 UNDRIP Implementation

2.2.1 Canada

On 21 June 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* came into force in Canada.¹¹ The Act has two purposes:

- (a) to affirm the UNDRIP has a universal international human rights instrument with application in Canadian law; and
- (b) to provide a framework for the Canadian Government's implementation of the UNDRIP.¹²

The Act seeks to achieve these purposes in two ways. First, the Act requires that the Canadian Government, in consultation with Indigenous peoples, 'take all measures necessary to ensure that the laws of Canada are consistent with' the UNDRIP.¹³ Second, the Act requires the preparation and implementation of an action plan to achieve the objectives of the UNDRIP.¹⁴ This action plan must be publicly available and must be completed as soon as practicable, but no later than 21 June 2023.¹⁵ The Canadian Government is currently engaging with Indigenous peoples and has invited First Nations, Inuit and Métis to provide feedback on the development of the application plan until 31 December 2022.¹⁶

The Act requires the action plan to include measures:

- that:
 - address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons; and

¹¹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ('Canadian UNDRIP Act').

¹² *Ibid* s 4.

¹³ *Ibid* s 5.

¹⁴ *Ibid* s 6(1).

¹⁵ *Ibid* s 2(4).

¹⁶ 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act', *Government of Canada* (Web Page) <<https://www.justice.gc.ca/eng/declaration/index.html>>.

- promote mutual respect and understandings as well as good relations, including through human rights education;
- relating to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the UNDRIP; and
- relating to monitoring the implementation of and reviewing and amending the action plan.¹⁷

2.2.2 New Zealand

New Zealand is similarly developing a plan to implement the UNDRIP.¹⁸ The New Zealand Government committed to developing a plan 'that includes time-bound, measurable actions that show how [New Zealand is] making a concerted effort towards achieving the Declaration's aspirations'. Unlike Canada, New Zealand's commitment to developing an implementation plan is Executive-level and not enshrined in law through an Act of Parliament.

In April 2022, the New Zealand Government received feedback from targeted engagement with iwi, hapū, whānau, and Māori organisations on the implementation plan and the Cabinet committed to having a draft UNDRIP implementation plan available for wider public consultation later this year.¹⁹

2.2.3 Lessons for Australia

Australia has not developed an action plan for the implementation of the UNDRIP. This, in part, reflects the complicated relationship that Australia continues to have with the UNDRIP discussed in [our previous submission to the Senate inquiry](#). During Australia's third cycle of the Universal Periodic Review before the UN Human Rights Council in 2021,²⁰ several recommendations were made for Australia to progress with the implementation of the UNDRIP including the development of an action plan in consultation with First Nations peoples.²¹

Recommendations

We recommend that:

1. The Government develop an UNDRIP implementation action plan, such as that developed by Canada and New Zealand, with the consultation and input of First Nations peoples as soon as possible.

¹⁷ Canadian UNDRIP Act (n 11) s 6.

¹⁸ 'UN Declaration on the Rights of Indigenous Peoples', Te Puni Kōkiri Ministry of Māori Development (Web Page, 1 July 2022) <<https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples>>.

¹⁹ 'United Nations Declaration on the Rights of Indigenous Peoples - Update on the Development of the Declaration Action Plan', Te Puni Kōkiri Ministry of Māori Development (Web Page, April 2022) <<https://www.tpk.govt.nz/en/mo-te-puni-kokiri/corporate-documents/cabinet-papers/all-cabinet-papers/united-nations-declaration-on-the-rights-of-indige>>.

²⁰ The Universal Periodic Review is a process conducted by the UN Human Rights Council through which UN member States 'regularly ha[ve] their domestic human rights record reviewed, and recommendations made thereupon': Rosa Freedman, 'The Human Rights Council' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 2nd ed, 2020) 181, 213, quoting, Human Rights Council, GA Res 60/251, UN Doc A/RES/60/251 (3 April 2006, adopted 15 March 2006) para 5(c).

²¹ Human Rights Council, Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/47/8 (24 March 2021) para 146.

2. The Government consult with First Nations peoples on the utility of introducing legislation in the Parliament to set out the requirements of the implementation action plan, as in Canada.

Part 3: The Uluru Statement and the UNDRIP

3.1 The Uluru Statement

Australia does not currently have any treaties with First Nations peoples, nor are First Nations peoples recognised in the *Australian Constitution*. Australia is, however, in the midst of what has been a long and robust dialogue with First Nations peoples on the form and substance of constitutional recognition.²²

First Nations leaders have emphasised that constitutional recognition requires more than symbolic 'acknowledgement', and instead requires substantive structural reform.²³ Constitutional recognition is not to be understood as merely the identification or acknowledgment of First Nations peoples as this land's first peoples; it must be a formal acknowledgement of the existence, validity and political reality that this land is made up of many nations and peoples. It must encompass a formal meeting between First Nations peoples and the Australian State as equals.

To this end, following dialogue between First Nations peoples, in 2017 a delegation presented the Australian people with the Uluru Statement.²⁴ This powerful document saw First Nations peoples 'invite' non-Indigenous Australians 'to walk with [them] in a movement of the Australian people for a better future'. The Castan Centre strongly endorses the Uluru Statement and a constitutionally-entrenched First Nations Voice to Parliament as manifestations of Indigenous self-determination.

The central claims arising from the Uluru Statement are that of Voice, Treaty, Truth. The Uluru Statement prioritises establishing a constitutionally enshrined Voice to Parliament as a necessary first step towards structural reform and a rebalancing of the relationship between First Nations people and the Australian State to an equal footing.²⁵ The Voice is intended to 'redistribute public power via the Constitution' and create an 'institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander peoples in policy and decision-

²² For a summary of key historical developments in this area in see Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021); Harry Hobbs, 'Self-Determination and Treaty-Making in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters Lawbook Co, 2021) vol 1, 353.

²³ See, eg, Megan Davis, 'Constitutional recognition for Indigenous Australians must involve structural change, not mere symbolism', *The Conversation* (18 February 2020) <<https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>>.

²⁴ For an explanation of the dialogues see, Referendum Council (Final Report, 30 June 2017) ch 2.

²⁵ On the importance of constitutional enshrinement see, Megan Davis, 'Constitutional Recognition: Two Decades On', *Indigenous Constitutional Law* (Blog Post, 1 March 2021) <<https://www.indigconlaw.org/home/constitutional-recognition-two-decades-on>>.

making'.²⁶ The Voice would not have the same powers of a House of Parliament, such as the ability to initiate, pass or reject bills.²⁷

The present Government strongly supports the Uluru Statement, its sequencing of Voice, Treaty, Truth, and has committed to holding a referendum in its first term in office.²⁸ In July 2022, the Prime Minister announced the recommended wording of amendment to the Constitution and the question to be put to the Australian people at a referendum. The question to be put to the Australian people ('Do you support an alteration to the *Constitution* that establishes an Aboriginal and Torres Strait Islander Voice') was designed as a 'straightforward proposition', reflecting a 'simple principle'.²⁹

3.2 How the Uluru Statement coheres with the UNDRIP

While the Uluru Statement does not make explicit links to the UNDRIP, its text can be seen as imbued with the principles and rights recognised in the UNDRIP in a number of ways.

First, the Uluru Statement is predicated on the special and historic claim held by First Nations peoples as 'the first sovereign Nations of the Australian continent and its adjacent lands' under traditional laws and customs 'according the reckoning of [First Nations] culture, from the Creation, according to the common law from "time immemorial", and according to science more than 60,000 years ago'.³⁰ Similarly, the UNDRIP is, in part, based upon concern of the historic injustices suffered by Indigenous peoples, including from colonisation and dispossession from lands and resources.³¹

Second, the Uluru Statement speaks to the potential of the 'ancient sovereignty' of First Nations peoples to 'shine through as a fuller expression of Australia's nationhood' through 'substantive constitutional change and structural reform'. The UNDRIP recognises the self-determination of Indigenous peoples as a sub-national group which can co-exist with the more traditional international law understanding of the sovereignty of the State. This is articulated in art 5 of the UNDRIP, which recognises that Indigenous peoples 'have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'.

26 Davis and Williams (n 22) 151-2. See also Anne Twomey, 'Why an Indigenous Voice would not be 'third chamber' of Parliament', The Sydney Morning Herald (online, 28 May 2019) <<https://www.smh.com.au/national/why-an-indigenous-voice-would-not-be-third-chamber-of-parliament-20190526-p51r7t.html>>.

27 Twomey (n 26).

28 Lorena Allam, 'Voice, Treaty, Truth: What Does Labor's Commitment to Uluru Statement from the Heart Mean?', The Guardian Australia (online, 22 May 2022) <<https://www.theguardian.com/australia-news/2022/may/22/voice-treaty-truth-what-does-labors-commitment-to-uluru-statement-from-the-heart-mean>>.

29 Anthony Albanese, 'Address to Garma Festival' (Speech, Garma Festival, 30 July 2022) <<https://www.pm.gov.au/media/address-garma-festival>>.

30 Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).

31 UNDRIP (n 6) preamble para 6.

Third, the very substantive constitutional change and structural form sought in the Uluru Statement—Voice, Treaty, Truth—can be seen as grounded in the UNDRIP. Voice and Treaty can be seen as an aspect of the self-determination of First Nations peoples, and a mechanism through which First Nations peoples can exercise their right to autonomy or self-government in matters relating to Indigenous affairs.³² Voice and Treaty can also be seen as mechanisms for the realisation of the art 18 right of Indigenous peoples ‘to participate in decision-making in matters which would affect their rights’ through representatives they have chosen for their own Indigenous decision-making institutions. This, in turn, enables the State to meaningfully consult in good faith with First Nations peoples ‘to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them’.³³ Truth can also be seen through this lens, but it also goes beyond the UNDRIP and has its grounding in the right to truth and remedy for gross or systemic human rights violations well-recognised in international human rights law.³⁴

Finally, the process leading to the Uluru Statement can be seen as being influenced by the right to self-determination and participation recognised in the UNDRIP. As Wamba Wamba First Nations academic Eddie Synot notes, the ‘explicit example of self-determination’ embodied in the dialogues leading to the Uluru Statement is itself an expression of self-determination as recognised by the UNDRIP.³⁵

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

Recommendations

We recommend that:

3. The UNDRIP be incorporated into Australian law through legislation (such as part of a Commonwealth Human Rights Act or by requiring that Commonwealth law be interpreted consistently with the UNDRIP) and that comprehensive legislative reform be undertaken to ensure that existing Commonwealth legislation is consistent with the UNDRIP. This reform must be undertaken in consultation with, and with the free, prior and informed consent of First Nations peoples. This process of comprehensive reform to ensure adherence to the UNDRIP can take place through the Voice and the constitutional and structural reform called for in the Uluru Statement.

³² UNDRIP (n 6) arts 3 and 4.

³³ Ibid art 19.

³⁴ See further, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005).

³⁵ Eddie Synot, ‘The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart’ (2019) 73(4) *Australian Journal of International Affairs* 320, 323-4.

4. The Commonwealth Government ought not wait for a referendum on the Voice to ensure adherence to the UNDRIP in law, policy, and practice. Immediate work can be started to develop an UNDRIP implementation action plan in consultation with First Nations peoples.

3.3 Case Study: Victoria

Victoria's journey to truth and justice provides an example of meaningful, structural reform led by First Peoples, consistent with the principles enshrined in the UNDRIP. Broadly, the Victorian framework to truth and justice has the following institutional aspects:

- A representative body, the First Peoples' Assembly of Victoria;³⁶
- A truth-telling and justice commission, the Yoorook Justice Commission;³⁷ and
- A pathway to treaty, led by an independent Treaty Authority informed by First Peoples' 'lore, law and cultural authority'.³⁸

The Victorian Treaty Authority, the first of its kind in Australia, is an example of institutional reform in the interest of truth and justice and delivering upon the special and historic claims of First Peoples and thus reflecting UNDRIP principles. The Victorian Treaty Authority is created through agreement between the First Peoples' Assembly and the Victorian Government and recognised and given legal authority by an Act of Parliament.³⁹ The Treaty Authority is an institution independent of Parliament and the Government which seeks to establish an equal footing for treaty negotiations and mediate the significant power imbalance between the Government and First Peoples. The Treaty Authority, by respecting First Peoples' culture by focussing on dialogue to achieve agreement, is a significant development in Australia and the legal institutions and processes at our disposal to deliver treaty and embeds Indigenous practices at the heart of the Authority. Importantly, the Treaty Authority's independence is guaranteed through guaranteed funding which it controls and manages, ensuring that it can perform its functions long-term.⁴⁰

Although the Victorian framework to truth and justice is not the same as, nor coextensive with, the Uluru Statement, The Victorian framework to truth and justice can be seen as a manifestation of the rights recognised in the UNDRIP and a process through which the historic and special claims to sovereignty and nationhood of First Peoples can be achieved in the Australian context.

³⁶ 'The Assembly', *First Peoples' Assembly of Victoria* (Web Page) <<https://www.firstpeoplesvic.org/the-assembly/>>.

³⁷ 'Overview', Yoorook Justice Commission (Web Page) <<https://yoorrookjusticecommission.org.au/overview/>>; Governor of Victoria, Letters Patent for the Establishment of the Yoorook Justice Commission (12 May 2021).

³⁸ Gabrielle Williams, 'Historic Bill Brings Treaty a Step Closer' (Media Release, Minister for Aboriginal Affairs, Government of Victoria, 7 June 2022) <<https://www.premier.vic.gov.au/sites/default/files/2022-06/220607%20-%20Historic%20Bill%20Brings%20Treaty%20A%20Step%20Closer.pdf>>, quoting 'First Peoples' Assembly Co-Chair Marcus Stewart.

³⁹ *Treaty Authority and Other Treaty Elements Act 2022* (Vic) preamble, ss 6 and 7.

⁴⁰ *Ibid* div 3.

Part 4: Conclusion and Summary of Recommendations

Australia is falling behind in its implementation of the UNDRIP, with comparable jurisdictions much further advanced on plans to implement the UNDRIP in law, policy, and practice. Delivering on Voice, Treaty, and Truth as called for in the Uluru Statement will go some way to delivering on the rights and the principles recognised in the UNDRIP, including self-determination and participation. Yet, the Government can proceed with immediate work to implement the UNDRIP in law, policy, and practice in consultation with First Nations peoples without waiting for a referendum on the Voice.

In summary, we recommend:

1. The Government develop an UNDRIP implementation action plan, such as those developed by Canada and New Zealand, with the consultation and input of First Nations peoples as soon as possible.
2. The Government consult with First Nations peoples on the utility of introducing legislation in the Parliament to set out the requirements of the implementation action plan, as in Canada.
3. The UNDRIP be incorporated into Australian law through legislation (such as part of a Commonwealth Human Rights Act or by requiring that Commonwealth law be interpreted consistently with the UNDRIP) and that comprehensive legislative reform be undertaken to ensure that existing Commonwealth legislation is consistent with the UNDRIP. This reform must be undertaken in consultation with, and with the free, prior and informed consent of First Nations peoples. This process of comprehensive reform to ensure adherence to the UNDRIP can take place through the Voice and the constitutional structural reform called for in the Uluru Statement.
4. The Commonwealth Government ought not wait for a referendum on the Voice to ensure adherence to the UNDRIP in law, policy, and practice. Immediate work can be started to develop an UNDRIP implementation action plan in consultation with First Nations peoples.