

Samuel Thompson, Inquiry Secretary

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Department of the House of Representatives

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21 October 2022

**KALACC Supplementary Submission to the Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples:**

**‘States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession.’**

Dear Samuel

Thank you for your email of 19<sup>th</sup> October 2022:

As discussed, the secretariat is granting KALACC an extension to the submission deadline until the end of 21 October 2022 in order to allow you to provide a supplementary submission.

Please find attached KALACC’s Supplementary Submission to this inquiry.

The entirety of this submission can be regarded as being in the public realm and the Kimberley Aboriginal Law and Culture Centre hereby and herein provide approval for the publication online of this submission.

Kind regards

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**KALACC**

## **Inquiry Terms of Reference**

The application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, with particular reference to:

- the international experience of implementing the UNDRIP
- options to improve adherence to the principles of UNDRIP in Australia
- how implementation of the Uluru Statement from the Heart can support the application of the UNDRIP
- any other related matters.

### **KALACC Submission Vis a Vis UNDRIP Articles**

In the earlier KALACC main submission to this Inquiry we referred to the following UNDRIP Articles:

Article 5

Article 8

Article 9

Article 11

Article 12

In this present Supplementary Submission we refer specifically to Article 11, paragraph 2, as follows:

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.; and

Article 12, paragraph 2, being as follows:

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Further to that, we also refer to the October 2022 *Interim report of the Special Rapporteur on freedom of religion or belief - Indigenous peoples and the right to freedom of religion or belief*, which includes the following reference to UNDRIP:

Article 11 UNDRIP emphasizes that indigenous peoples must enjoy effective redress and restitution for spiritual property taken without FPIC.

## Precis/ Foreword

UNDRIP Article 12, paragraph 2, states as follows:

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

In this present submission from KALACC we hold and contend that Australia currently fails to meet its obligations under the UNDRIP in regards to the repatriation of ceremonial objects and human remains.

Across the following pages KALACC acknowledges and we show that we are aware of a range of activities and programs that are in place within Australia in regards to repatriations and in regards to the broader suite of cultural heritage activities and programs. But the test that KALACC applies to this matter is this:

In regards to repatriations within Australia, do the current suite of repatriation programs and activities within Australia embody and implement the principles that the Government itself espouses within the *Closing the Gap Partnership Agreement* and the *Closing the Gap Implementation Plans*?

In referencing those principles, KALACC highlights in particular *Closing the Gap Priority Reform Two: Building the community-controlled sector*. It is self – evidently true that at the present time the Australian Government is not working to build a community-controlled sector for first nations peoples to have ownership of and control over an appropriate suite of repatriation activities.

Having highlighted this issue, KALACC then maps out a suitable pathway forward to resolving the issue. We make extensive reference to *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation*. Within *Dhawura Ngilan* we can read the following recommendations:

- 3.4. The Australian Government should amend its policy on Indigenous Repatriation of cultural materials to align with current activity
- 3.5. Jurisdictions work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way
- 3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised

KALACC contends that if the Australian Government, supported by State jurisdictions, committed to implementing these three recommendations from *Dhawura Ngilan* then Australia would make considerable progress towards meeting its obligations under Articles 11 and 12 of the UNDRIP in regards to the repatriation of ceremonial items and ancestral remains.

## **KALACC Submission:**

### **‘States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession.’**

#### **UNDRIP Articles**

In this present Supplementary Submission KALACC refer specifically to UNDRIP Article 11, paragraph 2, as follows:

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.; and

UNDRIP Article 12, paragraph 2, being as follows:

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

The October 2022 *Interim report of the Special Rapporteur on freedom of religion or belief - Indigenous peoples and the right to freedom of religion or belief* states as follows in paragraph #39:

Many indigenous peoples regard these objects, and human remains as physical representations or homes of spirit, respectively, treating them as sentient beings. Removing these items from indigenous communities, land, and spiritual leaders may break their relationship with attached spirits or risk "spiritually-caused illnesses" that persist through future generations.

The Report from the Special Rapporteur then recommends that States act in the following manner:

- (iii) Deliver effective and appropriate remedies for indigenous survivors of rights violations, developed in consultation with them, consistent with international principles and guidelines, such as reparations, restitution, and supporting recommendations of truth and reconciliation commissions.

KALACC contends in this present submission that the Australian State is currently not meeting its obligations under Articles 11 and 12 to enable and facilitate the access and/or repatriation of ceremonial objects and human remains in their possession. The key words underpinning this contention from KALACC are the words ‘enable’ and ‘facilitate.’ How are we to understand these words? We are to understand these words in the way that the Australian Government has described its current macro Indigenous agenda:

There is a strong and sustainable Aboriginal and Torres Strait Islander community-controlled sector delivering high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country. <https://www.closingthegap.gov.au/national-agreement/priority-reforms>

It is KALACC’s contention that when it comes to the domain of repatriating cultural heritage, the Australian Government has thus far failed to implement its stated outcomes and targets. This view is expanded upon within this document. It is KALACC’s contention that this manifest and incontestable shortcoming represents a failure of the Australian nation to comply with UNDRIP Articles 11 and 12.

## **Closing the Gap Implementation Plan – as it Relates to Cultural Heritage and Repatriations**

### **1. Closing the Gap Implementation Plan**

The Australian Government's **Closing the Gap Implementation Plan** is dated 05 August 2021

<https://www.niaa.gov.au/resource-centre/indigenous-affairs/closing-gap-implementation-plan>. There are four priority action areas within the plan:

- Priority Reform One: Partnership and shared decision-making
- Priority Reform Two: Building the community-controlled sector
- Priority Reform Three: Transforming government organisations
- Priority Reform Four: Sharing access to data and information at a regional level

In regards to Priority Reform Two: Building the community-controlled sector we note as follows, from page 13 of the *Implementation Plan*:

**Outcome:** There is a strong and sustainable Aboriginal and Torres Strait Islander community-controlled sector delivering high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country.

**Target:** Increase the amount of government funding for Aboriginal and Torres Strait Islander programs and services going through Aboriginal and Torres Strait Islander community-controlled organisations.

The reality for now is that in the Kimberley region alone there are well in excess of 300 people employed by Aboriginal Community Controlled Health Organisations. In contrast, there is not one single person in the Kimberley employed to undertake the work of Indigenous heritage and repatriations.

It is manifestly self – evident that at the present time there are currently no government investments in to developing a strong and sustainable Aboriginal and Torres Strait Islander community-controlled cultural heritage and repatriations sector.

### **2. Closing the Gap Implementation Plan [WA Jurisdiction]**

Accompanying the national **Closing the Gap Implementation Plan** each State has its own Jurisdictional Plan. The **WA Jurisdiction Closing the Gap Implementation Plan** runs to some 203 pages

<https://www.wa.gov.au/government/publications/closing-the-gap-was-implementation-plan>. The word 'repatriation' appears not once across those 203 pages. Indigenous repatriation is still, sadly, considered by Government to be a fringe issue. The more amorphous, nebulous, motherhood term of 'heritage' appears some 45 times, including in the following context:

Supporting and promoting culture

This element of the draft Strategy requires government agencies to:

1. Value, recognise and celebrate Aboriginal peoples' cultures, languages, relationships to country, knowledge, and heritage
2. Invest in initiatives that support Aboriginal cultural identity, cultural continuity and community leadership

3. Use agreements with Traditional Owner groups to recognise and support Aboriginal peoples' connection to culture, country and heritage

The history of colonisation and subsequent government policies in Western Australia produced significant, and in many cases deliberate, barriers to the continuity of Aboriginal cultures. Central aspects of Aboriginal cultures were, at different times, either disrupted, controlled, devalued or prohibited.

This has had profound and lasting negative impacts, evident across a range of social, health, educational and economic outcomes. Recent reports on suicide by young Aboriginal people have identified cultural continuity and identity as critical protective factors that contribute to resilience and wellbeing.

Because of this history and its ongoing effects, the government has an important role to play in supporting Aboriginal people's cultural identities, cultural continuity, community leadership and cultural authority.

The **Western Australia State Budget 2023** predicts a budget surplus of \$5.7Billion

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/Another-strong-surplus-to-benefit-Western-Australian-households.aspx> This exceptionally strong State balance sheet is underpinned by royalties paid by Iron Ore and Gas producers operating within WA. In 2021 the WA Government introduced the controversial new **Aboriginal Cultural Heritage Act 2021**.

<https://www.wa.gov.au/government/document-collections/aboriginal-cultural-heritage-act-2021>

In response to this legislation the Kimberley Land Council on 15th December 2021 released a Media Statement with the title "The eyes of the world are on you". That KLC Media Statement includes these following words:

KLC CEO Tyronne Garstone said the legislation reform was historic, but not for the right reasons. "The McGowan Government's reform of the heritage legislation, which they referred to as the most progressive in the country, will be remembered as a disastrous moment for Aboriginal heritage protection. This is not progress. Calling it progressive is a reflection of how bad the previous legislation was." "The McGowan Government has wasted an opportunity to create legislation that strikes a balance between development and heritage protection. This Bill continues to expose Aboriginal heritage to destruction and disempowers Traditional Owners to speak for their country." "In a state where the economy is driven by the mining and resource sector, once again, the needs of industry trump everyone else."

<https://www.klc.org.au/media-releases>

What we note from the above is that the term 'heritage' is an amorphous and nebulous term that carries with it contradictory meanings depending on who is uttering the words. What is clear is that the WA Government has a **WA Jurisdiction Closing the Gap Implementation**, running to some 203 pages, and the word 'repatriation' appears not once across those 203 pages.

On this basis one can safely hold that the Commonwealth Government manifestly has no strategy for building community capacity building around repatriations and the State Government doesn't even mention the word 'repatriations' in its key Indigenous planning and policy documents.

### **3. *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation***

In September 2020 the Department of Agriculture, Water and the Environment published ***Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation***-

<https://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage> This document is not a repatriation policy per se, but it does include a number of relevant and related recommendations to Government, including the following:

- 1.3. Prioritise the recording and digitisation of place-based traditional knowledge, including Songlines and place names, which underpins Aboriginal and Torres Strait Islander heritage
- 2.2. Australia embraces truth - telling about our heritage and our heritage lists reflect this truth
- 3.3. Heritage Councils support the establishment of a National Resting Place for unprovenanced Remains of Ancestors
- 3.4. The Australian Government should amend its policy on Indigenous Repatriation of cultural materials to align with current activity
- 3.5. Jurisdictions work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way
- 3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised
- 4.1. Heritage Chairs support increased focus on identifying and taking forward Aboriginal and Torres Strait Islander heritage places for inscription on the World Heritage List
- 4.3. Australian heritage should be a global leader in the preservation, protection, celebration and promotion of Aboriginal and Torres Strait Islander heritage and the development of international partnerships to tell the rich global heritage narrative

***Dhawura Ngilan*** was published in September 2020. If there has been material progress towards the implementation of the recommendations contained in that report, then KALACC currently has no visibility around any such progress. On Saturday, 21 May 2022 a new Commonwealth Government was elected. As of October 2022 KALACC is currently unaware of the detail of the new Government's policies and priorities around Indigenous heritage and repatriation issues. But what we can say, from 37 years of community-based work in this field, is that building the capacity of the communities themselves, and of the Aboriginal Community Controlled Organisations that operate in this space, have historically been the very lowest priority of successive Governments. Repatriation issues are so completely peripheral that there are no references at all to them in the key Indigenous policy and program documents from both the Commonwealth and the WA State Governments.

As of May 2022 Australia has a new Commonwealth Government, the first Labor Government in a decade. ***Dhawura Ngilan*** provides the vision for Indigenous heritage and repatriations. In the decades – long macro policy cycle terms the *Closing the Gap Framework* and *Implementation Plan* are just moving beyond their infancy and are progressing in to their formative stages. The hope remains that moving forward we will see material and significant changes that will empower Aboriginal people, and the Aboriginal owned and controlled organisations which serve them, to take ownership of their spiritual, religious and ceremonial practices, including the restorative practices of repatriating ancestors and repatriating ceremonial items.

KALACC understands that there is associated activity that takes place in regards to moveable cultural heritage and in regards to repatriations in Australia. KALACC has some level of understanding around the following areas of activity:

- South Australian State Government has committed to undertaking repatriation activities of considerable and significant size and scale
- AIATSIS runs a program called the Return of Material Cultural Heritage program  
<https://aiatsis.gov.au/about/what-we-do/return-cultural-heritage>
- There is a long – established Repatriations Research network  
<https://chms.cass.anu.edu.au/research/projects/restoring-dignity-networked-knowledge-repatriation-communities>
- Through incidental and largely one- off processes and activities, repatriation activities do take place with the involvement of local Indigenous groups, and these activities increasingly include the involvement of local Indigenous Ranger groups
- In regards to Commonwealth Heritage legislation, national standards & legislative reform is taking place with the involvement of the National Native Title Council <https://nntc.com.au/our-agenda/cultural-heritage/>
- The Commonwealth Arts Office has long run a small repatriations program which continues to operate to this day <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation>

KALACC acknowledges all of the above. But with all due respect to the above activities and programs, there is not within Australia today a coherent, cohesive and coordinated approach to Indigenous repatriation matters. ***Dhawura Ngilan*** provides clear guidance as to the pathway forward for the creation of a coordinated approach to repatriations, including through the following recommendations:

- 3.4. The Australian Government should amend its policy on Indigenous Repatriation of cultural materials to align with current activity
- 3.5. Jurisdictions work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way
- 3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised

KALACC contends that if the Australian Government, supported by State jurisdictions, committed to implementing these three recommendations from ***Dhawura Ngilan*** then Australia would make considerable progress towards meeting its obligations under Articles 11 and 12 of the UNDRIP in regards to the repatriation of ceremonial items and ancestral remains.



#### 4. The Australian Repatriation Policy and Programs Do Not Reflect the Australian Government's Current Macro Indigenous Policy Priorities

*The Australian Government Policy on Indigenous Repatriation*, December 2019, can be found here - <https://www.arts.gov.au/documents/australian-government-policy-indigenous-repatriation> On page eight of this policy one can read as follows:

To continue empowering Aboriginal and Torres Strait Islander peoples and to increase their role and capacity in managing the return and care of their ancestral remains (and within Australia secret sacred objects), the Australian Government is working in partnership with communities to provide funding and develop pathways in the following areas of repatriation:

- the employment of Aboriginal or Torres Strait Islander Liaison Officers in major Australian museums
- establishing career pathways through workplace experience, placements and cadetships for Aboriginal and Torres Strait Islander peoples interested in a career in repatriation-related work
- direct funding to Aboriginal or Torres Strait Islander organisations to undertake research or provide administrative or management support to local communities, and
- outreach and exchange between communities and collecting institutions to share information and promote mutual understanding.

Across the preceding pages we have referenced the current macro policy settings relating to Indigenous policy in Australia. The Australian Government's *Closing the Gap Implementation Plan* is dated 05 August 2021 ie it was published some eighteen months after the *Australian Government Policy on Indigenous Repatriation*. There is an urgent need for the Repatriation Policy and Programs to be revisited so that they accord with and align with the Government's own macro policy settings in regards to Indigenous Affairs. This urgent need is reflected in the following recommendations from *Dhawura Ngilan*:

- 3.4. The Australian Government should amend its policy on Indigenous Repatriation of cultural materials to align with current activity
- 3.5. Jurisdictions work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way
- 3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised

In Australia there are some 144 Aboriginal Community Controlled Health Organisations. In the Kimberley region alone there is well in excess of 300 people employed by Aboriginal Community Controlled Health Organisations. In contrast, there is not one single person in the Kimberley who is specifically employed to undertake the work of Indigenous heritage and repatriations.

KALACC contends that if the Australian Government, supported by State jurisdictions, committed to implementing these three recommendations from *Dhawura Ngilan* then Australia would make considerable progress towards meeting its obligations under Articles 11 and 12 of the UNDRIP in regards to the repatriation of cultural items and of ancestral remains.

## **Appendix One:**

### **United Nations Declaration on the Rights of Indigenous Peoples**

#### **Selected Excerpts – Articles Relating to The Right to Practice and Maintain Culture**

##### **Article 5**

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.

##### **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

##### **Article 9**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

##### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

##### **Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

## **Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

## **Appendix Two:**

### **Interim report of the Special Rapporteur on freedom of religion or belief:**

### **Indigenous peoples and the right to freedom of religion or belief**

## **Selected Excerpts – Articles Relating to The Right to Repatriate Cultural and Spiritual Property**

39. According to the Expert Mechanism on Rights of Indigenous Peoples ("EMRIP"), improper acquisition, retention, and use of ceremonial objects may violate indigenous peoples' right to freedom of religion or belief. Many indigenous peoples regard these objects, and human remains as physical representations or homes of spirit, respectively, treating them as sentient beings. Removing these items from indigenous communities, land, and spiritual leaders may break their relationship with attached spirits or risk "spiritually-caused illnesses" that persist through future generations. Plundered by colonizers, displayed as curiosities, and even utilized to justify pseudo-scientific racist theories about indigenous peoples, it is reported that over one million indigenous ancestral remains and cultural items still reside in repositories worldwide. Interlocutors emphasize that public display of such objects may inflict spiritual and physical harm, damaging its spiritual essence and relationship with indigenous peoples, particularly where there are inappropriate preservation methods, untrained staff, and breaches of cultural secrecy.

40. Yet States, museums, other cultural institutions, and private collectors often express reluctance to repatriate ceremonial objects and remains, prioritizing proprietary "ownership" or scientific/historical value over indigenous rights. Interlocutors further report facing temporal, financial, and legal hurdles for successful repatriation, such as many national laws "limit[ing] deaccessioning" and enabling State justifications to set aside repatriation claims. Article 11 UNDRIP emphasizes that indigenous peoples must enjoy effective redress and restitution for spiritual property taken without FPIC.

## **K. Recommendations**

### **1. States**

- (i) Establish legal and policy frameworks that recognize the right of indigenous peoples to their beliefs and comprehensively promote and protect their rights—drawing on UNDRIP specifically—including freedom of religion or belief. To this end, regularly review and revise such frameworks to tackle discrimination, undue restrictions on spiritual manifestations, and impediments to access and use of their lands.
- (ii) Establish collaborative, consultative mechanisms for indigenous peoples to effectively influence decision-making on issues that affect them, including developing holistic rights-based policies and matters affecting spiritual practices. Consider and seek to overcome intersectional barriers based on religion or belief identity, disability, sexual orientation and gender identity, and ethnicity.
- (iii) Deliver effective and appropriate remedies for indigenous survivors of rights violations, developed in consultation with them, consistent with international principles and guidelines, such as reparations, restitution, and supporting recommendations of truth and reconciliation commissions. Where applicable, acknowledge historical and ongoing harms of colonization, the Doctrine of Discovery and forced assimilation/dispossession more broadly for their spirituality and culture.
- (iv) Condemn harmful practices that result in human rights violations against indigenous peoples, including those invoking religion or belief or related to accusations of witchcraft and ritual attacks.