



# TORRES SHIRE COUNCIL

*To lead, provide & facilitate a sustainable, safe and culturally vibrant community*

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Committee Secretary

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

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On the 2<sup>nd</sup> of August 2022, the Senate referred the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for inquiry and report.

It is noted that the Senate's Legal and Constitutional Affairs References Committee began an inquiry into the application of the UNDRIP in the 46<sup>th</sup> Parliament.

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (the Committee) is to inquire into and report on the following:

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

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

Torres Shire Council (Council) seeks to have input into particularly ToR (ii) - (iv). Regarding (iv), Council draws the Committee's attention to the intersectionality between the recently signed Masig Statement and the Uluru Statement from the Heart. The Masig Statement expressly enshrines Articles 3 and 4 of the UNDRIP and, by implication, Article 46 of the

Declaration as this Article explains how the Declaration must be interpreted, “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”.

It is noted that in protecting the cultural, civil and human rights of Aboriginal and Torres Strait Islander people, the Explanatory Note to the Queensland Human Rights Bill 2018, expressly addressed the following:

*“The modern idea of human rights is based on the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948. A key aim of the UDHR was to reaffirm faith in human rights following the experience of the preceding world wars. It was the first time countries, including Australia, agreed on a comprehensive statement of human rights to be enjoyed by all people”.*

Since the UDHR, Australia has ratified many human rights treaties including:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the Convention on the Elimination of all Forms of Discrimination Against Women;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child (CRC);
- the Convention on the Rights of Persons with Disabilities; and
- the International Convention on the Elimination of All Forms of Racial Discrimination.

Council, for a range of reasons enunciated later in this submission, holds firmly to the view that Australia should enshrine the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in the laws of this nation state. We hold it as self-evident that enshrining the UNDRIP will ensure that Australian law better consolidates and establishes statutory protections for Aboriginal and Torres Strait Islander human rights recognised under international law. Furthermore, most Australian jurisdictions have already embraced the intent of the UNDRIP and expressly the rights drawn from the ICCPR, as well as the rights to health services and education drawn from the ICESCR, and property rights drawn from the UDHR. (<https://www.legislation.qld.gov.au/view/html/bill.first.exp/bill-2018-076#bill-2018-076>)

### **Queensland legislation**

Section 28 of the Queensland *Human Rights Act 2019* (Human Rights Act) provides for the **distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples** as Australia’s first people as follows:

*28 Cultural rights—Aboriginal peoples and Torres Strait Islander peoples (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights. (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community— (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and (c) to enjoy, maintain, control, protect and develop their kinship ties; and (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources. (3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture*

This Section is modelled on article 27 of the ICCPR, but whilst it also reflects Articles 8, 25, 29 and 31 of the UNDRIP, because Australia has not as yet enshrined it in law, it cannot and was not expressly referenced in the Human Rights Act. These articles recognise that Indigenous peoples and individuals have the right: not to be subjected to forced assimilation or destruction of their culture (article 8); to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas (article 25); to conserve and protect the environment and the productive capacity of their lands, territories and waters (article 29); and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (article 31). Like Section 27, this right is also directed towards ensuring the survival and continued development of Indigenous culture.

Section 28 (1) recognises that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights. Section 28 (2) recognises the rights of Aboriginal peoples and Torres Strait Islander peoples to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture. The practise of culture includes, for example: the right to enjoy and maintain identity and culture; to maintain and use Indigenous languages; to maintain kinship ties; a freedom to teach cultural practices and education to their children; the right to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. Section 28 (3) provides that Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

In crafting the Human Rights Act, the aforementioned provision is intended to be read with the savings provision at Section 107, which provides that the Human Rights Act does not affect native title rights and interests.

Section 29 provides for the **right to liberty and security of person**. This clause is modelled on articles 9 and 11 of the ICCPR. Article 9 of the ICCPR is the right to liberty and security of person. The right protects personal liberty but is focused on the requirement that due process is followed when state authorities exercise their powers of arrest and detention. It is not deprivation of liberty that is prohibited but rather that which is arbitrary or unlawful. Section 29 (1) provides for a person's right to liberty and security. Section 29 (2) provides that a person must not be subject to arbitrary arrest or detention. The concept of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law. Section 29 (3) provides that a person's liberty may only be denied on grounds and in accordance with procedures established by law. Lawfulness is understood in the strict sense of either statute law or common law. Section 29 (4) provides that a person who is arrested or detained must be given a reason when they are arrested or detained and must be informed about any proceedings to be brought against them. Section 29 (5) provides for certain rights for a person who is arrested or detained on a criminal charge. It provides that a person who is arrested or detained on a criminal charge must be promptly brought before a court and has the right to be brought to trial without unreasonable delay. Section 29 (5)(c) states that the person must be released if not complied with these requirements.

Section 29 (6) provides for certain rights for a person who is awaiting trial. It reflects the principle that pre-trial detention should not be the general rule. It provides that a person who is awaiting trial must not be automatically detained in custody, but the person's release may be subject to certain guarantees. Section 29 (7) provides that a person deprived of liberty by arrest or detention has the right to apply to court for a declaration regarding the lawfulness of the person's detention and requires that the court makes a decision without delay and orders the person's release if it finds that the detention is unlawful. Section 29 (8) makes clear that a person must not be imprisoned because of their inability to perform a contractual obligation. This reflects article 11 of the ICCPR which prohibits detention for debt. Clause 30 provides for the **right to humane treatment when deprived of liberty**. This clause is modelled on articles 10(1) and 10(2)(a) of the ICCPR.

Certain treatment of an accused person or a person who is detained without charge under subclause (3). Section 33 provides for **rights of children in the criminal process**. This clause recognises that children are entitled to special protections on the basis of their age. This clause is modelled on articles 10(2)(b) and 10(3) of the ICCPR. S (1) provides that an accused child who is detained, or a child detained without charge, must be segregated from all detained adults. Subclause (2) provides that an accused child must be brought to trial as quickly as possible. This is a more onerous obligation than the requirement of a trial 'without delay' or 'without unreasonable delay' provided in Section 29 (5), 29 (7) and Section 32 (2) (c). Section 32 (3) provides that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.

"Council submits that in the event that the Commonwealth enshrines the UNDRIP in the law of the nation state, a more fulsome reference that better reflects the intent of these existing Queensland statutory references may be achieved. Council also recommends that the *Australian Human Rights Commission Act 1986* (Cth) be amended to include the UNDRIP as a Schedule to it; and that consequential and subsequent to this amendment, other amendments be recommended by the Committee to that Act.

Council understands that the Committee are engaged in understanding and exploring the aforementioned cultural rights and UNDRIP, in the Australian context. In the Queensland context, cultural rights may be relevant in decisions about bail and other release from custody, child protection decisions including placement and addressing a child's cultural support needs and in the procedures of the specialist Murri Court. Additionally, economic regulation by a public entity that impacts on the exercise of cultural rights (e.g., rights over fishing) may require consideration of this right:

- *“during bail applications brought by Aboriginal and Torres Strait Islander peoples, where cultural considerations are relevant to a bail application and refusal of bail decision under the *Bail Act 1980* (Qld)*
- *in the exclusion of an Aboriginal person from special courts such as the Murri Court, which may be inconsistent with both cultural rights and the right to recognition and equality before the law (s 15 Human Rights Act)*
- *where cultural rights are considered relevant in child protection proceedings (e.g. where an application is brought to return children to the care of their Aboriginal or Torres Strait Islander family member)*
- *in an application for an exemption under the *Anti-Discrimination Act 1991* (Qld) (e.g. to create and advertise a position that can only be taken by Aboriginal and Torres Strait Islander peoples).*

*Economic regulation may also give rise to cultural rights (e.g., where the Swedish government attempted to regulate the practice of reindeer breeding by ethnic Sami peoples). Similarly, regulation of fishing, land use and other traditionally exercised economic rights, even where those rights have adapted to modern times, are likely to require consideration of cultural rights.”*

(Caxton Legal Centre Inc., 1 December 2020, *Cultural Rights of Aboriginal and Torres Strait Islander Peoples*, 1 December 2020, <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/your-rights-and-responsibilities/human-rights-law-in-queensland/cultural-rights-of-aboriginal-and-torres-strait-islander-peoples>)

### **Uluru Statement from the Heart and the Masig Statement**

As part of the 85<sup>th</sup> Anniversary celebrations of the First Island Councillor Conference that took place on Masig Island on 23<sup>rd</sup> August 1937, the Masig Statement was signed and released.

That was a momentous event. The Masig Statement is the beginning of a new beginning, a culturally united path to regional sovereignty. It connects our past to the present, and the present to our future. It is the link that joins the heroic work of our forebears at the First Island Councillors Conference and their aspiration for self-government to our aspiration for self-determination today. It enshrines our culture. It respects our history. It secures our independent future.

The Masig Statement seeks to achieve self-determination for the peoples of the Torres Strait and Northern Peninsula Area, to freely determine our political status and to freely pursue our economic, social and cultural development. In exercising our right to self-determination, we have the right to autonomy or self-government in matters relating to our internal and local affairs, as well as ways and means for financing their autonomous functions. Therefore, we will create partnerships with Key Regional Stakeholders, the Queensland and Australian governments together with other relevant organisations to better equip us to work together to achieve our regional goals and aspirations; and in working together as peoples of the Torres Strait and Northern Peninsula Area obtain and safeguard our human rights enshrined in international, national and Queensland law. The Masig Statement, therefore, enshrines Articles 3 and 4 of the UNDRIP. Council cannot see why these Articles cannot be enshrined in Commonwealth law in terms of the legislation to be presented to the Parliament to enshrine the Voice, consequent upon a successful referendum.

Council calls upon the Commonwealth government to support the peoples of the Shire and region in achieving our ambition, and our forebears ambition, for self-determination and regional sovereignty. We have come together as a region. We have agreed a path forwards. We have signed the Masig Statement that supports the aspirations of the Uluru Statement from the Heart.

### **UNDRIP Bill before the Senate**

Mindful of the Bill currently before the Senate regarding the UNDRIP

([https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/25937/0021/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/25937/0021/hansard_frag.pdf;fileType=application%2Fpdf)), Council draws the Committee's attention our representation to the Productivity Commission (Mr Romlie Mokak) review into Closing the Gap at Thursday Island on 7 October 2022, Council noted that:

Torres Shire Council has called for the tabling of a comparative report card each year on 23<sup>rd</sup> August coinciding with the signing of the Masig Statement. Council has proposed that the report card be prepared by the Government Statistician, Qld Treasury, and the report card will compare the metrics (as cited in Annexure 1) involving regional data and Queensland data.

This data from the region covers the Northern Peninsula and Torres Strait region. We have sought support from both the Queensland and Commonwealth Governments in preparing this annual score card. We feel this comparison is not only achievable but provides reliable comparisons. Furthermore, it is our view that once the region reaches parity with Queensland, the issue then becomes more one of the federation reaching parity by the target date. Council notes that the *Closing the Gap* Agreement was developed in partnership between Aboriginal and Torres Strait Islander representatives and all Australian governments and commits governments (including the Queensland Government) to working in full and genuine partnership with Aboriginal and Torres Strait Islander people in making policies to close the gap. Finally, it is to be noted that the Queensland Regional Profiles also apply the national census data and other relevant Australian data sets.

The following was cited in Annexure One of Council's representation to the Productivity Commission (7 October 22):

"Council has proposed to the Queensland Government that the Government Statistician, Queensland Treasury produces a report card on 23<sup>rd</sup> August of each year (the anniversary of the signing of the Masig Statement) based on the following table, using data from the regional profiles. The regional approach, rather than an individual LGA approach, connects with the proposal of regional voices regarding the proposed Voice to Parliament. A further benefit with this approach is that this data includes both Queensland and Commonwealth data and is a practical way to track progress in *Closing the Gap*.

Category	Our Region	Queensland
Estimated Resident Population (ERP)	0.2% estimated growth over 10 years	1.5% over 10 years
Age Profile	30.7% = Aged 0-14 62.6% = Aged 15-64 6.7% = Aged 65+ 27.3 years = Median age	19.3% = Aged 0-14 64.6% = Aged 15-64 16.1% = Aged 65+ 37.8 years = Median Age
Population Projection	Increase 0.6% per year over 25 years 30.3 years = pop mean age as at 30 June 2041	Increase 1.6% per year over 25 years 40.7 years = pop mean age as at 30 June 2041
Aboriginal and Torres Strait Islander Population	81.2%	4.6%
Births and Deaths	205 registered births 29 registered deaths (2020)	59,490 registered births 31,367 registered deaths (2020)
Migration	12.6% with a different address one year ago	17.5% with a different address one year ago
Country of Birth	4.6% born overseas	22.7% born overseas
Language spoken at home	70.3% a language other than English	13.5% a language other than English
Family Composition	43.2% of total families = couple families	41.2% of total families = couple families

Household Composition	64.% one family households of total households	70.0% one family households of total households
Dwellings	77.6% separate houses	74.8% separate houses
Dwellings by tenure type	6.9% fully owned	29.1% fully owned
Homelessness	376.1 per 10,000 persons	45.6 per 10,000 persons
Number of Motor Vehicles per dwelling	7.2% with 3 or more motor vehicles 35.3% with no motor vehicles	20.0% with 3 or more motor vehicles 5.7% with no motor vehicles
Internet Access	68.2% with internet access	83.7% with internet access
Schooling	62.2% with year 11 or 12 schooling 58.0% with no school qual	63.6% with year 11 or 12 schooling 59.1% with no school qual
Degree or Diploma	58.1%	59.1%
Profound/Severe Disability	2.9%	6.0%
Socio-economic disadvantage	No person is in the least disadvantaged 81.8% in most disadvantaged quintile	20% are in least disadvantaged 20% in most disadvantaged quintile
Remoteness	100% in very remote	1.1% in very remote
Total Personal Income	\$28,903 = median income	\$40,924 = median income
Total Family Income	\$64,646 = median per year 17.7% = low-income families	\$105,248 = median per year 6.9% = low-income families
Unemployment	16.8% = March 2022	4.9% = March 2022
Building Approvals	5 new houses ending 31 May 2022	26,001 houses ending 31 May 2022

Council concurs that as it stands, the Bill proposed by Senator Thorpe, Australian Greens, regarding the UNDRIP does no more than what she states in her second reading speech (Hansard, 1 August 2022, p.253):

“This bill doesn't spell out exactly how the government needs to enact the UNDRIP. The bill instead requires the government to prepare an implementation plan to achieve the objectives of the UNDRIP, and to work towards ensuring that our current and future laws respect First Nations rights. Passing this bill means putting First People in the driver's seat when it comes to making decisions about our communities, our culture and our country”.

The Bill has been modelled on the Canadian Bill of 2021. Council notes Senator Dodson's observation that: “It's worth acknowledging that the Canadian act has not been without criticism from First Nations Canadians. This include the criticism that it was passed without sufficient community engagement. At the time that it was passed, Canadian academics Ken Coates and Heather Exner-Pirot wrote in the Vancouver Sun: Properly done, the legislation could be a unifying and transformative act ... Instead, this legislation was introduced in December in the midst of the pandemic, rushed through a truncated House of Commons agenda under closure, and is being pushed along with minimal public engagement or interest.

We can and should take time to ensure meaningful consultation on this bill. Indeed, this is at the heart of the declaration itself. Article 19 of the declaration states: 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” (Hansard, 1 August 2022, p.255).

Accordingly, Council seeks that the Committee further engages with representatives of the Torres Strait and Northern Peninsula area on how Article 4 and Articles 17 - 21, 35 - 37 may be approached, and consistent with the intent of the Masig Statement signed by the peoples of the Torres Strait and Northern Peninsula, Council seeks further consultation on this matter.

### **UN Declaration**

The work towards the UNDRIP began 14 years before the first Inter Islander Councillors Conference at Masig.

As outlined earlier, much of the Articles have found their way (albeit in a nascent form) into Human Rights legislation in this country and where not, should.

Leaving aside the 23 preamble clauses, the 46 articles. explain how each nation state should promote and protect the rights of indigenous people including:

- Rights of self-determination of indigenous individuals and peoples (Articles 1 - 8; 33 - 34)
- Rights of indigenous individuals and people to protect their culture through practices, languages, education, media, and religion, including control of their intellectual property (Articles 9 - 15, 16, 25, and 31)
- Rights to our own type of governance and to economic development (Articles 4, 17 - 21, 35 - 37)
- Health rights (Article 23 - 24)
- Land rights from ownership (including reparation, or return of land i.e. Article 10) to environmental issues (Articles 26 - 30, and 32)
- Article 46 of the Declaration explains how the ‘Declaration must be interpreted, and *it is “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith’*

The Declaration was supported by the Australian Government on 3<sup>rd</sup> April 2009. More than thirteen years have elapsed since then, and with the passage of time a number of its Articles have been effectively absorbed into law in different jurisdictions in Australia, albeit indirectly.

Therefore, it is not a bridge too far for the Commonwealth to formally enshrine these Articles in Commonwealth law, subject to the same precautions and exclusions as occurs in other jurisdictions or required by law.

Article 4 and Articles 17 - 21, 35 - 37 will, however, need careful consideration and crafting. It goes to self-determination and the rights of First Nations peoples regarding our internal and local affairs as well as ways and means for financing their autonomous functions. Council suggests it goes to how the legislation enshrines the Voice. Council readily notes that if this legislation is not carefully crafted, it will give rise to anticipated counter claims, including by parties already opposed to the Voice. Council seeks that representatives of the Torres Strait and Northern Peninsula area be invited to contribute further to the Committee, on this matter, thus ensuring the Committee respects and honours the Masig Statement. There is, in our view, a synergy between the Masig Statement and the Voice (that may include regional voices), which will be properly empowered to advise on internal and local affairs and their autonomous functions.

The Northern Peninsula Area Regional Council, Torres Shire Council and Torres Strait Island Regional Council consider that the Torres Strait and Northern Peninsula is one such region. Should the Committee be minded to examine further Articles 4, 17 - 21, 35 – 37 of the UNDRIP, Council would be honoured to contribute to such an examination.

Additionally, it is Council's view that two other practical, non-contentious, steps, which will align Australia to many other countries (including New Zealand) that the Committee may consider recommending are:

- every Government agency and Department will be known by their Aboriginal, Torres Strait Islander and English names; and
- every relevant government decision must be assessed through the prism of Aboriginal and Torres Strait Islander cultural safety, preservation, sensitivity, with primacy being given to this approach.

The UNDRIP is the most comprehensive international instrument on the rights of indigenous peoples.

It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it expands on existing human rights standards and fundamental freedoms as they apply to indigenous peoples. It should thus be enshrined in Australian law.

Council notes that on 23<sup>rd</sup> September 2022, the UN Human Rights Committee (UNHRC) found that Australia had violated two of their three human rights set out in the International Covenant on Civil and Political Rights (1966) — the right to enjoy their culture and be free from arbitrary interferences with their private life, family and home — but not their right to life.

This ground-breaking finding was made in response to a complaint filed in 2019 by eight Torres Strait Islanders (known as the “Torres Strait 8”) from the small, low-lying islands of Boigu, Poruma, Warraber and Masig. The Torres Strait 8 argued that rising sea levels have already damaged food sources and ancestral burial sites on the islands, scattering human remains and putting homes at risk of being submerged. Would have the right to life been included in the findings had Australia been a signatory to the UN Declaration of the Rights of Indigenous Peoples? This is a question Council seeks that the Committee consider.

### **Recommendations**

1. That the Commonwealth formally enshrine the Articles of the UNDRIP into Commonwealth law.
2. That the *Australian Human Rights Commission Act 1986* (Cth) be amended to include the UNDRIP as a Schedule to it; and that consequent and subsequent to this amendment, other amendments be recommended by the Committee regarding that Act.
3. That the Committee further engage with representatives of the Torres Strait and Northern Peninsula area on how Article 4 and Articles 17 - 21, 35 - 37 may be approached, and consistent with the intent of the Masig Statement signed by the peoples of the Torres Strait and Northern Peninsula, Council seeks further consultation on this matter.
4. That the Committee recommends two practical and non-contentious steps forward, in line with other countries including New Zealand, that every Australian Government agency and Department (and every State and Territory department and agency) is to known by their Aboriginal, Torres Strait Islander and English names; and
5. That every relevant government decision is assessed through the prism of cultural safety, preservation of Aboriginal and Torres Strait Islander peoples, with primacy being given to this approach.

Thank you for providing Council the opportunity to contribute to the Committee’s deliberations. Should you wish to clarify any aspect of this submission, please do not hesitate to do so.

Yours faithfully

**Dalassa Yorkston**

Chief Executive Officer