



# **JOINT STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS**

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

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## Terms of Reference

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australia has invited submissions with particular reference to:

- (i) the international experience of implementing the UNDRIP
- (ii) options to improve adherence to the principles of the 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.

## Background

Terri Janke and Company (**TJC**) is a 100% Indigenous owned and operated law firm, established in 2000. TJC is a unique firm that provides advice to a diverse range of clients on commercial law and cultural matters and is a global authority on Indigenous Cultural and Intellectual Property (**ICIP**), which encompasses cultural heritage, traditional knowledge and traditional cultural expressions as those terms are understood in the UNDRIP. TJC delivers services nationally and internationally, and is currently on the Whole of Australian Government Legal Services Panel and the Queensland Legal Services Panel.

As part of our role within the community and the Indigenous legal sector, and our commitment to protecting and promoting the rights and culture of Indigenous peoples, TJC strongly supports the implementation of the UNDRIP in Australia.

The UNDRIP was developed with considerable input and contributions of Indigenous Australians, including with the now dissolved Aboriginal and Torres Strait Islander Commission to be an instrument that accurately captures the scope of protection required to safeguard the cultural heritage, traditional knowledge and traditional cultural expressions of Indigenous peoples. Therefore, the UNDRIP seeks to inform the way in which governments, and societies generally, engage with and uphold the rights of Indigenous peoples. It is a ground-breaking legal instrument that advocates for and protects the rights of Indigenous peoples at an international level, and has the potential to do the same domestically if embedded in the form of sui generis law.

The UNDRIP's application in the Australian context underpins many developments and best-practice movements. Notably, TJC extensively advocates for and relies directly upon the following Articles of the UNDRIP in day-to-day practice:

- **Article 3** – Indigenous peoples right to self-determination;
- **Article 19** – Standards of free, prior and informed consent (**FPIC**); and
- **Article 31** – Indigenous peoples right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (in addition to the rights in relation to the intellectual property over such heritage and knowledge).

Other influential articles that TJC's work directly implement include:

- **Article 11** – the right to practice and revitalise cultural traditions;

- **Article 12** – the right to practice, develop and teach customs and access cultural sites in privacy;
- **Article 24** – the right to traditional medicines and health practices, including the conservation of medicinal plants, animals and minerals; and
- **Article 25** – the right to maintain and strengthen relationships with lands, waters, seas and resources.

TJC also promotes the principles of the UNDRIP in the following ways:

- Terri Janke and Company's 10 True Tracks principles® for best-practice engagement with Indigenous peoples;
- Best practice ICIP protocols to guide collaboration and engagement with Indigenous peoples within the arts, sciences, bush foods, film and education industries such as the Australia Council for the Art's [Protocols for using First Nations Cultural and Intellectual Property in the Arts](#);
- Advice in relation to FPIC in the context of the Convention on Biological Diversity, the [Nagoya Protocol on Access and Benefit Sharing, and Australian state and federal laws \(including Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)\)](#);
- Advice on reforms and inquiries into improving cultural heritage protection and legislation such as work on translating the [Dhawura Ngilan Vision](#) into practical standards for use in the corporate sector developed by the Aboriginal and Torres Strait Islander Chairs as members of the Heritage Chairs of Australia and New Zealand, and contributions to the Joint Standing Committee on Northern Australia into the destruction of Juukan Gorge;
- Guides, Protocols, Strategic Advice on Intellectual Property and ICIP issues, Intellectual Property & ICIP Management Plans and Indigenous Data Sovereignty; and
- Commissioned Reports (including the 2021 [State of Environment Report](#), and the 2021 [State of Victoria's Aboriginal Cultural Heritage \(SoVACH\) Report](#)).

Despite the increasing recognition of and compliance with UNDRIP principles and standards across government and business sectors in Australia, the Federal Government has failed other than in a piecemeal way to implement these rights into Australian law thus denying Indigenous peoples clear and binding recognition and remedies.

This must change as a matter of priority.

### International Experience

While Australia has taken some positive steps in supporting the UNDRIP, including our 2009 endorsement of the instrument and subsequent commitment in international forums, we have much to learn from our international counterparts, such as Canada and New Zealand, who have taken comprehensive steps to practically implement the UNDRIP.

The UNDRIP is often viewed as 'soft law' given the fact that it is not a convention or a treaty and does not itself create legally binding obligations. This has limited the Australian government's perception and application of the UNDRIP in Australia, which currently provides limited influence

over policy rather than delivering legal recognition of these rights of Indigenous peoples. If Australia continues to endorse, instead of formally implement the UNDRIP, there will be no legal means to keep government and corporations accountable. Avenues for Indigenous people are left to the good will of these parties. Deliberate and comprehensive action must be taken to deliver tangible legal rights to Indigenous peoples.

In the Law Council of Australia's Submission to the Inquiry into the Application of UNDRIP in Australia, dated 24 June 2022 (**Law Council Submission**), the Law Council expressed Canada's ascension to the best-practice benchmark for implementing the UNDRIP on the international stage. Notably, Canada has implemented the UNDRIP through legislation. As provided in the Law Council Submission, the enactment of 'An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples' provides a roadmap for the implementation of legislation that is consistent with the UNDRIP.<sup>1</sup> In this way, the State is legally obligated to uphold the aspirations and responsibilities provided for in the Act, which also calls for the development of a national action plan to achieve the objectives of the UNDRIP. As a result, Canada provides a minimum international benchmark for the implementation of the UNDRIP that Australia should seek to meet. Australia should also look to the New Zealand experience for guidance and learnings on the implementation of the UNDRIP. In particular, the Law Council Submission references New Zealand's establishment of a working group to consider the form and content of a national action plan to prioritise their implementation of the UNDRIP.<sup>2</sup> It should be noted that a national action plan is a government strategy that does not in itself provide legal rights or remedies for Indigenous populations.<sup>3</sup> Nevertheless, New Zealand has sought to use this mechanism to raise the priority status of ongoing the UNDRIP implementation.

It is worth noting that New Zealand has had a suite of treaties and rights-protection measures in place prior to the drafting and introduction of the UNDRIP. Most notably, its founding document, the Treaty of Waitangi, which formalised a relationship between the New Zealand Crown and Maori and set a foundation for ongoing negotiations and protections that are evident. The current processes and outcomes arising out of New Zealand have been largely facilitated by their implementation of UNDRIP, providing another positive international example for Australian reflection.

As prioritised by both the Canadian and New Zealand government, Australia should seek to develop a national action plan to facilitate the implementation of the UNDRIP as a matter of national significance.

### Options to Improve Adherence to the UNDRIP

To date, the legal protection offered to Indigenous peoples under the UNDRIP have been implemented in Australia in a limited area of the laws. For example, the recognition and protection of intangible cultural heritage in the *Aboriginal Heritage Act 2006* (Vic), the Victorian Government Self Determination Reform Strategy and the inclusion of Traditional Knowledge in the *Biodiscovery Act 2004* (Qld). From these recent examples alone the inconsistent and ad hoc implementation of the UNDRIP is apparent and evidently reliant on the priorities and interests of the relevant State and Territorial governments. Consequently, the need for a more formal implementation of the UNDRIP and its standards to actively promote and protect the rights of Indigenous peoples in Australia is imperative.

<sup>1</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) [63].

<sup>2</sup> Ibid [61]-[62].

<sup>3</sup> Ibid [58].

As such, TJC supports the recommendations and analysis of options for domestic application provided by the Law Council Submission. Notably, TJC supports the following options to improve Australia's adherence to the principles of the UNDRIP:

- **Constitutional Enshrinement of a Voice to Parliament:** TJC endorses all three pillars of reform called for in the Uluru Statement from the Heart, and views the calls for change as an avenue for ensuring Australia's adherence to the UNDRIP. A Voice to Parliament is the first pillar of reform in the Uluru Statement from the Heart. A priority conveyed within the Law Council Submission is the call for a referendum for a First Nations Voice to Parliament to be enshrined in the Australian Constitution. This Voice would be a manifestation of the right to self-determination, pursuant to Article 3 of the UNDRIP.
- **Sui Generis Legislation:** Australia should draw from the Canadian approach in providing for a legislative means of clarifying and cementing Australia's obligations under the UNDRIP. In accordance with the Law Council's note surrounding the proposed *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (Cth) introduced in March 2022, the key requirements under a sui generis law could replicate or be substantially derived from the Canadian Act.<sup>4</sup> Such a statute could provide general statutory obligations, or as we recommend, should go further to specify issues of concern, including interpretive clauses, additional duties, right of actions, remedies and timelines for review.
- **Legislative Amendments:** Reforms to Australian environmental, cultural and heritage legislation would enable greater adherence to the UNDRIP. There is significant overlap between the scope of potential legislative amendments in this area and the principles of the UNDRIP, which can assist in the integration of the UNDRIP's provisions into domestic regulatory and legislative frameworks. For instance, changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should embed and bolster the application of the UNDRIP. Reform of this Act, in line with the independent statutory review conducted in 2019 (found [here](#)), should provide for further acknowledgement and involvement of Indigenous peoples and consistent FPIC processes, and can raise awareness and reinforce the need for Caring for Country in accordance with Articles 24 and 25 of the UNDRIP, as emphasised by the 2021 State of Environment Report referenced above. These outcomes would provide additional statutory foundations for Australia's adherence to the UNDRIP.
- **Education and Awareness:** Comprehensive implementation of the UNDRIP also requires the allocation of resources to education and awareness strategies to complement legislative reform.
  - Indigenous organisations will require information on how to understand and use the UNDRIP to their advantage in negotiations and projects particularly with FPIC, such as the [Community Guide to the UNDRIP](#).
  - The implementation guidelines and frameworks are a key resource that may be used to improve the application of and adherence to the UNDRIP in the Australian private sector. Guides, such as the UN Global Compact's [Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples](#) and the [Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples](#), are crucial in encouraging and guiding the private sector to initiate changes to business practices that

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<sup>4</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) [65]-[67].

are consistent with the UNDRIP. Additionally, Indigenous-led programs such as the upcoming Dhawura Ngilan Business and Investor Initiative led by the First Nations Heritage Protection Alliance in partnership with the Global Compact Network Australia and the Responsible Investment Association of Australia, which is aimed at bringing awareness to the role of the private sector in cultural heritage protection should be drawn upon and replicated across other relevant industries. These guides improve the reception and application of the UNDRIP and its principles within Australia.

- In addition to the suggested UNDRIP adherence guidelines in the private sector, the Australian general public would undoubtedly benefit from improved education and awareness. A key lever for societal change is knowledge. With improved awareness and education on the aspirations, responsibilities and practicalities of the UNDRIP, the Australian public could champion for greater adherence across various jurisdictions and sectors.
- **Recognition of ICIP (Cultural Heritage, Traditional Knowledge and Traditional Cultural Expression):** Improving the recognition of ICIP (referred to as cultural heritage, traditional knowledge and traditional cultural expression in the UNDRIP) would in turn allow for social, economic, environmental, health & wellbeing and cultural benefits to flow to Indigenous communities. ICIP is protected in principle under the UNDRIP, but is not yet fully realised under Australian law or appropriately protected for Indigenous peoples in Australia. Implementing holistic initiatives and policies based on the UNDRIP that target knowledge, heritage and culture in line with the findings of the SoVACH Report and the 2022 Commonwealth State of the Environment Report, and providing systems that enable Indigenous self-determination, leadership, co-design and benefit-sharing, will see areas such as the Australian native food and botanicals industry, tourism, arts, health and research sectors and the carbon industry continue to develop in line with best practice principles, and ensuring that Indigenous representation will flourish. Australia has undertaken some movement in this space which is also consistent with the objectives of the [Nagoya Protocol on Access and Benefit Sharing](#). Examples of current domestic application are the:
  - recent reforms to the *Biodiscovery Act 2004* (Qld) to incorporate an Access and benefit sharing framework and [Traditional Knowledge Code of Practice](#);
  - Victorian [Traditional Owner Native Foods and Botanicals Strategy](#); and
  - Australian Carbon Industry Code of Conduct which endorses and builds upon the standards of free, prior and informed consent as set out by The Indigenous Carbon Industry Network.

Government initiatives and programs that are bound by the key provisions of the UNDRIP with respect to ICIP will improve the application of and adherence to the UNDRIP by providing for the realisation of respect and benefits for Indigenous peoples and the continued growth of the Indigenous private sector based on its provisions.

- **Treaty Discussions:** Treaty is the second pillar of reform outlined in the Uluru Statement from the Heart. Current treaty discussions and negotiations are taking place in Victoria, South Australia and the Northern Territory which provide an avenue for Indigenous people to exercise rights consistent with the UNDRIP. TJC supports the Law Council Submission's proposal that Indigenous communities across Australia may seek to incorporate the

Government's adherence to the UNDRIP principles and standards through the terms of a treaty or agreement with the Government.<sup>5</sup>

- **Truth Telling:** Truth telling is the final pillar of reform in the Uluru Statement. Truth telling is an integral component when recognising the ongoing injustices facing Indigenous people. The Commonwealth Government has previously facilitated truth telling through various reports and Commissions, such as the Royal Commission into Aboriginal Deaths in Custody. In 2021, Victoria, established the first formal truth-telling body for First Peoples of Australia - the [Yoorrook Justice Commission](#). Yoorrook's inquiry is underpinned by the UNDRIP. This needs to be considered at a national level. An ongoing process of truth telling is a mechanism whereby the adherence to the UNDRIP can be exercised. This is in line with international best-practice, as reflected by the Truth and Reconciliation Commission established in the Canadian landscape.
- **Best Practice ICIP Protocols:** TJC recommends the implementation of best practice protocols for government and industries throughout Australia to guide appropriate engagement with Indigenous peoples and their ICIP in the course of trade and business. This extends to large government departments, to local and regional organisations and agencies who work with Indigenous peoples. ICIP Protocols address the specific cultural and social considerations and nuances that arise when engaging with Indigenous peoples in specific projects or industries. Often, these considerations and nuances are not covered in general industry guidelines, policies or legislation. Prominent examples included the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research, and [Screen Australia's Pathways and Protocols](#). ICIP Protocols across every level contribute to best practice and ongoing compliance with the UNDRIP. Consideration should be given to enabling exercise of these rights by local and regional Indigenous groups via an Indigenous controlled entity - a National Indigenous Cultural Authority.<sup>6</sup>

### Other related matters – Indigenous Data Sovereignty

In line with the UNDRIP and the recommendation discussed above, the implementation of the UNDRIP must be Indigenous led and co-designed. This must be prioritised as stronger adherence to the UNDRIP in Australia will necessitate greater engagement and involvement of Indigenous peoples, particularly in the areas of cultural heritage and access and use of traditional knowledge. In turn, when data collected includes information pertaining to Indigenous people or their cultural heritage or traditional knowledge then principles of Indigenous Data Sovereignty are raised.

Indigenous Data Sovereignty refers to the rights of Indigenous people to exercise ownership over data pertaining to them and their community. It requires that Indigenous people be able to decide and govern how data and information about them is collected, stored, interpreted and shared in a way that aligns with their interests and priorities. There are strong identifiable links between the priorities of Indigenous Data Sovereignty and the aspirations and key provisions of the UNDRIP. Namely, developing infrastructure, whether in the private or public sector, to facilitate Indigenous Data Sovereignty empowers self-determination and self-governance.

It is important to acknowledge that discussions of Indigenous Data Sovereignty must also address privacy. Privacy concerns arise where data relates to the personal information, health information and identifiable details of Indigenous people, and that adequate consent is given to access and

<sup>5</sup> Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) [45].

<sup>6</sup> <https://www.terrijanke.com.au/beyond-guarding-ground>



use of that data in accordance with FPIC. There is a need for development of further data governance guidelines and frameworks which protect the Indigenous Data Sovereignty and privacy of Indigenous people.

Indigenous Data Sovereignty is a complex and developing area of interest, particularly to our clients. As such, TJC strongly encourages that alongside any education and awareness strategies focusing on the UNDRIP implementation should be information and strategies on Indigenous Data Sovereignty and privacy.

### **Conclusion**

This submission is in response to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the application of the UNDRIP in Australia. TJC believes that Australia must employ a more comprehensive and formal adoption and implementation of the UNDRIP as outlined above. To this end, TJC supports the recommendations and analysis provided in the Law Council Submission.

Kind regards,

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