

# Inquiry into Australia's Human Rights Framework - Questions on notice from Senator Thorpe

2 November 2023

## Wilderness Society response

- 1. Does the AHRC proposal go far enough with its outline and consequences of participation duty, especially as it relates to self-determination and Free Prior informed consent in UNDRIP?**

While the proposal has a recommended approach, it ultimately and rightly calls for further co-creation and development of the approach with First Nations Australians.

We commend the proposal for squaring the focus of First Nations participation rights on the international human right to self determination, which is a collective right. This right is the basis for much of the additional rights of Indigenous people under international law including in UNDRIP.

The proposal also helpfully recommends that the exact bounds of “the question of how best to reflect principles of self-determination should be a matter for First Nations peoples” and that the proposed participation duty “be considered subject to deeper consultations.”

The proposal's exploration of domestic attempts to enshrine the right to self determination provides useful guidance on practical ways to operationalise the right.

- 2. How could the Aarhus convention which links environmental rights and human rights and UNDRIP interact especially as it comes to the right to participate in decision making and accessing justice?**

The Aarhus Convention's provision for access to information (Art 4), public participation (Art. 6-8)



and to challenge (Art. 9(2)) effectively adapts pre-existing human rights set out under the International Covenant on Civil and Political Rights (ICCPR) to the context of environmental decision-making. These are human rights that are held by all people, including Indigenous people.

The rights and protections in UNDRIP are specifically owed to Indigenous peoples.

In a setting where both instruments were binding, the Aarhus convention rights would likely provide a foundation, with UNDRIP then providing additive rights and protections for Indigenous peoples. The effect would be additive, not contradictory.

There would be some harmony and overlap between the two. The Aarhus's information access and public participation requirements are very relevant to requirements for obtaining the free, prior and informed consent (FPIC) of Indigenous peoples as set out in UNDRIP. For instance, consent given without information will not meet the FPIC standard. Likewise, best practice for fulfilling the right to participate would be to follow many of the tenets of the FPIC standard (excluding the veto right), such as making sure that such participation was based on access to and comprehension of relevant information and not subject to any undue pressure or manipulation.

Likewise an Indigenous person accessing the right to challenge under the Aarhus convention (Art. 9(2) - *focused on challenging the legality of environmental decisions*) would likely broaden the type of legal action they could notionally bring under UNDRIP (Art 40 - *focused on breaches of their individual and collective rights as an Indigenous person or people*).