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

INQUIRY INTO APPLICATION OF THE UNDRIP IN AUSTRALIA

31 OCTOBER 2022

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Introduction and overview of submission

Thank you for the opportunity to make a submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, in its inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

We make this submission as members and associates of the Indigenous Law Centre, UNSW. We are solely responsible for the views and content in this submission.

The submission responds to two of the terms of reference of the inquiry, and in particular:

1) the international experience of implementing the UNDRIP
2) how implementation of the Uluṟu Statement from the Heart can support the application of the UNDRIP

The submission is structured into three parts.

Part 1 The Indigenous Law Centre & UNDRIP: We introduce the role of the Indigenous Law Centre, and the work of Centre members in relation to the creation and implementation of the UNDRIP at the international level.

Part 2 UNDRIP and Australia: We explain the role of UNDRIP in the restructuring of the First Nations and State relationship in Australia.

Part 3: Uluṟu Statement from the Heart & UNDRIP: We explain the relationship between the Uluṟu Statement from the Heart and UNDRIP, with reference to:

(A) The Regional Dialogues, First Nations Constitutional Convention as an example of the exercise of the right of self-determination, and for First Nations people to freely determine their political status.

(B) The Uluṟu Statement: First Nations Voice as a structural reform aimed to deliver a self-determined First Nations political institution to participate in the affairs of the State and provide Free, Prior and Informed Consent, and the minimum design and resourcing conditions of the Voice to deliver this.

(C) The Uluṟu Statement: Makarrata as a structural relational reform through which to deliver Indigenous nation-building and self-determination.

Part 1: The Indigenous Law Centre & UNDRIP

The Indigenous Law Centre (ILC), based at the University of New South Wales, is Australia's first and pre-eminent University-based Indigenous Legal Centre. Established in 1981, the ILC contributes to the recognition, protection and development of the legal rights and freedoms of Indigenous peoples both in Australia and internationally. It does so through conducting and disseminating innovative and high quality research on Indigenous legal issues and through community legal education on issues of particular significance.

The ILC has played a long-standing role in supporting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and has significant expertise on the UNDRIP in the Australian context. The founding Director, Garth Nettheim, established the centre in 1981 (originally the Aboriginal Law Research Unit), with its mandate focussed on research and law reform. Since then, its work has been important to the Aboriginal and Torres Strait Islander community, including to help establish community controlled legal services and through involvement with High Court cases such as *Koowarta v Bjelke-Peterson* (defending the constitutional validity of the *Racial Discrimination Act 1975*), *Mabo v Queensland (No 2)* (in which the High Court recognised a common law native title) and International Indigenous rights advocacy, including developing the UNDRIP.

The Director of the ILC, Professor Megan Davis, is one of six global experts on the UNDRIP serving on the United Nations Expert Mechanism on the Rights of Indigenous People (UNEMRIP) from 2017-2022. The UNEMRIP's mandate is the implementation of the UNDRIP globally by states. Professor Davis was a drafter of the UNDRIP between 1999-2004 including 1999 as the UN Office of the High Commissioner for Human Rights and 2000-2002 as a lawyer from the Legal Branch of the Aboriginal and Torres Strait Islander Commissioner. She was an expert member of the UN Permanent Forum on Indigenous Issues between 2011-2016 and wrote the first UN study on Indigenous women and UNDRIP.[1] During her time as EMRIP expert she was the lead author on the study on **Free, prior and informed consent: a human rights-based approach' (2018)**[2] and the lead author on the study on self-determination, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination*.[3] **We attach a copy of these two reports to assist the Committee in its inquiry under its first term of reference.**

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1 See also Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439, 459; Megan Davis, 'The United Nations *Declaration on the Rights of Indigenous Peoples*' (2007) 11(3) *Australian Indigenous Law Review* 55; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

2 UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/61 (10 August 2018).

3 UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination,* 48th Session, Agenda Item 2 and 5, A/HRC/48/75 (13 September 2021).

We also draw the Committee's attention to the 2021 study on **'Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.'**[4]

Other current members and associates of the ILC, including Dr Janine Gertz[5], Associate Professor Hannah McGlade[6], Dr Dylan Lino[7], and Dr Sophie Rigney[8], also have practical and academic experience in United Nations processes relating to Indigenous peoples, and the UNDRIP.

Consistent with its founding objectives of working toward legal and structural reform to advance Aboriginal and Torres Strait Islander peoples, the ILC's work has most recently been involved over 12 years in constitutional reform. Professor Davis and Dr Dylan Lino commenced a constitutional law project in 2008. Professor Davis designed the First Nations Regional Dialogues in 2014 and 2015 and chaired the Indigenous Steering Committee of the Referendum Council. Fellow experts from the ILC have been involved in the development of the Regional Dialogues, the First Nations Constitutional Convention, and the delivery of the Uluṟu Statement from the Heart, which calls for meaningful structural and constitutional reform to recognise the proper place of First Nations in the Australian community. The ILC continues this work in partnership with the Uluṟu Dialogue.

In the remaining parts of this submission, we explain how the Regional Dialogues, and the reforms called for in the Uluṟu Statement from the Heart represent foundational structural reforms that implement several provisions of the UNDRIP.

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4 See further https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/treaties-agreements-and-other-constructive-arrangements-between-indigenous-peoples-and-states

5 Janine Gertz's cultural heritage is drawn from the Gugu Badhun and Ngadjon-ji from North Queensland. Janine is a Lecturer within Nura Gili Centre for Indigenous Programs and Research Associate Indigenous Law Centre, University of New South Wales. Previous co-chair of the Indigenous Peoples Organisation Network of Australia, Janine has attended and participated within UN Permanent Forum of Indigenous Issues (New York); Expert Mechanism on the Rights of Indigenous Peoples (Geneva); EMRIP Seminars on Treaties, Agreements and other reconciliation initiatives, and their constitutional recognition.

6 Hannah McGlade is a Noongar academic at Curtin University. Hannah has worked for many Indigenous organizations and bodies and has been active in establishing services for Indigenous women and children impacted by violence. A former Senior Indigenous Fellow at the Office of the United Nations High Commissioner for Human Rights (OHCHR), Hannah is a current member of the United Nations Permanent Forum on Indigenous Issues (Economic and Social Council). See https://staffportal.curtin.edu.au/staff/profile/view/hannah-mcglade-d624610a/; and https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2/newmembers.html

7 Dylan Lino is a non-Indigenous academic based at the University of Queensland Law School. His research focuses on constitutional law and the rights of Indigenous peoples. For over a decade, Dylan has taught courses that cover the relationship between Indigenous peoples and international law.

8 Sophie Rigney has previously served as a Director of Amnesty International Australia and as Chair of the Commonwealth Human Rights Initiative. Her research on UNDRIP includes the publication 'Is Indigenous Nation Building Capable of Strengthening and Improving Indigenous Holistic Health Outcomes?' (2016) *Journal of Northern Studies* 10(2), 147-159 (with Mark McMillan and Faye McMillan).

Part 2 UNDRIP and Australia

Australia has a very poor record regarding the recognition of the rights of Indigenous peoples especially the right to self-determination, autonomy, self-government, and political participation (Articles 3, 4, 5, 18, 19 and 20 of the UNDRIP). This record has manifested in Australia's failure to engage with Indigenous peoples in any meaningful way. The recognition of Indigenous rights federally and across each state and territory jurisdiction has been piecemeal and ad hoc. The genesis of this maybe found in the lack of treaty at first contact between the British arrivals and the Indigenous populations present. Only recently has there been sub-national and national developments toward modern treaty-making with First Nations. There are no constitutional arrangements, such as section 35 of the *Canadian Constitution* which recognises and guarantees treaty rights and those rights negotiated into the future nor is there any other constitutional right that recognises First Nations.

This history has had a lasting, structural impact. Australian legal and political institutions have developed without a normative framework that grants Indigenous peoples rights legitimacy. In the absence of this, structural recognition has been hindered by a narrow focus on the achievement of equal citizenship rights as the way to overcome socio-economic disadvantage, rather than a full recognition of the distinctive and collective rights of Indigenous peoples.

This structural disempowerment of First Nations in Australia, and its relationship to socio-economic disadvantage more broadly was identified by the UN Special Rapporteur on the Rights of Indigenous Peoples (2014-2020), Victoria Tauli-Corpuz in her 2017 report following her visit to Australia. The Special Rapporteur noted the policies of the Government

> do not duly respect the rights to self-determination and effective participation; contribute to the failure to deliver on the targets in the areas of health, education and employment; and fuel the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islanders.[9]

The Special Rapporteur's first recommendation was to endorse constitutional change via the Uluṟu Statement from the Heart, including through a constitutionally protected First Nations Voice and later, a Makarrata Commission.

In this unique Australian context, the UNDRIP performs an important role for the advancement of First Nations rights and self-determination. As Eddie Synot has written previously, its standards 'are potent mechanisms for Indigenous peoples to speak from and be heard. UNDRIP especially provides recognition of the foundation of self-determination being key to all Indigenous rights and that Indigenous claims exist beyond the narrow understanding of Indigeneity aimed at the alleviation of socio-economic disadvantage. Perhaps most importantly, UNDRIP provides a principled road map to effect self-

[9] *Report of the Special Rapporteur on the rights of indigenous peoples in her visit to Australia*, A/HRC/36/46/Add.2, Human Rights Council, 36th Session (8 August 2017) [Note by the Secretariat].

determination beyond abstraction',[10] or as Janine Gertz argues, operationalised at the local level within the context of autonomy and self-government of Indigenous Nations.[11]

But importantly, in the Australian context, the historical lack of engagement with self-determination rights of Indigenous peoples emphasises the need for the focus now to be on the urgent structural changes that will deliver meaningful, practical reforms for First Nations people. The experience in Canada provides an exemplary warning here. There, British Columbia has enacted the *Declaration on the Rights of Indigenous Peoples Act* [SBC 2019], and the Canadian Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (2020). These Acts require the governments to ensure laws are consistent with the Declaration and prepare an action plan to achieve the objectives of the legislation. These legislative responses, while considered by some as a step towards reconciliation, have been met with concern from many First Nations. First Nations lawyer Bruce McIvor warned that the legislation does not require the government to address the pressing issues of First Nations people, and, rather, 'focus on []future promises" and 'sidestep the realities that Indigenous people face on a daily basis.'[12] Judith Sayers, the Nuu-chan-nulth Tribal Council President has noted that in British Columbia following the implementation of the legislation, this has resulted in fewer opportunities for First Nations participation, not more, prioritising voices that were involved in the drafting of the legislation. Jeremy Patzer, an Indigenous law expert, was concerned that the legislation allowed for the Canadian to selectively endorse the Declaration and write down its normative requirements.[13]

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10 Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluṟu Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320, 324.

11 Janine Gertz, 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples at the local level: Gugu Badhun Self-Determination.' In T. Petray & A. Stephens (Eds.), Refereed proceedings of TASA 2015 conference: *Neoliberalism and contemporary challenges for the Asia-Pacific* (November, 2015); Janine Gertz. 'Determining the Self in Self-Determination', *Indigenous Constitutional Law Blog,* Indigenous Law Centre University of New South Wales (31 March 2022).

12 Bruce McIvor, 'A Cold Rain Falls: Canada's Proposed UNDRIP Legislation' (16 December 2020) https://www.firstpeopleslaw.com/public-education/blog/a-cold-rain-falls-canadas-proposed-undrip-legislation.

13 See further https://vihrc.com/blog/2021/4/13/a-new-era-for-indigenous-rights-in-canada

Part 3 Uluṟu Statement from the Heart & UNDRIP

The UNDRIP is a non-binding declaration of the General Assembly. It reflects international consensus on the rights of indigenous peoples. It is an aspirational framework although several states have implemented it into domestic legislation, giving rise to binding obligations. It is a framework that sits within the structures of the existing state. The UNDRIP does not support secession or impairment of the territory of a sovereign state. This is reflected in Article 46 of the UNDRIP.

> Article 46
>
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The UNDRIP is underpinned by a conception of what is referred to as 'relational' or 'internal' self-determination, that is, self-determination achieved within the State, and focussed on restructuring the relationship between Indigenous Peoples and the State. The right to Self-determination under UNDRIP was to be understood as a duty on states to 'accommodate the aspirations of Indigenous peoples through *constitutional reforms designed to share power democratically'*.[14]

As the UNEMRIP explained in 2021, political participation, Free, Prior and Informed Consent (FPIC) and other rights in the Declaration 'are indivisible, interdependent and grounded in the overarching right of self-determination.'[15] In this part, we will demonstrate how the Regional Dialogues that delivered the Uluṟu Statement, the First Nations Voice, and Makarrata

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[14] UN Sub-Commission on the Promotion and Protection of Human Rights, *Explanatory note concerning the draft Declaration on the Rights of Indigenous Peoples / by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations.*, 19 July 1993, E/CN.4/Sub.2/1993/26/Add.1 [25] (emphasis added).

[15] UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination,* 48th Session, Agenda Item 2 and 5, A/HRC/48/75 (13 September 2021) [14]

represent intertwined assertions of the right to political participation and the broader claims to self-determination through autonomy and self-government. The First Nations dialogues remain a part of a trajectory of implementation as the UNDRIP does not envisage one single moment, act or development as constituting FPIC or the right to self-determination. This dialogue is ongoing.

(B) The Regional Dialogues, First Nations Constitutional Convention & UNDRIP

Article 3 of the UNDRIP states that Indigenous peoples have the right to self-determination, and by virtue of that right 'they freely determine their political status.' The process that led to the Uluru Statement from the Heart provides an historical example of First Nations exercising this determination. As the first time that First Nations people had conducted their own set of consultations on the question of the intention, nature and form of constitutional recognition, the process also represents an historic exercise of **Indigenous-led political participation and FPIC**.

UNDRIP sets out a framework for Indigenous participation in decision-making and the standard of FPIC. This is contained in the two key political participation provisions of the UNDRIP, Articles 18 and 19:

> **Article 18** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> **Article 19** 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.

The right to 'participation' under UNDRIP as opposed to 'consultation', 'shifts decision-making power in some instances from the State (the former consultor) to the Indigenous people (the former consultee)'.[16]

As we explain further below, the First Nations Voice to Parliament was expressly framed during the Dialogues as originating from Article 18 of the UNDRIP on the right to participate in decision-making. The most recent statement on this right in international law was by the UNEMRIP, a UN expert body of the UN Human Rights Council whose mandate was modified in recent times to be the mechanism that provides direction on how the UNDRIP is meant to be implemented and how each article is implemented. The UNEMRIP is issuing studies, article by article, to elucidate the meaning of the Declaration. It commenced with FPIC and then moved onto the right to self-determination. On several occasions the UN has stated the

[16] Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments', in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford, New York: Oxford University Press, 2017), 63, 66-7.

UNDRIP would be better implemented in Australia by implementing the Uluru Statement from the Heart. The UNEMRIP explains the constitutional First Nations Voice as an important right to political participation in the following way:

> The right of indigenous peoples to participate in decision-making is provided for separately in article 18 of the Declaration, a provision grounded in article 25 of the International Covenant on Civil and Political Rights, which guarantees every citizen's right to "take part in the conduct of public affairs". The Declaration adapts this general right to participation to the needs and circumstances of indigenous peoples by seeking to achieve two objectives: first, to correct de jure and de facto exclusion of indigenous peoples from public life or decision-making processes owing to many factors, including prejudiced views against them, a low level of education, difficulties in obtaining citizenship or identification documents and non-participation in electoral processes and political institutions; and, second, to revitalize and restore indigenous peoples' own decisions-making and representative institutions that have either been disregarded or abolished. These institutions should be recognized, revitalized and given opportunities to participate in decision-making.[17]

The right to participation has also been explained as requiring two elements: first, an ability to actually participate in decision-making processes (that is, ensuring mechanisms for participation are available and accessible); and second, a substantive 'capacity to influence the outcomes of decision-making processes'.[18] The three elements of FPIC – that the consent is 'free', 'prior', and 'informed' – are each important, but interlinked. As the UNEMRIP has explained in 2021:

> The term "free" is understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur or the legitimacy of the consultation process may be called into question:
>
> (a) The context or climate of the process should be free from intimidation, coercion, manipulation (see A/HRC/18/42, annex, para. 25) and harassment, ensuring that the consultation process does not limit or restrict indigenous peoples' access to existing policies, services and rights;
>
> (b) Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization (see A/HRC/39/17), violence towards indigenous peoples or prejudiced views towards them;
>
> (c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them.

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17 UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/61 (10 August 2018) [15].

18 International Law Association, 'The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report', 14.

They should therefore enjoy the freedom to resolve international representation issues without interference;

(d) Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue;

(e) Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.

Any free, prior and informed consent process must also be prior to any other decisions allowing a proposal to proceed and should begin as early as possible in the formulation of the proposal. The Inter-American Court of Human Rights in *Saramaka People v. Suriname* (2007) (the *Saramaka* case) uses the terms "early stage" and "early notice". To that end, the "prior" component of free, prior and informed consent should entail:

(a) Involving indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not launched at a late stage in a project's development, when crucial details have already been decided;

(b) Providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes (see A/HRC/18/42, annex, para. 25).

Consultation in the free, prior and informed consent context should be "informed", implying that:

(a) The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear;

(b) The information should be presented in a manner and form understandable to indigenous peoples, including translation into a language that they understand. Consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organization of the indigenous peoples concerned (see A/HRC/18/42). The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity (see E/C.19/2005/3); the reasons for the project; the areas to be affected; social, environmental and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity;19

(c) Adequate resources and capacity should be provided for indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the indigenous peoples of their rights in general — prior or parallel to the process of consultation. For example, the Australian Referendum Council recommended that the Government of Australia consider proposals designed by Aboriginal and Torres Strait Islander peoples during 13 regional dialogues and a national indigenous constitutional convention in May 2017 calling for a new First Nations representative public institution called "Voice to Parliament" based on articles 18 and 19 of the Declaration.20 In two cases (*Finmark Estate Agency v. Nesseby regional society* (the *Unjárga* case) and *Norway v. Jovsset Ánte Iversen Sara* (the *Sara* case)), the Supreme Court of Norway referred to the consent and participation of the Sami Parliament as support for its decision

> that national legislation was in accordance with international law on indigenous rights, including the Declaration, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).21 However, in the Sara case, the Court referred to the participation of the Sami Parliament as support for its decision, although consent was not achieved. It is a concern if participation is used as support for State decisions where consent is not achieved, as this could discourage indigenous peoples from participating in decision-making processes.
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> Failure to engage with legitimate representatives of indigenous peoples can undermine any consent received. In the Declaration it is clear that States and third parties should consult and cooperate with indigenous peoples "through their own representative institutions" (arts. 19 and 32) and "in accordance with their own procedures" (art. 18). All parties should ensure representation from women, children,22 youth and persons with disabilities, and efforts should be made to understand the specific impacts on them (see A/HRC/18/42). Yet, identifying the legitimate representatives of indigenous peoples can be challenging. States should be mindful of situations where indigenous peoples' decision-making institutions have been undermined by colonialism and where communities have been dispersed, dispossessed of land or relocated, including to urban areas. These situations may require State assistance to rebuild indigenous peoples' capacity to represent themselves appropriately. It is important for States or third parties to ensure that institutions supporting indigenous peoples and claiming to represent them are so mandated.[19]

The Uluṟu Statement from the Heart was delivered at the First Nations Constitutional Convention in Uluṟu on 26 May 2017, by 250 delegates who had been selected to represent 13 Regional Dialogues conducted across the country. The Convention delegates met to deliver the Record of Meeting from each of the Dialogues. Approximately 1200 First Nations people participated in the exercise. It was overseen by the Indigenous Steering Committee of the Referendum Council. This comprised of some of the Indigenous members of that Council.

Here, we highlight seven elements of the ***Regional Dialogue*** design and process to demonstrate how it was an exercise of First Nations' right to determine their own political status, and an example of political participation under article 19, and an exercise of Free, Prior and Informed Consent.

1. **The establishment of the Referendum Council at the request of First Nations leaders:** The Referendum Council was established in 2015, following the delivery of the Kirribilli Statement to the Prime Minister and Opposition Leader by First Nations leaders after the movement to constitutional recognition seemed destined to symbolic recognition. The Kirribilli Statement demanded a new dialogue between the government and First Nations and rejected minimalist constitutional change.
2. **Self-determined design of the process:** Throughout 2016 the Indigenous Steering Committee of the Council undertook three national meetings - traditional owners, community organisations and prominent and representative individuals – to design a

[19] UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/61 (10 August 2018) [20-23] and see further [24]-[30].

process of First Nations Regional Dialogues across the country. In the end, thirteen Dialogues were held, from Hobart to Broome to the Torres Strait. The design process was, for the first time, led by Aboriginal and Torres Strait Islander people themselves. This meant that it was designed to be culturally legitimate, as well as responsive to Aboriginal and Torres Strait Islander community needs.

3. **First Nations selection of delegates to the Dialogues and the Convention:** Each dialogue included approximately 100 participants, drawing 60% from traditional owners (native title holders, land rights holders), 20% from local community organisations and 20% local community people. Delegates were selected with the assistance of local Indigenous leaders, being a community controlled process throughout. Each Dialogue then selected – in accordance with its own self-determined selection process – ten delegates to attend the Uluṟu Convention and represent the views of the Dialogue to the national forum.

4. **Dialogues were led by local First Nations representatives:** The dialogues were all locally led. The structure of engagement was set by the leaders forums and was overseen by the Referendum Council, with convenors and working group leaders being elevated from within local communities. This ensured, that a base level of trust had already been established with the communities.

5. **Informed decision-making:** The dialogues were structured to ensure information was provided to the dialogue participations prior to the discussion of options. This included a history of advocacy for structural change, civics education on the Australian legal and political system, the legal options (including treaty and voice) and political considerations. Unlike consultations in the past, materials – written and audio-visual – were developed so delegates could engage in the dialogue from a shared level of understanding of the issues. Each dialogue was assisted by technical advisers expert in public law.

6. **Agreed meeting record:** All the records of the meetings of the Dialogues were settled with delegates at the meeting before everyone departed. The agreement and adoption of the record of meeting was the final act of the dialogue. This was important, as these records reflected the local community views, and were to be read out at the national constitutional convention by the regional delegates.

7. **Self-determined – not pre-determined – outcomes:** The dialogues were designed to encourage dialogue about options for change. This is a departure from the contemporary approach of consultation with Indigenous communities that is more often than not, *consultation* on pre-determined options. This was evident in a number of dimensions, perhaps most significantly in the emergence of truth-telling as a final reform endorsed by the Uluṟu Convention. Truth-telling was not an official 'option' on which the Referendum Council structured the agenda of the dialogues (these included – acknowledgement, change to the races power, Voice, racial non-discrimination

> clause and Treaty). But the need for truth telling – and its absence to date – emerged so clearly across the sessions in every single dialogue, It could not be ignored, and it was endorsed by the delegates at Uluṟu as one of the three reforms included in the Uluṟu Statement.

The ***First Nations Constitutional Convention*** also represents an important part of the self-determined nature of the process that delivered the Uluṟu Statement from the Heart. The Convention provided a forum that respected self-determined priorities which were deliberated and settled by delegates at the Regional Dialogues. It was a forum in which regional delegates were asked to endorse a national reform position that accorded with the priorities that had been set at the regional level.

This process was conducted through initial agreement on a set of Guiding Principles, against which the reform priorities must be addressed. As the Referendum Council Final Report (2017) explains, these Guiding Principles were distilled from the Regional Dialogues' records of meetings, as well as historically underpinning declarations and calls for reform by First Nations (including in the Bark Petitions 1963, the Barunga Statement 1988, the Eva Valley Statement 1993, the Kalkaringi Statement 1998, the report on the Social Justice Package by ATSIC 1995 and the Kirribilli Statement 2015). They also reflect international standards pertaining to Indigenous peoples' rights and international human rights law. The Referendum Council Report sets out the principles as follows:

> The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:
>
> 1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
>
> 2. Involves substantive, structural reform.
>
> 3. Advances self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*.
>
> 4. Recognises the status and rights of First Nations.
>
> 5. Tells the truth of history.
>
> 6. Does not foreclose on future advancement.
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> 7. Does not waste the opportunity of reform.
>
> 8. Provides a mechanism for First Nations agreement-making.
>
> 9. Has the support of First Nations.
>
> 10. Does not interfere with positive legal arrangements.[20]

[20] Referendum Council *Final Report* (2015) 22, see also 22-28.

Guiding Principle 3 explicitly references the standards of the UNDRIP, but other Guiding Principles also engage directly with the UNDRIP, including the need for substantive, structural reform (Articles 3 and 37), recognition of the status and rights of First Nations (preamble to UNDRIP), telling the truth of history (Preambular paragraphs 3, 4, 8, 15 and 21; Articles 5, 15, 37 and 40), providing a mechanism for First Nations agreement-making (Article 37) and requiring the support of First Nations (Articles 3 and 19).

Each of the proposed constitutional reforms considered at the Dialogues was then assessed against the Guiding Principles. The Referendum Council Report explains those assessments in relation to the reforms of Voice, Treaty and Truth:[21]

> **Voice to Parliament**
>
> A constitutionally entrenched Voice to Parliament was a strongly supported option across the Dialogues. It was considered as a way by which the right to self-determination could be achieved. Aboriginal and Torres Strait Islander peoples need to be involved in the design of any model for the Voice.
>
> There was a concern that the proposed body would have insufficient power if its constitutional function was 'advisory' only, and there was support in many Dialogues for it to be given stronger powers so that it could be a mechanism for providing 'free, prior and informed consent'. Any Voice to Parliament should be designed so that it could support and promote a treaty-making process. Any body must have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia. It must represent communities in remote, rural and urban areas, and not be comprised of handpicked leaders. The body must b structured in a way that respects culture. Any body must also be supported by a sufficient and guaranteed budget, with access to its own independent secretariat, experts and lawyers. It was also suggested that the body could represent Aboriginal and Torres Strait Islander Peoples internationally. A number of Dialogues said the body's representation could be drawn from a Assembly of First Nations, which could be established through a series of treaties among nations.
>
> **Treaty**
>
> The pursuit of Treaty and treaties was strongly supported across the Dialogues. Treaty was seen as a pathway to recognition of sovereignty and for achieving future meaningful reform for Aboriginal and Torres Strait Islander Peoples. Treaty would be the vehicle to achieve self determination, autonomy and self-government.
>
> The Dialogues discussed who would be the parties to Treaty, as well as the process, content and enforcement questions that pursuing Treaty raises. In relation to process, these questions included whether a Treaty should be negotiated first as a national

[21] Referendum Council *Final Report* (2017) 30-32. Please note we have omitted the extensive references in the original report to the Regional Dialogues Records of Meetings.

framework agreement under which regional and local treaties are made. In relation to content, the Dialogues discussed that a Treaty could include a proper say in decision-making, the establishment of a truth commission, reparations, a settlement, the resolution of land, water and resources issues, recognition of authority and customary law, and guarantees of respect for the rights of Aboriginal and Torres Strait Islander peoples. In relation to enforcement, the issues raised were about the legal force the Treaty should have, and particularly whether it should be backed by legislation or given constitutional force.

There were different views about the priority as between Treaty and constitutional reform. For some, Treaty should be pursued alongside, but separate from, constitutional reform. For others, constitutional reform that gives Aboriginal and Torres Strait Islander peoples a voice in the political process will be a way to achieve Treaty. For others, specific constitutional amendment could set out a negotiating framework, and give constitutional status to any concluded treaty.

Truth-telling

The need for the truth to be told as part of the process of reform emerged from many of the Dialogues. The Dialogues emphasised that the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination. This truth also needed to include the stories of how First Nations Peoples have contributed to protecting and building this country. A truth commission could be established as part of any reform, for example, prior to a constitutional reform or as part of a Treaty negotiation.

The Regional Dialogue process and First Nations Constitutional Convention that delivered the Uluṟu Statement from the Heart pioneered a model of genuine deliberative consultation with Aboriginal and Torres Strait Islander communities on sophisticated, nuanced and highly contested issues of public policy and law. For the reasons we have explained in this Part, it represents an extraordinary, and historic example of the exercise of the right to freely determine political status, as is enshrined in the foundational Article 3 of the UNDRIP.

(B) The Uluṟu Statement: First Nations Voice & UNDRIP

The Uluṟu Statement calls for three reforms: Voice and Makarrata, comprised of agreement-making and truth telling. Each of these reforms is consistent with the objectives of the UNDRIP, in that they are structural mechanisms designed to support the self-determination of Indigenous peoples, and to mediate the relationship between Indigenous peoples and the State.[22] The first reform, the constitutional establishment of a First Nations Voice, as we

[22] UN Sub-Commission on the Promotion and Protection of Human Rights, Explanatory note concerning the draft Declaration on the Rights of Indigenous Peoples / by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations., 19 July 1993, E/CN.4/Sub.2/1993/26/Add.1 [13]. See also

explain in this part, provides a forum for First Nations ongoing political participation and the provision of Free, Prior and Informed Consent (FPIC). The constitutional nature of this mechanism provides the groundwork for negotiation of broader self-determination rights, autonomy and self-government, including through Makarrata (agreement making and truth-telling).

Its **constitutional status** is a fundamental dimension of its ability to realise the rights in the UNDRIP. Without constitutional establishment, protection and status, the First Nations Voice is vulnerable to instability and future abolition and is likely to lack the necessary legal and political authority that is required to provide FPIC. As the UNEMRIP explained in 2021:

> The constitutional recognition of Indigenous peoples provides legal authority for the realization of the right to self-determination. Failure to legally recognise indigenous peoples obviates that right.'[23]

The report recommends:

> States should support the effective participation, political and otherwise, of indigenous peoples in the overall functioning of the State. That can be achieved through a constitutionally recognized indigenous role and through a duty to consult and cooperate with the indigenous peoples concerned.[24]

In 2017, UN Special Rapporteur on the Rights of Indigenous Peoples (2014-2020), Victoria Tauli-Corpuz, urged the government and the Australian people to support the call for a constitutionally enshrined Voice:

> With respect to the institutional and legal framework, the Special Rapporteur recommends that the Government:
>
> > (a) Place full political weight behind and act on the proposals put forth by the Referendum Council, including the establishment of a "First Nations Voice" in the Constitution and of a commission for treaty negotiation and truth-telling. Such measures would carry momentous significance to resetting the relationship with the First Peoples of Australia.[25]

The UN Special Rapporteur, in urging support for the Uluru Statement, explained that the Voice would 'strengthen First Nations voices, to create a mechanism where First Nations voices can really be heard'.[26] As we have explained in Part 3(B), the First Nations Voice was

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Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) Melbourne Journal of International Law 439, 459.

23 UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination,* 48th Session, Agenda Item 2 and 5, A/HRC/48/75 (13 September 2021) [35].

24 Ibid [70].

25 *Report of the Special Rapporteur on the rights of indigenous peoples in her visit to Australia*, A/HRC/36/46/Add.2, Human Rights Council, 36th Session (8 August 2017) [107].

26 Victoria Tauli-Corpuz, National Press Club, 4 July 2018.

conceived by the delegates at the Regional Dialogues as a self-determined political institution to provide a dual function:

1. A mechanism to elicit FPIC from the state on decisions the state makes about them and through it; and
2. To achieve self-determination.

In calling for this reform, delegates sought political participation as recognised in the Art 19 UNDRIP before decisions are made about them and actions are taken against them. The most recent UN statement on what this means is set out below, highlighting that the obligation of the state to consult is not one single event, but it is ongoing:

> States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective (see A/HRC/18/42, annex, para. 9). The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up. Use in the Declaration of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard (see A/HRC/18/42). It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.[27]

Professors Megan Davis and George Williams have explained that the Voice will be:

> a structural reform. It is a change to the structure of Australia's public institutions and would redistribute public power via the Constitution … [it] will 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-making.[28]

Each of the conditions for political participation under Article 19 that we have outlined above has important repercussions for the design and resourcing of the Voice. Based on the requirements, we draw the Committee's attention to the need for the following:

(a) **Its membership must be legitimate and authoritative within First Nations communities, drawn from self-determined processes.** It must have a structure that represents and reflects local communities in their diversity, giving those a voice who haven't had a voice in the past. It must have cultural legitimacy, in that it must be selected by Aboriginal and Torres Strait Islander peoples themselves in accordance with their own local practices, protocols and expectations. Cultural authority is

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27 UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/61 (10 August 2018) [15].

28 Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (UNSW Press, 2021), 151-2. See also Dani Larkin and Sophie Rigney, 'State and territory legislative vulnerabilities and why an Indigenous Voice must be constitutionally enshrined' (2021) 46(3) *Alternative Law Journal* 205-211.

integral to the consent being able to be provided. This is key to the Voice being an exercise of the right under Article 3 of the UNDRIP, of a 'freely determined political status' within the State.

(b) **The scope of its participation cannot be limited by the Parliament or the Executive.** In this respect, the ILC have argued that the primary function of the Voice should extend to all matters *it deems relevant* to Aboriginal and Torres Strait Islander Peoples.[29]

(c) **It must have a clear status and power vis-à-vis other arms of government, and be structurally independent of government.** Its constitutional status should be clearly separated from the other branches of government, through the creation of a new, separate chapter. This would accord it constitutional status to speak to the other branches of government, which are each given their own separate constitutional chapter. It must be independent from the government so that it can present accurately and robustly the views of the Aboriginal and Torres Strait Islander peoples that it represents. This will be connected to (d) in relation to independent funding.

(d) **It must have appropriate levels of resourcing and support.** Political participation, and 'free', 'prior', and 'informed' each have resourcing implications, and cannot be realised without a structure that is designed with sufficient resourcing at its disposal.

(C) The Uluṟu Statement: Makarrata & UNDRIP

The Uluṟu Statement from the Heart acknowledges the entangled relationship between the existence of First Nations and Australia's nationhood:

> "With substantive constitutional change and structural reform, we believe (our) ancient sovereignty can shine through as a fuller expression of Australia's nationhood."

The Uluṟu Statement is also clear about First Nations sovereignty, which "has never been extinguished" or ceded, whilst explaining the existence of Indigenous nationhood:

> "Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent lands and possessed it under our own laws and customs."

The Uluṟu Statement from the Heart is an invitation to the Australian people to not only reset their social and political relationship with the Aboriginal and Torres Strait Islander population (Treaty), but for Australian Governments to re-establish their legal and political relationships with the multitude and diversity of Indigenous Nations (treaties). Strengthened by a constitutionally enshrined Voice to Parliament, Makarrata through agreement making is an opportunity not only for the sovereignty of Indigenous Nations to be recognised by the

[29] Indigenous Law Centre, *Issues Paper 1: The Constitutional Amendment* (2022)

Australian people and its governments but for Indigenous Nations to re-build their own capacity for effective and capable self-government.[30] Treaties are the mechanism to facilitate and achieve the social, cultural, economic, and political development goals according to the own customs and procedures of Indigenous Nations as per UNDRIP Articles 3, 9 and 34. Along with Article 3, the right to self-determination, Article 9 articulates the right of Indigenous peoples to be members of an Indigenous Nation, and Article 34 promotes the right of Indigenous peoples to develop and maintain their own institutional structures in accordance with their customs, spirituality, traditions, procedures, practices and juridical systems.

This Indigenous nation-building[31] approach via Makarrata involve a shift in the self-determination mindset of First Nations peoples and Australian governments however, and rather than looking to Australian governments to design and implement programs of Indigenous self-determination, the policy design emphasis becomes more about how can First Nations people exercise their own capacity for self-determination? This is particularly important within the context of Health and Wellbeing, as the research shows that Indigenous Nation-Building "mitigates the effects of settler-colonialism on Aboriginal and Torres Strait Islander communities and individuals thereby improving health and well-being" indicators.[32]

Issues based vs Culturally based representation

First Nations peoples so far have largely been represented through issues-based policy and program initiatives such as the National Partnership Agreement on Closing the Gap. There is a need for issues-based representation to continue however, the opportunity for cultural and political representation of Indigenous Nations presents itself through the Uluṟu Statement, firstly through the potential of a 'First Nations Assembly'[33] within the Voice to Parliament and via the negotiation of Treaty and treaties. As Janine Gertz writes, the authority of an Indigenous Nation to decide important local level matters such as cultural identity and

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30 Darryle Rigney, Anthea Compton, Damien Bell, Debra Evans, Donna Murray and Janine Gertz, 'Establishing a Voice to Parliament could be an opportunity for Indigenous Nation Building. Here's what that means.' (August 2022), The Conversation, Australia.

31 Ibid. See also 'What is Native Nation Building?', See https://nni.arizona.edu/programs-projects/what-native-nation-building.

32 Darryle Rigney, Simone Bignall, Alison Vivian and Steve Hemming. 'Indigenous Nation-Building and the Political Determinants of Health and Wellbeing', Discussion Paper, Lowitja Institute, August 2022, 1. https://www.lowitja.org.au/content/Document/LI_IndNatBuild_DiscPaper_0822.pdf

33 Tony McAvoy. 'Time for Treaty.' *Arena Magazine (Melbourne, Vic.)*, 141, 16–19, (2016). Over recent years there has been discussion at the annual National Native Title Conferences about the creation of a national Assembly of First Nations. These discussions have led to the establishment of a working group consisting of several people having interest in pursuing such a body. The working group consists of Wirdi man Tony McAvoy, Mick Gooda (previous Aboriginal and Torres Strait Islander Social Justice Commissioner), Geoff Scott (previous CEO of the National Congress of Australia's First Peoples), Mark McMillan (law lecturer at Melbourne University), Valerie Coombs (member of the National Native Title Tribunal and Chair of the Quandamooka Yoolooburrabee Aboriginal Corporation (RNTBC), Robynne Quiggin (formerly CEO of the Australian Indigenous Governance Institute and Australian Human Rights Commission) and Janine Gertz (a Gugu Badhun and Ngadjon-jii woman), (2016, 19).

membership or to design local level social, cultural, and economic policy and programs for the Nation could be delegated and assigned through negotiated treaty arrangements. These treaty negotiations and self-government arrangements would be based on the sovereignty of Indigenous Nations that is drawn from the geographic territories, populations and the social, cultural, and political jurisdictions that facilitate the cultural and political identity of Indigenous Nations.[34]

If Australian governments engage with the many Indigenous nations across this continent by acknowledging their distinct and separate laws and customs a constitutionally enshrined Voice to Parliament followed by Makarrata would enable and enhance the cultural and political representation of Aboriginal and Torres Strait Islander Nations. This can be achieved by implementing the right of Indigenous Nations to self-determination and their right to self-governing institutions that facilitate participation in the political, economic, social, and cultural life of the Australian state as per UNDRIP Articles 3, 4, 5, 9 and 18; along with implementing the right of Indigenous Nations to practice their distinct and separate laws and customs as per UNDRIP Articles 11, 12 & 13 and 34.

When implementing the right of Indigenous Nations to establish their own local level self-determining, self-governing political institutions it is important to understand and acknowledge the limitations of Registered Native Title Body Corporates (and their regional representative bodies) to engage in the fuller expression and scope of Treaty Negotiations.[35]

Makarrata - Agreement Making and the UNDRIP

As we have outlined earlier within this submission the articles and principles within UNDRIP provide an important framework for Aboriginal and Torres Strait Islander political dialogue and advocacy with the state.[36]

The right to self-determination and the recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements, are affirmed in UNDRIP Articles 3 and 37, and when read in conjunction with preambular paragraphs 14, 15 and 24, the UNDRIP

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34 Janine Gertz, 'Determining the Self in Self-Determination', *Indigenous Constitutional Law Blog,* Indigenous Law Centre, University of New South Wales Sydney (31 March 2022).; See also Alison Vivian, Miriam Jorgensen, Alexander Reilly, Mark McMillan, Cosma McRae & John McMinn. 'Indigenous Self-Government in the Australian Federation.' *Australian indigenous law review*, *20*(2017), 215-242.

35 Janine Gertz 'Statement on the Limitation of Native Title Corporations in Treaty Negotiations' (Paper presented at the Expert Mechanism on the Rights of Indigenous Peoples Seminar on Treaties, Agreements and other reconciliation initiatives, and their constitutional recognition, Online, (30 November 2021).

36 Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439, 459; Megan Davis, 'The United Nations *Declaration on the Rights of Indigenous Peoples*' (2007) 11(3) *Australian Indigenous Law Review* 55; Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

underscores the importance of partnerships between Indigenous Peoples and states based on mutual consent and good faith:[37]

> Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 37.1 - Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

When combined, UNDRIP articles, 27, 28, and 40 provide a framework for states implementing Article 37 (the right to negotiate treaties) in full partnership with Indigenous Peoples. This includes the processes that can help resolve conflicts or disputes about the violations of treaty rights during negotiations and implementation. UNDRIP Article 27 addresses Indigenous Peoples' right to participate in a fair, independent, impartial, open, and transparent process; Article 28 speaks to the right to compensation and redress; and Article 40 conveys the right to fair procedures for the resolution of conflicts and disputes.[38]

The UNDRIP principles of self-determination; participation in decision-making that is supported by free, prior, and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination, also provide guidance on the practical implementation of UNDRIP Article 37 which outlines the right to negotiate treaties. The establishment of a Makarrata Commission as called for within the Uluṟu Statement will be integral to the processes of monitoring and facilitating fair and just treaty negotiations across the continent, ensuring that each treaty is negotiated through the guiding articles and principles of the UNDRIP — but most importantly through the principle of Free, Prior and Informed Consent.

Makarrata (Truth-Telling)

In the Regional Dialogues, truth-telling emerged as a Guiding Principle (Principle 5 – Tells the Truth of History), and as one of the three structural reforms that was included in the Uluṟu Statement.

The UNDRIP recognises in its preamble the importance of understanding historic injustices caused by colonial dispossession to inform the exercise of the rights in the Declaration:

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37 Expert Mechanism on the Rights of Indigenous Peoples [EMRIP]. (2014). Compilation of Conclusions and Recommendations from the United Nations Seminars on Treaties, Agreements and other Constructive Arrangements, Expert Mechanism on the Rights of Indigenous Peoples, Seventh session 7-11 July 2014, Item 7 of the provisional agenda United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council, United Nations, Geneva, 3, 4.

38 Ibid

> ***Concerned*** that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

The UNDRIP also recognises the importance of history in understanding the UNDRIP rights:

> ***Recognizing*** the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources, (emphasis added)

Article 15 articulates this importance in the right to culture, and the States' responsibility to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

> Article 15
>
> 1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
>
> 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society

In addition to these explicit acknowledgements of the foundational role of truth about historical injustices, and Indigenous history, the right to self-determination in UNDRIP gives to First Nations people *the right to control their history*.

The call in the Uluṟu Statement for truth telling reflects the need for First Nations control of the truth-telling process, including what is told, how it is told, and when it is told.

The reform emerged independently from the dialogue process, in that it was not a pre-set reform option that had been set by the government or Referendum Council. Rather, it emerged powerfully, organically and independently from each Dialogue. Delegates were consistent in their belief that a truth-telling of injustices, resistance, resilience, achievement and culture, was part of reforming the Australian nation. In this way, as Professors Gabrielle Appleby and Megan Davis have written,[39] the truth-telling that is being sought is both an historical exercise, but also part of the contemporary political transition in Australia. In the Uluṟu Statement, truth-telling is part of the culmination of the reform agenda, to occur after the First Nations Voice has been constitutionally enshrined to guarantee political participation through FPIC.

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[39] Gabrielle Appleby & Megan Davis 'The Uluṟu Statement and the Promises of Truth' (2018) 49 *Australian Historical Studies* 501-509.

The political participation that is provided by the Voice makes a self-determined exercise of truth-telling possible. The Uluṟu Statement explains this is to be overseen by an independent Makarrata Commission. The intention is that the Commission, its membership, its terms of reference and its procedure, will be negotiated between the Voice and the State. This demonstrates the importance of truth-telling being shared in nature. Importantly, it is not to be controlled by the State. A truth-telling process that occurs before the work of developing and ensuring robust political participation and FPIC risks the fate of many Australian attempts at truth-telling in the past, including State commissions of inquiry such as the Royal Commission into Aboriginal deaths in custody, recognising the damage and ongoing intergenerational trauma caused by dispossession, violence and assimilation policies; and the Human Rights and Equal Opportunity Commission's Bringing them Home Report into the stolen generations, which included testimony from individuals who had been affected by the government's policies. As historian Kate Fullagar has written, 'it's not that we lack truths about the Indigenous presence in Australian history', but that state-led processes can be 'wrenchingly slow or simply useless.' [40] In the Uluṟu Statement from the Heart, in seeking a Makarrata Commission in which *they* negotiate the rules of the game, are seeking to change this.

[40] https://insidestory.org.au/why-does-truth-come-third/