Submission to the Senate Legal and Constitutional Affairs References Committee's Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

June 2022

About us

Change the Record is Australia's only national First Nations-led justice coalition. We are a coalition of legal, health, human rights and First Nations organisations who share two key objectives - to end the mass incarceration of Aboriginal and Torres Strait Islander peoples and the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander women and children.

We thank the Committee for the opportunity to contribute to this inquiry.

Our submission

Systemic breaches of the rights of First Nations peoples

Racism, discrimination and denial of the collective rights of sovereign Aboriginal and Torres Strait Islander peoples underpin many of the political, economic and legal systems that form 'modern Australia'. Despite this, First Nations peoples have resisted and survived the violence of colonisation, dispossession, displacement and discrimination for more than two centuries with strength, pride and dignity.

First Nations peoples' social, economic and cultural rights under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) are not being upheld or protected by Commonwealth, state or territory law and systems.

Evidence of this is widespread in:

- The continent-wide mass incarceration of First Nations children and adults;

- First Nations peoples' disproportionate experience of child removal and family violence;
- The systemic discrimination First Nations peoples face when attempting to access justice and in legal systems;
- Implementation of government policy which fundamentally impacts the lives of First Nations peoples without consultation or consent;
- Discriminatory social security measures such as compulsory income management and targeted compliance frameworks;
- Discrimination and inequality within the labour market, rental market and other markets;
- The profound social and economic inequality faced by First Nations peoples;
- Denial of land and resource rights; and
- The lack of government support for self-determination in development, implementation and evaluation of policy affecting Aboriginal and Torres Strait Islander peoples.

First Nations peoples in Australia are systematically denied the decision-making power and resources needed to collectively determine their own affairs and futures.

Change the Record has two specific objectives - to address the mass imprisonment of First Nations peoples, and the disproportionate rate of family violence experienced by Aboriginal and Torres Strait Islander women. Therefore, our submission will focus on these key areas. However, the denial of the human rights of First Nations peoples is a systemic and structural phenomenon that must be combatted at all levels of government, business and community. Though we will not discuss them in this submission, we consider land rights and ownership and control of land and resources to be fundamental to the achievement, protection and enforcement of Aboriginal and Torres Strait Islander peoples' social, economic and cultural rights on this continent.

Aboriginal and Torres Strait Islander people are criminalised and incarcerated at appalling rates and face discrimination at every point in the criminal legal system. In her 2017 report on her country visit to Australia, the UN Special Rapporteur on the Rights of Indigenous Peoples reported that 'The extraordinarily high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern.'[1] First Nations peoples are denied access to justice according to traditional law and disproportionately affected

[1] Office of the United Nations High Commissioner for Human Rights, 2017, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on her visit to Australia*.

by punitive bail and mandatory sentencing laws. First Nations children are the disproportionate victims of Australia's disgracefully low minimum age of criminal responsibility.

Incorporating UNDRIP into domestic law would go some way to addressing and redressing these injustices and preventing similar injustices in the future. It would require governments to recognise the foundational importance of self-determination to the rights of First Nations peoples, and to actively promote and support self-determination when developing and implementing policy and law.

Commonwealth failure to protect human rights and allow for relief through the courts

The lack of a Commonwealth Human Rights Act that recognises the individual and collective social, economic and cultural rights of First Nations peoples limits First Nations peoples' ability to enforce those rights and challenge discriminatory policy through the courts. The failure of successive federal governments to implement a Human Rights Act is not for want of trying on the part of many First Nations, civil society, legal and human rights organisations. We encourage the Committee to consider the history of attempts to enshrine human rights instruments into domestic law as instructive of the barriers advocates face in pursuing the full incorporation and enforcement of the rights enshrined in UNDRIP.

The lack of a Commonwealth Human Rights Act which enables the community to seek relief from the courts for human rights abuses has enabled laws that clearly breach human rights to remain in force, such as mandatory sentencing laws in Western Australia and the Northern Territory. Mandatory sentencing laws have had a disproportionate and catastrophic impact on the lives of criminalised First Nations peoples, their families and their communities, as noted by the United Nations in 2014.[2] Such laws breach human rights enshrined in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, international treaties to which Australia is a signatory.[3] The United Nations Committee Against Torture has recommended that Australia 'review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances'.[4]

[2] Australian Law Reform Commission, 2017, 'Mandatory sentencing' in Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84), 4.31
[3] Ibid., 4.29
[4] Ibid., 4.31

Without the ability to pursue their rights through the courts, affected people and communities are left to rely on the federal government to uphold them. While the Commonwealth has the Constitutional ability to strike down mandatory sentencing laws[5], successive governments have refused to do so. With the federal parliament also repeatedly refusing to implement a human rights framework which would allow laws that breach human rights to be challenged in the courts, discriminatory and cruel treatment such as mandatory sentencing is allowed to continue unabated.

Failure of the *Human Rights (Parliamentary Scrutiny) Act 2011* to protect or uphold individual and collective rights

In the absence of any overarching human rights framework in Australia, the *Human Rights (Parliamentary Scrutiny) Act 2011* (**the Act**) was implemented by the Gillard government. Implementation of such an Act was recommended by the 2009 National Human Rights Consultation led by Frank Brennan, prepared for the Rudd Government.[6] The report also recommended implementation of a Human Rights Act[7], as did the majority of consultation participants[8].

The Act requires that new Bills and disallowable legislative instruments be accompanied by a Statement of Compatibility with relevant human rights recognised in the following international treaties ratified by Australia[9]:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

[5] Zdenkowski, G., 1999, *New Challenge to NT Mandatory Sentencing: Bob Brown's Abolition of Compulsory Imprisonment Bill 1998*, Indigenous Law Bulletin 15.
[6] *National Human Rights Consultation Report*, 2009, Recommendations 6 & 7.
[7] Ibid., Recommendation 18.
[8] Ibid., p72.
[9] Commonwealth Attorney-General's Department, *International human rights system*, website.

- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Rights of Persons with Disabilities (CRPD).

A Parliamentary Joint Committee on Human Rights, comprised of 10 members of both houses of parliament, is tasked with examining Bills, Acts and legislative instruments for compatibility with the rights contained in these treaties, and to conduct inquiries into matters relating to human rights referred to it by the Commonwealth Attorney-General.

In a national human rights framework which relies solely on parliamentary action for the protection of social, economic and cultural rights, the fact that Australia's parliamentary human rights committee can only be referred matters for inquiry by a government Minister is not acceptable.

Williams and Reynolds[10] distil the goals of the Act as to:

- *"improve engagement and debate among parliamentarians about the human rights issues raised by proposed laws (the 'deliberative impact');*
- *improve the quality of legislation from a human rights perspective, such as by leading to legislative amendments or retractions of rights-infringing Bills (the 'legislative impact');*
- *promote broader community awareness and understanding of human rights issues in regard to proposed laws (the 'media impact'); and*
- *not give rise to additional litigation or powers to judges in respect of human rights (the 'judicial impact')."*

In our view, the Act has been effective in achieving only the final goal, that of providing no scope for Bills, Acts or legislative instruments to be declared non-compliant with Australia's obligations under international law and struck down by the judiciary.

Another major failure of the legislation is that UNDRIP is not included in the Act's definition of human rights, preventing even parliamentary scrutiny of the protection of the collective rights of

[10] Williams, G., and Reynolds, D., 2015, *The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights*, Monash University Law Review, Volume 41(2), p472.

First Nations peoples. The Act has not had the effect of preventing the passage of laws and instruments that discriminate against First Nations peoples.

The Act and Parliamentary Joint Committee on Human Rights' failures are particularly notable in relation to social security law, regulations and policies which disproportionately affect First Nations peoples such as the Community Development Program, ParentsNext and compulsory income management; the continuation of legal arrangements and policies of dispossession, coercion, control and denial of land rights as part of the Northern Territory Intervention and Stronger Futures legislation; and failure to implement the Optional Protocol on the Convention Against Torture (**OPCAT**) nationwide in a comprehensive and timely manner.

The need to audit legislation, instruments and policy frameworks

Given the lack of an effective framework for protecting human rights in Australia to date and the historic and ongoing systemic discrimination against Aboriginal and Torres Strait Islander peoples, a comprehensive audit should be undertaken of the non/compliance of federal legislation and legislative instruments, policy and federal department and agency practices with the rights contained in UNDRIP.

The audit should identify inconsistencies with UNDRIP that give rise to human rights breaches, gaps in legislative and policy frameworks resulting in inadequate protection of the individual and collective rights of First Nations peoples, and priorities for reform. This approach was taken in both Victoria and the United Kingdom[11] before they implemented their own Human Rights Acts.

It is our view that irrespective of whether or not the Commonwealth government intends to implement a Human Rights Act, a government committed to the implementation of UNDRIP must investigate the extent of non-compliance with UNDRIP in existing legal and policy frameworks as a first step. At the very least, such an audit should have First Nations oversight and the agency conducting the audit should encourage and facilitate the input of Aboriginal and Torres Strait Islander peoples, communities and organisations into its conduct, priorities and conclusions.

Given the scale of the task, such an audit should prioritise legal and policy regimes identified by Aboriginal and Torres Strait Islander communities and First Nations-led civil society bodies, the

[11] *National Human Rights Consultation Report*, 2009, p155-156.

United Nations Special Rapporteur on the rights of Indigenous Peoples, the United Nations Human Rights Council and the Australian Human Rights Commission as areas of particular concern. National Agreements, Action Plans and Frameworks should be reviewed for compliance with UNDRIP. Particularly relevant examples include the National Agreement on Closing the Gap, the next National Women's Safety Plan, and any future National Anti-Racism Strategy or Framework.

In our view, a logical conclusion of the four Priority Reforms contained in the National Agreement on Closing the Gap is the full incorporation of UNDRIP into domestic law and practice. Progress on the incorporation of rights laid out in UNDRIP should form part of Commonwealth, state and territory Closing the Gap Implementation Plans.

Change the Record has called for a stand-alone, self-determined National Safety Plan for Aboriginal and Torres Strait Islander women, which we discuss in our 2021 paper *Pathways to Safety*[12]. Both the mainstream National Women's Safety Plan and National Safety Plan for Aboriginal and Torres Strait Islander Women should have regard for the imperatives of self-determination, free, prior and informed consent, support for Aboriginal Community-Controlled Organisations and cultural competence in mainstream services in ending violence against First Nations women and their children.

Need for an action plan

The incorporation of UNDRIP into Australian law and policy requires an implementation plan that adheres to the intrinsically-linked principles of self-determination and free, prior and informed consent. According to Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar AO, 'the first step [for incorporation of UNDRIP] would be for the Australian government to commit to a co-design process with First Nations people to progress implementation of the declaration in Australia.'[13]

This could take the form of a National Action Plan, as suggested in a Private Members Bill tabled by Senator Thorpe in the 46th parliament of Australia, the *United Nations Declaration on*

[12] Change the Record, 2021, *Pathways to Safety*.
[13] Oscar, J., 2021, *Incorporating UNDRIP into Australian law would kickstart important progress*, Australian Human Rights Commission.

the Rights of Indigenous Peoples Bill 2022[14]. The Bill would require the Commonwealth government to 'take all measures necessary to ensure the laws of the Commonwealth are consistent with' UNDRIP, and require the Prime Minister to prepare and implement an Action Plan to achieve the objectives of UNDRIP in consultation with the Human Rights Commission, led by First Nations peoples, and with free, prior and informed consent of First Nations peoples. The Action Plan would be required to be completed within 2 years of passage of the Bill, with annual reporting against the Plan to the Parliament.

Resourcing

Pursuing incorporation of UNDRIP into domestic law would require additional, dedicated resources for the Australia Human Rights Commission and for First Nations representative bodies and civil society.

We expect the Human Rights Commission would be delegated a significant role in furthering the incorporation of UNDRIP. The Human Rights Commission should be supported to determine the scope of its role and work, and be guaranteed the resources needed to do this work.

Given the fundamental importance of self-determination, Aboriginal and Torres Strait Islander representative bodies, peaks, communities and civil society should also be adequately resourced to participate in codesign of the process for incorporation, and to advocate for the rights of First Nations peoples.

Aboriginal and Torres Strait Islander peoples are the experts in identifying solutions to the issues facing communities and in advocating for their needs. However, the chronic underfunding of service, policy, research and advocacy capacity in First Nations-controlled civil society constrains communities and Aboriginal Community-Controlled Organisations from participating in policy design, implementation, analysis and evaluation on anything resembling an equal footing with government. Combined with a lack of institutional power to challenge the discriminatory actions of governments, this stands as a significant barrier to the realisation of self-determination.

[14] *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022*, introduced March 2022 in the Australian Senate.

In its successful 2017 pitch for a seat on the United Nations Human Rights Council, the Australian government stated it 'supports the United Nations Declaration on the Rights of Indigenous Peoples in both word and deed'[15]. Genuine support for UNDRIP requires its incorporation into domestic law, policy and practice. We urge the committee to develop recommendations to meaningfully progress and implement this important step towards ensuring the rights of Aboriginal and Torres Strait Islander peoples on this continent are upheld.

[15] See *Note verbale dated 14 July 2017 from the Permanent Mission of Australia to the United Nations addressed to the President of the General Assembly*, p2.