ENQUIRY INTO RACISM, HATE AND VIOLENCE DIRECTED AT ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

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Date: 8th March 2026

ACKNOWLEDGMENTS

The author thanks the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for the opportunity to make a submission to this critical inquiry into racism, hate, and violence directed at Aboriginal and Torres Strait Islander people. This submission represents the culmination of extensive research into international law, Australian constitutional and statutory frameworks.

ABSTRACT AND EXECUTIVE SUMMARY

This submission argues that **racism, hate, and violence directed at Indigenous Australians are perpetuated not only through individual acts of prejudice but through systemic legal discrimination embedded in Australian law and policy.**

The submission demonstrates that systemic discrimination operates through three interconnected mechanisms:

- **Categorical Demotion** (Parts Two-Three): Indigenous spirituality is categorised as "heritage" rather than "religion," denying Indigenous peoples the comprehensive legal protections afforded to Western religious communities under the *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth).

- **Subsumption of Distinct Sovereignties** (Parts Three-Four): Distinct Indigenous nations (such as the Bibbullmun nations) are subsumed into broader categories (such as "Noongar"), denying them recognition of distinct sovereignty and self-identification rights under international human rights law.

- **Failures in Treaty Processes** (Parts Three-Four): Contemporary treaty processes fail to obtain genuine free prior and informed consent (FPIC), do not recognise full Indigenous self-determination, and do not provide absolute protection for sacred sites as religious sites.

The submission demonstrates that the Australian legal system is in **substantive breach of international human rights law**, specifically the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Key Recommendations:

- Amend the 2026 Act to explicitly extend religious protections to Indigenous sacred sites and spiritual leaders
- Amend heritage legislation to provide absolute protection for Indigenous sacred sites equivalent to Western religious sites
- Enact treaty legislation in all Australian jurisdictions comparable to the *Statewide Treaty Act 2025* (Vic)
- Recognise distinct Indigenous nations and implement robust FPIC standards
- Report to international human rights bodies on compliance with UNDRIP, ICCPR, and CERD

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PART 1: THE JURISPRUDENTIAL ARCHITECTURE OF INEQUALITY: SYSTEMIC DISCRIMINATION, EXTREMISM, AND THE STRUCTURAL DEMOTION OF INDIGENOUS RIGHTS IN AUSTRALIA

Part 1 Introduction

The Australian legal landscape in 2026 is defined by a profound and widening gap between the protective frameworks afforded to Western religious and cultural institutions and the discretionary management of Indigenous spiritual and territorial rights. While the Commonwealth government has taken assertive steps to combat rising social fragmentation through the passage of the *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth), the application of these new protections has exposed a persistent structural bias.[1]

This bias operates through what is termed **"categorical demotion,"** a mechanism by which Indigenous spirituality is legislatively classified as "heritage" rather than "religion," effectively denying First Nations people the comprehensive legal shields granted to other faith communities under the 2026 Act.[2] This legal asymmetry occurs alongside a surge in ideologically motivated extremism, evidenced by the attempted mass casualty bombing at an Invasion Day rally in Boorloo (Perth) on 26 January 2026, and violent assaults on sacred sites such as Camp Sovereignty in Melbourne.[3]

Simultaneously, the evolution of treaty frameworks, most notably the landmark *Statewide Treaty Act 2025* (Vic), offers a potential blueprint for reform, even as existing arrangements like the 2021 Bibbullmun (Noongar) settlement remain mired in controversy regarding free prior and informed consent (FPIC) and the subsumption of distinct sovereignties.[4]

This Part establishes the jurisprudential framework that underlies the entire submission. It demonstrates how categorical demotion, subsumption of sovereignty, and failures in treaty processes combine to create a legal environment that perpetuates racism, hate, and violence against Indigenous peoples.

1.1 THE 2026 HATE CRIMES FRAMEWORK AND THE PROTECTION GAP

1.1.1 The Legislative Response to Extremism: Context and Enactment

The *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth) represents the most significant expansion of Australia's hate crime and counter-extremism legislation in the post-colonial era.[5] Enacted in January 2026 in response to a devastating antisemitic attack at Bondi Beach on 14 December 2025, the Act introduces multi-layered protections designed to penalise the dissemination of hatred and the radicalisation of domestic groups.[6]

Central to this reform is the objective of preserving social cohesion by targeting people and groups who seek to spread division.[7] The legislative urgency with which the 2026 Act was passed—through both Houses of Parliament in January 2026—reflects the political priority assigned to addressing antisemitism and Islamophobia following the Bondi attack.[8] However, the internal logic of the Act creates a tiered system of protection that inadvertently excludes the most significant manifestations of Indigenous spirituality.[9]

The 2026 Act represents a watershed moment in Australian criminal law. Prior to this legislation, Australia's approach to hate crimes was fragmented across Commonwealth and state legislation, with inconsistent application and variable penalties. The 2026 Act consolidates and expands these protections, establishing clear statutory frameworks for addressing hate-motivated violence and extremism. However, as this submission demonstrates, the architects of the 2026 Act failed to explicitly include Indigenous spirituality within the definition of "religion," thereby excluding Indigenous sacred sites and spiritual leaders from the Act's most robust protections.

1.1.2 The Architecture of the 2026 Act: Multi-Layered Protections

Under the 2026 Act, a "hate crime" is defined with extraordinary breadth in Division 114A of the *Criminal Code Act 1995* (Cth), encompassing conduct that causes serious harm to persons, damage to property, or risks to public safety when such acts are motivated by the victim's race, national origin, or ethnic origin.[10] While these protections are robust in the context of racialised violence, the Act maintains a separate track for "religious" protections that is not equally accessible to Indigenous people.[11]

Specifically, the Act introduces Section 80.2DA of the *Criminal Code*, which creates aggravated offences for "religious officials" and "spiritual leaders" who promote violence, carrying a maximum penalty of 12 years imprisonment.[12] Although the definition of a spiritual leader includes anyone who "performs religious functions" regardless of formal appointment, the functional application of this protection is restricted to the context of recognised religious institutions.[13]

The following table synthesises the primary mechanisms introduced by the 2026 Act to combat hate-motivated conduct and the specific statutory penalties associated with each:

Provision	Legislative Function	Maximum Penalty	Application
Criminal Code s 80.2DA	Aggravated offence for religious/spiritual leaders who advocate violence or genocide	12 years imprisonment	Religious leaders and spiritual leaders in recognised institutions
Criminal Code div 114A	New definition of "hate crime" targeting racial, national, or ethnic groups	Varies by underlying offence (up to 25 years for murder with hate motivation)	Conduct motivated by hatred based on race, national origin, or ethnic origin
Criminal Code div 114B	Offences for membership, recruitment, or support of "prohibited hate groups"	7 to 15 years imprisonment	Members or supporters of organisations designated as prohibited hate groups

Provision	Legislative Function	Maximum Penalty	Application
Criminal Code ss 80.2H, 80.2HA	Prohibition of public display of Nasi symbols or prohibited organisation symbols	Up to 12 months imprisonment (base offence); up to 2 years (aggravated offence)	Public display of prohibited symbols; reasonable person test applies
Crimes Act 1914 (Cth) s 16A(2)(mb)	Mandatory sentencing aggravation for offences motivated by racial or ethnic hatred	Sentence increase as determined by court	Any offence committed with hatred-based motivation
Criminal Code s 80.2N	New police seizure powers for materials containing prohibited symbols displayed in public	N/A (Procedural power)	Police powers of search and seizure for materials displaying prohibited symbols

This architecture reveals a carefully constructed framework designed to protect religious minorities from hate-motivated violence. The provisions work together to create multiple layers of protection:

- **Individual protection**: Section 80.2DA protects religious and spiritual leaders from violence and from promoting violence
- **Group protection**: Division 114A protects racial and ethnic groups from hate crimes
- **Symbolic protection**: Sections 80.2H and 80.2HA protect religious symbols from desecration
- **Organisational protection**: Division 114B provides mechanisms to designate and prosecute prohibited hate groups
- **Sentencing protection**: Section 16A ensures that hatred-based motivation results in enhanced sentences
- **Procedural protection**: Section 80.2N provides police with powers to seize materials displaying prohibited symbols

The 2026 Act's framework is comprehensive and sophisticated. It recognises that hate crimes operate at multiple levels—against individuals, groups, symbols, and organisations—and provides statutory responses at each level. This multi-layered approach reflects an understanding that hatred is systemic and requires systematic legal response.

1.1.3 The Protection Gap: Indigenous Sacred Sites Excluded

The structural limitation of the 2026 Act lies in its failure to explicitly extend these protections to Indigenous sacred sites.[14] Because these sites are categorised under "heritage law" rather than "religious freedom law," an attack on a sacred burial ground or a site of 46,000-year-old spiritual practice does not automatically trigger the religious desecration or leader protections afforded to Western faiths.[15] This is particularly evident in the reasonable person test for symbol offences in Sections 80.2H and 80.2HA, which requires courts to consider the perspective of a member of the targeted group. While this provides a high degree of subjective protection for members of Western religious minorities, the lack of recognition of Indigenous spiritual symbols as "religious" under federal law leaves them outside this enhanced scrutiny.[16]

The protection gap can be illustrated through a hypothetical comparison:

Hypothetical 1: Destruction of a Synagogue
- If a person destroyed a synagogue to expand a mining operation, this would violate multiple provisions of the 2026 Act
- Section 80.2DA could be invoked if the destruction was motivated by hatred toward Jewish people or the Jewish faith
- The destruction would constitute damage to property motivated by hatred under Division 114A
- The perpetrator would face enhanced sentencing under Section 16A(2)(mb)

- If the destruction occurred as part of an organised campaign, Section 80.2H/HA could apply to symbols associated with the campaign

Hypothetical 2: Destruction of Juukan Gorge (46,000-Year-Old Sacred Site)
- The destruction occurs under ministerial authorisation under heritage law
- No provisions of the 2026 Act are triggered because the site is classified as "heritage," not "religious"
- Even if the destruction was motivated by indifference to Indigenous spirituality, no hate crime provisions apply
- The perpetrator faces no enhanced sentencing for hatred-based motivation
- The destruction is lawful under existing heritage legislation

This comparison reveals the protection gap. The 2026 Act protects Western religious sites and symbols through multiple statutory mechanisms, while Indigenous sacred sites remain vulnerable to destruction under ministerial discretion.

1.1.4 The Reasonable Person Test and Subjective Protection

Sections 80.2H and 80.2HA of the 2026 Act introduce a "reasonable person test" for determining whether public display of a symbol incites hatred. The legislation provides that courts must consider "whether a reasonable person in the position of an intended audience of the display would regard the display as intending to incite hatred."[17]

This reasonable person test creates a framework for subjective protection. A reasonable Jewish person would regard the public display of a Nasi swastika as inciting hatred toward Jewish people. A reasonable Muslim person would regard displays of anti-Islamic symbols as inciting hatred. The test thus provides a mechanism for recognising the perspective of members of targeted groups.

However, when applied to Indigenous spirituality, the test fails because Indigenous sacred sites are not recognised as "symbols" under the 2026 Act. A reasonable Bibbullmun person would regard the destruction of Juukan Gorge as inciting hatred toward Bibbullmun spirituality and cultural continuity. Yet because the site is classified as "heritage" rather than a religious symbol, the reasonable person test does not apply.

1.2 THE CATEGORICAL DEMOTION OF INDIGENOUS RELIGION

1.2.1 The Most Fundamental Form of Systemic Legal Racism

The most fundamental manifestation of systemic legal racism in Australia is the **categorical demotion of Indigenous spiritual systems from the status of "religion" to that of "heritage" or "culture"**.[18] This distinction is not a neutral classification but a deliberate jurisprudential choice with deep historical roots.[19]

The concept of "categorical demotion" refers to the process by which the law places Indigenous spirituality into a lower-tier category (heritage) rather than the protected category (religion), thereby denying Indigenous peoples the legal protections afforded to Western religions. This is not a matter of accident or oversight. The legislative frameworks governing heritage protection were consciously developed to manage Indigenous cultural assets as state property rather than to recognise Indigenous peoples' spiritual autonomy.

The historical roots of categorical demotion trace back to colonial legal theory, which characterised Indigenous peoples as lacking "civilisation" and therefore lacking "religion" in the Western sense. Colonial theorists argued that Indigenous peoples practiced "superstition" or "custom" rather than "religion." This theoretical framework justified the assertion of state control over Indigenous spiritual sites and practices.

1.2.2 Constitutional Recognition of Religion: Section 116

In Australian law, "religion" is a protected category under Section 116 of the *Constitution of the Commonwealth of Australia*, which provides: "The Commonwealth shall not make any law for establishing any religion, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[20]

Section 116 establishes two key principles:

- **Negative establishment clause**: The Commonwealth cannot establish or favour any religion
- **Free exercise clause**: The Commonwealth cannot prohibit the free exercise of religion

These provisions reflect a foundational principle of Australian constitutional law: religious freedom is a protected right that cannot be infringed by the state. This protection extends beyond the Commonwealth to apply throughout Australian law through interpretive principles and through express protections in state constitutions and statutes.

The protection accorded to religion under Section 116 and throughout Australian law is **absolute in character**. It is not subject to ministerial discretion or balancing against economic interests. A government minister cannot authorise the destruction of a synagogue because the economic benefits of mining outweigh the religious significance of the site. The principle of religious freedom is treated as inviolable.

1.2.3 The High Court Definition: Church of the New Faith Test

The High Court of Australia has provided guidance on what constitutes "religion" for the purposes of Section 116 and Australian law generally. In *Church of the New Faith v Commissioner of Payroll Tax (Vic)* [1983] 154 CLR 120, the Court established a test for determining whether a belief system qualifies as "religion."[21]

The High Court held that "religion" requires:

- **A system of faith and worship**: The belief system must involve faith—belief in something beyond the material world—and organised practices of worship
- **Acceptance of canons of conduct**: The belief system must establish moral or ethical principles that guide adherents' behaviour
- **Substantial theological or moral content**: The belief system must address fundamental questions about existence, morality, and meaning

Significantly, the Court emphasised that "no single feature is determinative" and that the test should be flexible enough to encompass diverse belief systems.[22] This language suggests that the test should be capable of recognising diverse forms of spirituality, including Indigenous spiritual systems.

The Court's approach was designed to be inclusive rather than exclusive. The Court recognised that "religion" is not limited to Western monotheistic faiths but encompasses diverse belief systems. The test was developed in the context of determining whether the Church of the New Faith (a controversial organisation) qualified as a "religion." The Court ultimately held that it did, demonstrating a willingness to extend the category of "religion" to unfamiliar belief systems.

1.2.4 Why Indigenous Spirituality Fails the Test (Formally) – And Why It Shouldn't

Despite the flexibility of the High Court's test, Indigenous spiritual systems are routinely excluded from the category of "religion" in Australian law. This exclusion is not based on the High Court's test but on historical assumptions and bureaucratic categorisation.

Indigenous spiritual systems clearly satisfy the High Court's test:

- **System of faith and worship**: Indigenous spiritual systems involve profound faith in the spiritual significance of Country, Law, and ancestral connection. Indigenous peoples organise practices of worship through ceremonies, corroborees, and sacred site access.
- **Acceptance of canons of conduct**: Indigenous spiritual systems establish comprehensive codes of conduct governing behaviour, kinship relations, resource use, and interaction with Country. These codes are enforced through community mechanisms.
- **Substantial theological content**: Indigenous spiritual systems address fundamental questions about the origin of the world, the nature of human relationship with Country, the meaning of life and death, and moral principles governing human conduct.

Yet despite satisfying the High Court's test, Indigenous spirituality is classified as "heritage" rather than "religion." This classification is not legally justified. It is the product of historical bias and administrative inertia.

1.2.5 Comparative Legal Protections: The Disparity of Legal Frameworks

The consequences of categorical demotion are material and devastating. When a Western religious site, such as a synagogue or church, is threatened, the state recognises an absolute right to its preservation and free exercise.[23] The destruction of such a site for economic gain would be legally unthinkable and potentially prosecutable as a hate crime under the 2026 Act.[24]

In contrast, Indigenous sacred sites are subject to **"ministerial discretion"**.[25] Under heritage legislation, a government minister has the power to authorise the harm or destruction of a site if it is determined that the economic or development benefits outweigh its "heritage significance".[26] This represents a fundamentally different approach: from absolute protection to discretionary management.

The following table provides a direct comparison of how the legal system treats Western religious sites versus Indigenous sacred sites:

Protection Factor	Western Religious Sites	Indigenous Sacred Sites
Legal Classification	Religion / Place of Worship	Heritage / Culture
Core Governing Law	*Constitution* s 116; 2026 Act	State/Federal Heritage Acts
State Authority	Absolute protection from state-authorised destruction	Ministerial discretion to approve destruction (e.g., *Aboriginal Heritage Act 1972* (WA) s 18)

Protection Factor	Western Religious Sites	Indigenous Sacred Sites
Decision-Making Power	Held by the religious institution/owner	Vested in the state; Indigenous groups have consultation rights only
Hate Crime Application	Explicit protection for symbols and leaders under 2026 Act	Generally excluded from religious-specific hate protections
Legal Standard	Rights-based; cannot be balanced against mining or development	Interest-based; cultural value is weighed against economic gain
Economic Override	Cannot be overridden for economic reasons	Can be overridden if minister determines economic benefits outweigh heritage significance
Community Veto	Religious community has absolute veto	Indigenous community has consultation rights but not veto
International Law	Protected under ICCPR Art 18, CERD Art 5	Breach of UNDRIP Art 12, ICCPR Art 27, CERD Art 5

This table reveals the structural inequality. Western religions receive absolute, rights-based protection. Indigenous spirituality receives discretionary, interest-based management. The difference is not one of degree but of kind. It reflects a fundamental difference in how the law values Western and Indigenous spiritual systems.

1.3 CASE STUDY: JUUKAN GORGE AND THE FAILURE OF DISCRETION

1.3.1 The Site and Its Significance

The 2020 destruction of the rock shelters at Juukan Gorge in Western Australia provides the starkest evidence of the catastrophic failure of heritage law to protect Indigenous spirituality.[27] The sites, located in the Pilbara region approximately 250 kilometres south of Port Hedland, held archaeological evidence of continuous human occupation spanning **46,000 years, or forty-six millennia**.[28]

For the Puutu Kunti Kurrama and Pinikura (PKKP) peoples, the shelters were an "anchor" of their living culture, a site that provided a 4,000-year-old genetic link to contemporary Traditional Owners through remains such as plaited human hair.[29] The rock shelters contained over 7,000 artefacts, including sacred objects, grindstones, and other items of profound spiritual significance to the PKKP peoples.

The Juukan Gorge sites represent more than an archaeological location. They are a continuous record of human spiritual and cultural practice spanning nearly fifty thousand years. They embody the lived connection of the PKKP peoples to Country, to spiritual practice, and to their ancestors. The sites are sacred in the deepest sense: they are where the PKKP peoples' ancestors lived, died, were buried, and continue to reside in spiritual form.

1.3.2 The Legal Authorisation: Ministerial Discretion and State Complicity

The destruction was not an act of rogue vandalism, but a **lawful operation authorised by the state**.[30] Rio Tinto, a multinational mining corporation, obtained ministerial consent to "harm" the site in 2013 under Section 18 of the *Aboriginal Heritage Act 1972* (WA).[31]

Section 18 of the *Aboriginal Heritage Act 1972* (WA) provides:

> "The Minister for Aboriginal Affairs may... consent to the carrying out of an activity that would otherwise be an offence under this Act if the Minister is satisfied that the activity is justified in the circumstances."[32]

This provision vests **unlimited ministerial discretion** in determining whether destruction of Aboriginal heritage is "justified." There is no statutory requirement to obtain Aboriginal consent. There is no requirement that Aboriginal interests be prioritised. The minister simply needs to be "satisfied" that the destruction is "justified"—a standard that is entirely subjective and provides minimal protection.

In 2013, the Western Australian Department of Aboriginal Affairs granted ministerial consent to Rio Tinto to harm the Juukan Gorge sites as part of an iron ore mining expansion project. The consent was based on a heritage assessment conducted in 2009 and 2010. However, in 2014, after the ministerial consent had been granted, Rio Tinto commissioned a new heritage salvage dig. This dig revealed that the Juukan Gorge sites were substantially older and more significant than previously understood.

The 2014 salvage dig revealed:
- The sites were twice as old as previously believed
- The sites contained over 7,000 artefacts (previous estimates had been much lower)
- The sites contained sacred objects and materials of profound spiritual significance
- The sites represented a continuous record of human occupation spanning 46,000 years

Despite this new evidence of the sites' extraordinary significance, the ministerial consent granted in 2013 remained valid and could not be revoked. The *Aboriginal Heritage Act 1972* (WA) provided no mechanism for the PKKP peoples to appeal the 2013 consent or for the Minister to reconsider considering new evidence. The discretionary decision made in 2013, based on incomplete information, locked in authorisation for destruction in perpetuity.

On 25 May 2020, Rio Tinto destroyed the Juukan Gorge rock shelters using explosives, blasting and destroying the sites to expand the iron ore mine. The destruction was lawful under Western Australian heritage law.

1.3.3 The Counterfactual: If Juukan Gorge Were Protected as "Religion"

The legal analysis becomes crystalline when we ask: **What if Juukan Gorge had been legally recognised as a "religious site," equivalent to a cathedral or synagogue?**

If Juukan Gorge were protected as a religious site under the *Constitution* (Section 116) and the 2026 Act:

- **Absolute Protection**: No minister could have authorised destruction. Religious sites receive absolute protection that cannot be overridden for economic reasons.
- **Hate Crime Prosecution**: The destruction, if motivated by indifference to PKKP spirituality or by a desire to enable mining that economically benefited the perpetrator at the expense of PKKP spiritual interests, could have been prosecuted as a hate crime under Division 114A of the *Criminal Code*.
- **Leader Protection**: If PKKP spiritual leaders had opposed the destruction, they could have been protected under Section 80.2DA, which protects spiritual leaders from violence or threats.
- **Symbol Protection**: The sacred objects within the sites could have been protected under Sections 80.2H and 80.2HA as religious symbols not to be displayed or used in ways that incite hatred.
- **Enhanced Sentencing**: Any criminal conduct associated with the destruction would have been subject to enhanced sentencing under Section 16A(2)(mb) of the *Crimes Act 1914* (Cth) if motivated by hatred.

None of these protections applied because Juukan Gorge was classified as "heritage," not "religion." The destruction proceeded legally, without criminal consequence, and without any recognition that a sacred site central to PKKP spirituality had been destroyed.

1.3.4 International Law Breach: UNDRIP Articles 12 and 19

The destruction of Juukan Gorge constitutes a clear breach of Australia's international human rights obligations. Specifically, it breaches:

UNDRIP Article 12(1): "Indigenous peoples have the right to practice, revitalise, transmit and teach their spiritual and religious traditions, customs and ceremonies and to maintain, protect and have access to their religious and cultural sites; to use and control their ceremonial objects; and to repatriate their human remains."[33]

The destruction of Juukan Gorge prevented the PKKP peoples from maintaining, protecting, and having access to the sites. It prevented them from transmitting knowledge of the sites to future generations. It violated their fundamental right to practice their spiritual and religious traditions.

UNDRIP Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[34]

The PKKP peoples did not consent to the destruction of Juukan Gorge. They were not granted a veto over the mining project. The consultation process, if one occurred, did not result in free and informed consent. The destruction proceeded through ministerial discretion, not through genuine FPIC.

The destruction of Juukan Gorge demonstrates that Australia's heritage law framework does not meet the UNDRIP standard. It does not protect Indigenous sacred sites as religious sites. It does not provide

Indigenous peoples with veto power over projects affecting sacred sites. It allows ministerial discretion to override Indigenous spiritual interests for economic gain.

1.4 IDEOLOGICALLY MOTIVATED EXTREMISM AND ANTI-INDIGENOUS VIOLENCE

1.4.1 The Rise of Anti-Indigenous Extremism

The inquiry into racism, hate, and violence directed at Aboriginal and Torres Strait Islander people was prompted by an alarming rise in ideologically motivated extremism targeting Indigenous Australians.[35] This trend reached a terrifying apex in early 2026 with a series of high-profile attacks that demonstrate the intersection of white supremacist ideology and anti-Indigenous sentiment.[36]

The rise of anti-Indigenous extremism is not a sudden or isolated phenomenon. Rather, it represents a convergence of multiple factors:

- **Political polarisation**: The politicisation of Indigenous affairs, particularly around land rights and treaty negotiations, has created a polarised political environment in which extremist voices gain platform and credibility.
- **Online radicalisation**: White supremacist and anti-immigration online communities have increasingly targeted Indigenous peoples as part of a broader narrative about "replacement" and "white genocide."
- **Mainstreaming of extremism**: Anti-immigration rallies and nationalist political movements have provided cover for neo-Nasi and white supremacist organisations to operate in mainstream political space.
- **Intersection with anti-immigration sentiment**: Anti-Indigenous extremism has become increasingly intertwined with anti-immigration and anti-refugee sentiment, creating a broader narrative of white supremacist opposition to multiculturalism and Indigenous rights.
- **Legal ambiguity**: The failure of Australian law to clearly protect Indigenous sacred sites and spiritual leaders as religious sites has created ambiguity about the state's commitment to protecting Indigenous peoples from extremism.

This last factor is crucial to understanding the causal connection between systemic legal discrimination and the rise of extremism. When the law fails to protect Indigenous spirituality as religion, it sends a signal that Indigenous spiritual interests are secondary concerns that can be balanced against economic or political interests. Extremist actors interpret this signal as license to target Indigenous sacred sites and spiritual practices.

1.4.2 The Boorloo (Perth) Attempted Terror Attack – January 26, 2026

On 26 January 2026, during a peaceful Invasion Day rally in Boorloo (Perth) attended by approximately 2,500 people, a 31-year-old man named Liam Alexander Hall allegedly tossed a homemade "fragment bomb" into the crowd.[37]

The improvised device consisted of a glass container filled with volatile chemicals, ball bearings, and nails, and was concealed in an Elsa-themed sock.[38] The device landed in a section of the crowd where Elders, children, and mobility-challenged individuals were gathered, but it fortunately failed to explode.[39]

Had the device exploded as intended, it would have caused mass casualties. The use of ball bearings and nails would have created shrapnel designed to cause maximum injury. The targeting of an area with Elders and children suggests an intent to maximise the emotional and physical impact of the attack.

Sisonke Msimang, a writer and social commentator attending the rally, reportedly saw the device land and recognised it as a potential weapon. Ms. Msimang handed it to police, preventing the explosion.[40]

On 5 February 2026, the Australian Federal Police (AFP) charged Hall with one count of engaging in a terrorist attack. **This prosecution is historically seismic: it is the first time in Western Australian**

history that a terror charge has been laid against someone for violence targeting Indigenous people, and it is believed to be the first time in Australia that an act of violence by a white settler against Indigenous people has been recognised as terrorism.[41]

Prosecutors allege the attack was "nationalist and racially motivated," aimed at advancing a white supremacist cause.[42] The initial downplaying of the incident—which took authorities nine days to label as terrorism—ignited significant outrage, particularly as it occurred while the nation was undergoing a massive legislative overhaul to combat antisemitism.[43]

The delayed designation of the attack as terrorism highlights the "two-tier justice system" discussed below. If a similar device had been thrown into an antisemitic or Islamophobic rally, it would have been immediately designated as terrorism. The nine-day delay in recognising the Boorloo attack as terrorism suggests that the state was less urgent in responding to an attack on Indigenous people than it would have been in responding to an attack on other religious or ethnic communities.

1.4.3 The Assault on Camp Sovereignty –January 2026

Camp Sovereignty, located on the steps of Parliament House in Melbourne, is a **living sacred site and burial ground for ancestral remains**.[44] The camp was established as an ongoing assertion of Indigenous sovereignty and as a sacred space for Indigenous spiritual practice and mourning.

In August 2025 and January 2026, the camp was targeted by violent mobs associated with the neo-Nasi National Socialist Network (NSN).[45]

The August 2025 Attack

During an unprovoked attack on 31 August 2025, which followed an anti-immigration "March for Australia" rally, a group of approximately 30 individuals dressed in black allegedly stormed the camp.[46] Neo-Nasi leader Thomas Sewell was accused of punching a member of the camp in the collarbone and kicking another occupant while others "charged" the encampment, tearing down flags and tents.[47]

The attack was coordinated and violent. The perpetrators were organised, dressed identically, and acted in concert to assault camp occupants and destroy camp infrastructure. The attack was not a spontaneous scuffle but a planned assault on a sacred site.

Magistrate Donna Bakos, in denying Sewell bail, stated that **"to lead and participate in, if not incite an unprovoked attack on a sacred site... can only be viewed as serious conduct"**.[48] The magistrate's language explicitly recognised Camp Sovereignty as a "sacred site," acknowledging its spiritual and cultural significance.

This underscores a systemic failure: an attack on a Western religious cemetery would be processed through the lens of religious freedom and hate crime sentencing, while a similar attack on an Indigenous sacred burial site is relegated to general criminal law.[51]

The January 2026 Attack

In January 2026, the camp was again targeted by violent actors. The continued targeting of Camp Sovereignty demonstrates that extremist actors view it as a legitimate target for violence and harassment. The fact that Indigenous peoples continue to occupy and maintain the camp despite repeated attacks demonstrates their commitment to asserting Indigenous sovereignty and maintaining sacred space.

1.4.4 The Causal Chain: How Legal Disparities Perpetuate Extremism

The persistence of legal disparities between protections for Western religions and Indigenous sacred sites creates a **causal chain that perpetuates systemic prejudice and emboldens extremist actors**.[52] When the law categorises Indigenous spirituality as less worthy of absolute protection than Western religions, it sends a powerful signal to the public and to extremist groups that Indigenous cultural and spiritual assets are legitimate targets for "protest" or "destruction".[53]

The Causal Chain of Systemic Prejudice:

Step 1: Statutory Exclusion
The 2026 Act excludes Indigenous sacred sites from religious-specific protections.[54] This is not accidental. It reflects a deliberate choice by legislators to define "religion" narrowly, excluding Indigenous spirituality.

Step 2: Perceived Devaluation
Extremist actors interpret this exclusion as a signal that the state values Indigenous spirituality as subordinate to Western religions.[55] If the state does not protect Indigenous sacred sites as religious sites, then the state implicitly values them less than Western religious sites. This message is received and acted upon by extremist actors.

Step 3: Radicalisation and Mainstreaming
This perceived devaluation provides a "shield" for mainstream grievances to provide cover for neo-Nasi violence.[56] Anti-immigration rallies become venues where neo-Nasis can organise and recruit. The state's failure to explicitly protect Indigenous sacred sites from attack is interpreted as implicit permission for such attacks.

Step 4: Community Trauma
The resultant violence, such as the Boorloo bombing attempt and the Camp Sovereignty assaults, leads to "deep distress and fear" among First Peoples, who feel targeted for their identity and fearful that exercising their democratic rights may have deadly consequences.[57] Indigenous peoples who attend Invasion Day rallies are at risk of terrorist attack. Indigenous peoples who maintain sacred sites are at risk of violent assault.

Step 5: Institutional Non-Response
The delayed designation of the Boorloo attack as terrorism further reinforces this cycle.[58] By contrast, the 2026 Act was fast-tracked specifically to address antisemitism and Islamophobia following the Bondi attack.[59] This discrepancy creates the perception of a **"two-tier justice system"** where the safety of some racial and religious groups is prioritised over others.[60]

This causal chain is not speculative. It is grounded in how systemic discrimination operates. When law sends a message that a group's fundamental rights and sacred sites are not protected with the same vigour as other groups' rights and sites, extremist actors receive that message. They interpret it as permission. They act on it.

The solution to this causal chain is not simply law enforcement response to individual attacks (though that is necessary). The solution is to break the chain at its foundation by amending the law to provide equivalent protection for Indigenous sacred sites and spiritual leaders as for Western religious sites and leaders.

1.5 SOVEREIGNTY, TREATY PROCESSES, AND INTERNATIONAL LAW BREACHES

1.5.1 Two Models of Treaty-Making in Australia

The evolution of treaty-making in Australia is characterised by two vastly different models: the $1.3 billion Bibbullmun (Noongar) settlement in Western Australia and the *Statewide Treaty Act 2025* in Victoria.[61] These models reflect the ongoing struggle to align Australian domestic law with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[62]

The comparison between these two models is essential for understanding the current state of Australian law regarding Indigenous rights and treaty-making. The Bibbullmun settlement represents a traditional approach based on the *Native Title Act 1993* (Cath) framework, which requires the extinguishment of Native Title claims in exchange for settlement benefits. The Victorian Treaty Act represents a new approach based on explicit statutory recognition of Indigenous nations and their right to negotiate binding treaties without extinguishment of land rights.

1.5.2 The Bibbullmun Nations and the South West Settlement (2021)

The South West Native Title Settlement, covering 200,000 square kilometres, is described as the most comprehensive native title agreement in Australian history.[63] Formally commenced on 25 February 2021, the agreement involves six Indigenous Land Use Agreements (ILUAs) and recognises "the Noongar people" as the Traditional Owners of the south-west region.[64]

In exchange for a $1.3 billion funding package (over 10 years), land grants, and the creation of a Noongar Land Estate, the Noongar people agreed to surrender all current and future native title claims.[65] This means that the Noongar people extinguished their legal right to seek further land rights recognition and surrendered their ability to bring future Native Title claims.

However, the settlement faces significant criticism regarding its compliance with UNDRIP Articles 3, 19, and 33.[66] A critical issue is the **"subsumption of distinct sovereignties"**.[67]

The Bibbullmun/Noongar Distinction

The Bibbullmun nations (also spelled Bibbulmun) assert a distinct identity and governance structure within the broader Noongar language group. The Bibbullmun represent a specific sovereign nation with distinct language, governance structures, and spiritual practices. However, the settlement recognised "the Noongar people" as a single entity.[68]

This potentially violates UNDRIP Article 33, which establishes that Indigenous peoples have the right to determine their own identity "in accordance with their own customs and traditions."[69] If the Bibbullmun nations assert the right to be recognised as a distinct nation separate from "Noongar," then the settlement's use of the broader "Noongar" category may have violated their right to self-identify.

Furthermore, serious questions remain as to whether genuine free prior and informed consent (FPIC) was obtained specifically from the Bibbullmun nations, or if their distinct claims were effectively silenced through a majority vote of a broader linguistic cluster.[70]

Issues with the Settlement Process

The settlement raises multiple concerns regarding FPIC:

- **Subsumption of identity**: Bibbullmun nations may not have been given adequate opportunity to assert their distinct identity separate from "Noongar"
- **Representation**: Bibbullmun nations may not have been adequately represented in settlement negotiations if broader "Noongar" representatives were negotiating on their behalf

- **Information**: Bibbullmun nations may not have received complete information about the implications of extinguishing Native Title in perpetuity

- **Genuine choice**: Bibbullmun nations may not have had genuine choice about whether to participate in the settlement or to pursue separate negotiations

These concerns suggest that the Bibbullmun settlement may not meet the UNDRIP Article 19 standard for FPIC.

1.5.3 The Statewide Treaty Act 2025 (Victoria) – A New Model

On 13 November 2025, Victoria became the first Australian state to enact a statutory framework for a statewide treaty.[71] The *Statewide Treaty Act 2025* (Vic) received Royal Assent on the same day the treaty was signed between the State of Victoria and the First Peoples' Assembly.[72]

Unlike the Noongar settlement, the Victorian Act creates a parallel rights framework that does not require the extinguishment of existing land rights.[73] The Act establishes that Victorian Aboriginal nations retain their land rights while simultaneously negotiating a treaty with the state.

Key Institutions Established by the Statewide Treaty Act 2025

The Act establishes three key institutions:

- **Gellung Warl** (meaning "Tip of the Spear"): An ongoing representative and deliberative body empowered to make rules regarding Aboriginal identity and to advise Parliament on all legislation affecting First Peoples.[74] It has a guaranteed funding stream set to increase to over $70 million per year by 2028.[75]

The significance of Gellung Warl lies in its permanent status and its role in determining Aboriginal identity. Unlike temporary consultation bodies, Gellung Warl is an ongoing institution with real power. It can make rules regarding who is recognised as Aboriginal for treaty purposes. This directly implements UNDRIP Article 33 (self-identification) into Victorian law.

- **Nginma Ngainga Wara** (meaning "you will do"): An independent accountability mechanism tasked with evaluating the effectiveness of state programs and holding the government to its promises under the Closing the Gap agreement.[76]

This institution is crucial for enforcement. It provides a mechanism for holding the state accountable if it fails to meet its treaty obligations. This addresses a major gap in the Noongar settlement, which lacks clear enforcement mechanisms.

- **Nyerna Yoorrook Telkuna**: A body designed to continue the truth-telling work of the Yoorrook Justice Commission.[77]

This institution recognises that healing from colonialism requires truth-telling. It provides an ongoing mechanism for documenting and acknowledging historical wrongs and contemporary injustices.

Recognition of Distinct Nations

Crucially, the *Statewide Treaty Act 2025* explicitly recognises distinct nations—such as the Wurundjeri Woi-wurrung, Boonwurrung, Taungurung, Dja Dja Wurrung, Gunditjmara, and Yorta Yorta—as sovereign entities with the right to negotiate local treaties.[78]

This model directly addresses the "subsumption" problem seen in the Noongar settlement by providing a statutory mechanism for self-identification and distinct nation-to-nation negotiation.[79] Rather than requiring all Aboriginal peoples to be represented through a single "Aboriginal" category, the Act recognises multiple distinct nations.

1.5.4 Comparative Framework: Structural Differences

The following table compares the structural differences between the 2021 Noongar model and the 2025 Victoria model:

Issue	Noongar Settlement (2021)	Statewide Treaty Act (2025)
Legal Basis	Native Title Act (ILUAs); Extinguishment model	Dedicated Statewide Treaty Act; Non-extinguishment model
Identity Management	Subsumes distinct nations into "Noongar" group	Explicit recognition of distinct Aboriginal nations (Wurundjeri, Boonwurrung, etc.)
Land Rights	Native Title surrendered in exchange for settlement	Treaty exists alongside and does NOT extinguish land rights
Governance Structure	Noongar Boodja Trust (Trustee model); limited Aboriginal authority	Gellung Warl (Representative authority model); Aboriginal decision-making power
Self-Determination	Limited to joint management and consultation on specific projects	Powers to confirm identity, manage infrastructure, advise Parliament on all legislation
Binding Legal Status	Primarily a land settlement agreement; unclear legal enforceability	Legally binding Act of Parliament; enforceable through courts
Accountability Mechanism	No clear mechanism for holding government accountable	Nginma Ngainga Wara provides independent accountability
Funding	$1.3 billion (one-time); unclear long-term funding	Guaranteed ongoing funding increasing to $70 million per year by 2028
Future Amendments	Settlement terms can be modified unilaterally by government	Treaty cannot be modified without mutual consent
UNDRIP Compliance	Questions regarding compliance with Articles 3, 19, 33	Better alignment with UNDRIP Articles 3, 19, 33

This comparison reveals a fundamental difference in approach. The Noongar settlement uses an extinguishment model in which Aboriginal peoples give up future land rights in exchange for current settlement benefits. The Victorian Treaty Act uses a non-extinguishment model in which Aboriginal peoples retain their land rights while negotiating a treaty with the state.

The Victorian model better complies with international human rights standards. It recognises distinct Aboriginal nations, provides for genuine Aboriginal decision-making authority, includes enforcement mechanisms, and does not require extinguishment of land rights.

1.6 INTERNATIONAL HUMAN RIGHTS AND THE BREACH OF COMPLIANCE

1.6.1 Australia's International Obligations

The current Australian legal framework remains in **substantive breach of international human rights law**.[80] Australia is bound by the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the minimum standards of UNDRIP.[81]

These international instruments impose binding obligations on Australia regarding the protection of Indigenous peoples' rights. When Australian law fails to meet these standards, it places Australia in breach of its international legal obligations.

1.6.2 UNDRIP Breaches

UNDRIP Article 3 (Self-Determination): "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."[82]

Self-determination requires that Indigenous peoples have the right to determine their own political status, including whether to pursue separate sovereignty recognition or to participate in broader settlements. The "heritage management" model, which vests final decision-making power in state ministers, fundamentally violates this right.[83] When a minister can authorise destruction of sacred sites over Indigenous objections, Indigenous peoples do not have self-determination.

UNDRIP Article 12 (Spiritual Rights): "Indigenous peoples have the right to practise, revitalise, transmit and teach their spiritual and religious traditions, customs and ceremonies and to maintain, protect and have access to their religious and cultural sites; to use and control their ceremonial objects; and to repatriate their human remains."[84]

UNDRIP mandates the right to manifest, practice, and teach spiritual traditions and to protect religious and cultural sites.[85] The destruction of Juukan Gorge and the lack of religious-specific hate crime protection for sacred sites are direct violations of Article 12.[86]

UNDRIP Article 19 (Free Prior and Informed Consent): "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[87]

States must obtain FPIC before approving projects affecting Indigenous lands, particularly regarding mineral exploitation.[88] The 2013 consent process for Juukan Gorge, which occurred years before the true significance of the site was known and without a right of veto, fails to meet this international standard.[89]

UNDRIP Article 33 (Self-Identification): "Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the states in which they live."[90]

The right to determine identity in accordance with customs is undermined when the state mandates broad linguistic categories (e.g., Noongar) for settlement purposes, overriding the distinct sovereignty of nations like the Bibbullmun.[91]

1.6.3 ICCPR and CERD Violations

ICCPR Article 18 (Religious Freedom): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[92]

Article 18 protects the freedom to manifest religion. Indigenous peoples' freedom to manifest their spirituality through access to sacred sites is protected under this provision.

ICCPR Article 26 (Equality Before the Law): "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[93]

When Australian law provides "absolute" protection for Western religions while allowing "discretionary" destruction of Indigenous spiritual sites, it creates a tiered system of religious freedom that is inherently discriminatory.[94] This violates the principle of equality before the law.

ICCPR Article 27 (Minority Cultural Rights): "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[95]

Indigenous peoples are a minority in Australia. Article 27 protects their right to enjoy their own culture and practise their own religion. The categorical demotion of Indigenous spirituality from "religion" to "heritage" undermines this protection.

CERD Article 5 (Religious Freedom Without Discrimination): "In compliance with the fundamental obligations laid down in article 2 of this Convention, States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights... (vii) The right to freedom of thought, conscience and religion."[96]

CERD Article 5 requires states to guarantee the right of everyone to religious freedom without distinction as to race or national origin.[97] The categorical demotion of Indigenous religion to "heritage" constitutes a racial distinction that effectively nullifies the equal enjoyment of human rights for First Nations people.[98]

1.7 CONCLUSION TO PART 1: TOWARDS A RECONSTITUTED JURISPRUDENCE

The current inquiry into racism, hate, and violence directed at Aboriginal and Torres Strait Islander people provides an essential opportunity to confront the environment in which hatred grows.[99] However, addressing individual acts of prejudice is insufficient without a concurrent dismantling of **"systemic legal racism"**.[100]

The structural demotion of Indigenous spirituality, the subsumption of distinct sovereignties, and the discretionary model of heritage management collectively perpetuate a **state-authorised form of cultural and spiritual violence**.[101]

The destruction of Juukan Gorge and the attempted bombing in Boorloo are not isolated incidents but the logical outcomes of a legal system that treats Indigenous life and belief as a secondary concern to state economic interests and social cohesion as a privilege of recognised Western groups.[102]

The path forward requires a comprehensive realignment of domestic law with international human rights standards. The analysis presented in this Part indicates that the following legislative reforms are necessary to achieve substantive equality:

Recommendation 1: Amendment of the 2026 Act
The definition of "religion" in the *Combatting Antisemitism, Hate and Extremism Act 2026* must be explicitly expanded to include Indigenous spiritual traditions and connection to Country.[103] Sacred sites must be protected as "religious property" to trigger the hate crime framework of Division 114A and the aggravated leader protections of Section 80.2DA.[104]

Recommendation 2: Statutory Standard for FPIC
Federal and state heritage laws must be amended to replace "ministerial discretion" with a statutory

requirement for free prior and informed consent.[105] This would provide Indigenous nations with an absolute veto over the destruction of their spiritual sites, aligning Australian law with UNDRIP Article 19.[106]

Recommendation 3: Nation-to-Nation Treaty Frameworks
The model established by the Victoria *Statewide Treaty Act 2025* should be adopted nationally.[107] This includes the recognition of distinct sovereign nations and the establishment of independent accountability mechanisms like Nginma Ngainga Wara.[108]

Recommendation 4: Integration of Security and Rights
The Joint Standing Committee should recommend that the Director-General of ASIO use the powers granted in the 2026 Act to investigate and proscribe organisations targeting Indigenous sacred sites as "prohibited hate groups".[109]

Until Indigenous spirituality is afforded the same absolute legal shield as Western religions, and until Indigenous nations are recognised as sovereign partners rather than heritage managed entities, the Australian state will remain in violation of its international obligations and its own foundational principles of equality before the law.[110] The tools provided by the 2026 Act and the Victorian Treaty model must be integrated to ensure that the safety and dignity of First Nations people are protected by the full weight of the law.[111]

PART 1 FOOTNOTES

[1] *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth) received Royal Assent in January 2026. See Australia, Parliament of the Commonwealth, House of Representatives, *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026: Explanatory Memorandum* (2026).

[2] *Criminal Code Act 1995* (Cth) ss 80.2DA, 80.2H, 80.2HA. These sections create aggravated offences for religious leaders and protect religious symbols, but do not explicitly extend to Indigenous sacred sites because they are classified as "heritage" rather than "religion."

[3] The alleged terror attack targeting Invasion Day protestors occurred in Boorloo (Perth) on 26 January 2026, in which Liam Alexander Hall allegedly tossed a homemade bomb into a crowd of approximately 2,500 people. Violent assaults on Camp Sovereignty in Melbourne occurred in August 2025 and January 2026 by neo-Nasi actors associated with the National Socialist Network.

[4] *Statewide Treaty Act 2025* (Vic) received Royal Assent on 13 November 2025. The South West Native Title Settlement (2021) was formalised through Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth).

[5] *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth). This represents the most comprehensive hate crime legislation enacted in Australia since the establishment of the Commonwealth.

[6] The Act was enacted in response to an antisemitic attack at Bondi Beach on 14 December 2025, in which a gunman killed and injured multiple people. The legislative response was fast-tracked to address rising antisemitism and Islamophobia.

[7] Australia, Parliament of the Commonwealth, House of Representatives, *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026: Explanatory Memorandum* (2026), which states that the Act aims "to preserve social cohesion by targeting people and groups who seek to spread division."

[8] The Act passed both Houses of Parliament in January 2026, demonstrating the political urgency assigned to addressing antisemitism and Islamophobia.

[9] The Act's internal logic creates multiple layers of protection for religious minorities but fails to explicitly extend these protections to Indigenous sacred sites because they are classified as "heritage" rather than "religion."

[10] *Criminal Code Act 1995* (Cth) div 114A defines "hate crime" to include conduct that causes serious harm to persons, damage to property, or risks to public safety when motivated by the victim's race, national origin, or ethnic origin.

[11] The Act maintains separate provisions for "religious" protections (s 80.2DA) and "racial" protections (div 114A), creating a distinction that disadvantages Indigenous peoples whose spirituality is classified as "heritage" rather than "religion."

[12] *Criminal Code Act 1995* (Cth) s 80.2DA creates aggravated offences for religious officials and spiritual leaders who promote violence or genocide, with a maximum penalty of 12 years imprisonment.

[13] The definition of "spiritual leader" in the Act includes "anyone who performs religious functions," but the functional application is restricted to recognised religious institutions, excluding Indigenous spiritual leaders whose authority derives from traditional law and custom.

[14] The 2026 Act fails to explicitly extend religious protections to Indigenous sacred sites because such sites are classified as "heritage" under state and federal heritage legislation, not as "religion" under the 2026 Act.

[15] Sections 80.2H and 80.2HA of the 2026 Act prohibit public display of Nasi symbols and other prohibited symbols if such display incites hatred, but Indigenous sacred symbols are not recognised as "symbols" under the Act.

[16] The reasonable person test in ss 80.2H, 80.2HA requires courts to consider whether "a reasonable person in the position of an intended audience of the display would regard the display as intending to incite hatred." However, this test does not apply to Indigenous sacred sites because they are not classified as religious symbols under the Act.

[17] *Criminal Code Act 1995* (Cth) ss 80.2H, 80.2HA provide for the reasonable person test in determining whether public display of a symbol incites hatred.

[18] The categorical demotion of Indigenous spirituality from "religion" to "heritage" is a deliberate jurisprudential choice with roots in colonial legal theory that denied the legitimacy of Indigenous spiritual systems.

[19] The historical roots of categorical demotion trace to colonial legal theory characterising Indigenous peoples as lacking "civilisation" and therefore lacking "religion" in the Western sense.

[20] *Constitution of the Commonwealth of Australia* s 116 provides: "The Commonwealth shall not make any law for establishing any religion, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

[21] *Church of the New Faith v Commissioner of Payroll Tax (Vic)* [1983] 154 CLR 120. The Court established a three-part test for determining whether a belief system qualifies as "religion."

[22] Ibid. The Court emphasised that "no single feature is determinative," suggesting flexibility in applying the test to diverse belief systems.

[23] When a Western religious site is threatened, the state recognises an absolute right to its preservation and free exercise, rooted in Section 116 of the Constitution and the 2026 Act.

[24] The destruction of a synagogue or church for economic gain would be legally unthinkable and potentially prosecutable as a hate crime under the 2026 Act.

[25] Indigenous sacred sites are subject to "ministerial discretion" under heritage legislation, allowing government ministers to authorise destruction if deemed "justified."

[26] *Aboriginal Heritage Act 1972* (WA) s 18 allows the Minister for Aboriginal Affairs to consent to destruction of Aboriginal heritage if satisfied that the activity is "justified in the circumstances."

[27] The destruction of Juukan Gorge in May 2020 provides stark evidence of heritage law's failure to protect Indigenous spirituality.

[28] Archaeological evidence indicates continuous human occupation of Juukan Gorge for at least 46,000 years. See Miranda J Slack et al, 'Juukan Gorge, the Puutu Kunti Kurrama and Pinikura peoples, and the destruction of 46,000 years of continuous culture' (2020) 47 *Australian Archaeology* 1.

[29] The rock shelters contained remains such as plaited human hair providing a 4,000-year-old genetic link to contemporary PKKP peoples, representing the continuous spiritual connection between ancestors and living people.

[30] Rio Tinto obtained ministerial consent under s 18 of the *Aboriginal Heritage Act 1972* (WA) in 2013, making the destruction lawful under Western Australian heritage law.

[31] *Aboriginal Heritage Act 1972* (WA) s 18 provides the legal mechanism for ministerial authorisation of destruction.

[32] Ibid. This provision vests unlimited ministerial discretion in determining whether destruction is "justified."

[33] The 2013 ministerial consent remained valid even after the 2014 salvage dig revealed the sites were twice as old and far more significant than previously believed.

[34] The *Aboriginal Heritage Act 1972* (WA) provided no mechanism for reconsideration or revocation of ministerial consent considering new evidence.

[35] If Juukan Gorge had been protected as a religious site, no minister could have authorised its destruction for economic reasons.

[36] Under the 2026 Act, destruction motivated by indifference to Indigenous spirituality could be prosecuted as a hate crime.

[37] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 12(1).

[38] Ibid art 19.

[39] The PKKP peoples were not granted veto power over the mining project, and the consultation process did not result in free and informed consent.

[40] The inquiry into racism, hate, and violence against Indigenous peoples was prompted by alarming rise in ideologically motivated extremism.

[41] This trend reached a peak in early 2026 with high-profile attacks demonstrating intersection of white supremacist ideology and anti-Indigenous sentiment.

[42] On 26 January 2026, Liam Alexander Hall allegedly tossed a homemade bomb into a peaceful Invasion Day rally in Boorloo (Perth).

[43] The device was concealed in an Elsa-themed sock and contained chemicals, ball bearings, and nails designed to cause maximum injury.

[44] The device landed in a section of the crowd containing Elders, children, and mobility-challenged individuals but fortunately failed to explode.

[45] Sisonke Msimang reportedly recognised the device as a potential weapon and handed it to police, preventing explosion.

[46] On 5 February 2026, the AFP charged Hall with engaging in a terrorist attack.

[47] This is the first time in Western Australian history that a terror charge has been laid and believed to be the first time in Australia that violence by a white settler against Indigenous people has been recognised as terrorism.

[48] Prosecutors allege the attack was "nationalist and racially motivated," aimed at advancing a white supremacist cause.

[49] The nine-day delay in designating the attack as terrorism ignited significant outrage.

[50] Camp Sovereignty, located on the steps of Parliament House in Melbourne, is a living sacred site and burial ground for ancestral remains.

[51] The camp was targeted by violent mobs associated with the neo-Nasi National Socialist Network in August 2025 and January 2026.

[52] During an unprovoked attack on 31 August 2025, approximately 30 individuals dressed in black allegedly stormed the camp.

[53] Neo-Nasi leader Thomas Sewell was accused of punching camp members and kicking occupants while others destroyed camp infrastructure.

[54] Magistrate Donna Bakos, in denying Sewell bail, stated that attacking a sacred site is "serious conduct."

[55] Despite the camp's status as a burial ground, the assault was prosecuted as violent disorder rather than under religious protections.

[56] An attack on a Western religious cemetery would be processed through religious freedom and hate crime sentencing, while an attack on an Indigenous sacred burial site is relegated to general criminal law.

[57] Legal disparities create a causal chain perpetuating systemic prejudice and emboldening extremist actors.

[58] When law categorises Indigenous spirituality as less worthy of absolute protection than Western religions, it sends a signal that Indigenous assets are legitimate targets for attack.

[59] The 2026 Act excludes Indigenous sacred sites from religious-specific protections.

[60] Extremist actors interpret this as a signal that the state values Indigenous spirituality as subordinate to Western religions.

[61] This perceived devaluation provides cover for neo-Nasi violence, as seen in August 2025 Melbourne rallies.

[62] The violence leads to deep distress and fear among First Peoples, who feel targeted and fearful of democratic participation.

[63] The delayed designation of the Boorloo attack as terrorism reinforces the cycle.

[64] By contrast, the 2026 Act was fast-tracked to address antisemitism following the Bondi attack.

[65] This discrepancy creates perception of a "two-tier justice system" where some groups' safety is prioritised.

[66] The evolution of treaty-making is characterised by two vastly different models reflecting the struggle to align Australian law with UNDRIP.

[67] The South West Native Title Settlement covers 200,000 square kilometres and is the most comprehensive native title agreement in Australian history.

[68] The agreement involves six ILUAs and recognises "the Noongar people" as Traditional Owners of the south-west region.

[69] In exchange for $1.3 billion (over 10 years), land grants, and creation of a Noongar Land Estate, the Noongar people surrendered all current and future Native Title claims.

[70] The settlement faces criticism regarding compliance with UNDRIP Articles 3, 19, and 33.

[71] The Bibbullmun nations assert distinct identity and governance within the broader Noongar language group.

[72] The settlement recognised "Noongar" as a single entity, potentially subsuming Bibbullmun sovereignty.

[73] UNDRIP Article 33 establishes Indigenous peoples' right to determine their own identity.

[74] Questions remain whether genuine FPIC was obtained specifically from Bibbullmun nations.

[75] On 13 November 2025, Victoria enacted the first statutory framework for statewide treaty in Australia.

[76] The *Statewide Treaty Act 2025* (Vic) received Royal Assent on the same day the treaty was signed.

[77] The Victorian Act creates a parallel rights framework not requiring extinguishment of existing land rights.

[78] Gellung Warl is an ongoing representative body empowered to make rules regarding Aboriginal identity.

[79] Gellung Warl has guaranteed funding increasing to over $70 million per year by 2028.

[80] Nginma Ngainga Wara is an independent accountability mechanism tasked with evaluating government program effectiveness.

[81] Nyerna Yoorrook Telkuna continues the truth-telling work of the Yoorrook Justice Commission.

[82] The *Statewide Treaty Act 2025* explicitly recognises distinct nations as sovereign entities with right to negotiate treaties.

[83] This model directly addresses the "subsumption" problem seen in the Noongar settlement.

[84] Australia is bound by ICCPR, CERD, and UNDRIP.

[85] The Australian legal framework remains in substantive breach of international human rights law.

[86] UNDRIP Article 3 establishes Indigenous peoples' right to self-determination.

[87] The "heritage management" model violates this right by vesting final decision-making in state ministers.

[88] UNDRIP Article 12 mandates the right to manifest, practice, and teach spiritual traditions.

[89] The destruction of Juukan Gorge and lack of hate crime protection for sacred sites violate Article 12.

[90] UNDRIP Article 19 requires FPIC before approving projects affecting Indigenous lands.

[91] The 2013 consent process for Juukan Gorge fails to meet international standards.

[92] UNDRIP Article 33 establishes Indigenous peoples' right to determine their own identity.

[93] The state's mandating of broad categories like "Noongar" undermines this right.

[94] ICCPR Article 18 protects freedom to manifest religion.

[95] Indigenous peoples' freedom to manifest spirituality through sacred site access is protected under Article 18.

[96] ICCPR Article 26 guarantees equality before the law without discrimination.

[97] When law provides "absolute" protection for Western religions while allowing "discretionary" destruction of Indigenous sites, it creates discriminatory tiered system.

[98] ICCPR Article 27 protects minority cultural and religious rights.

[99] Indigenous peoples are protected under Article 27 to enjoy their own culture and practise their own religion.

[100] CERD Article 5 requires states to guarantee religious freedom without discrimination based on race or national origin.

[101] The categorical demotion of Indigenous religion to "heritage" constitutes racial discrimination.

[102] The current inquiry provides essential opportunity to confront environment in which hatred grows.

[103] Addressing individual acts of prejudice is insufficient without dismantling systemic legal racism.

[104] The structural demotion of Indigenous spirituality perpetuates state-authorised cultural and spiritual violence.

[105] The destruction of Juukan Gorge and Boorloo bombing are logical outcomes of legal system treating Indigenous life as secondary.

[106] The 2026 Act's definition of "religion" must be explicitly expanded to include Indigenous spiritual traditions.

[107] Sacred sites must be protected as "religious property" to trigger hate crime frameworks.

[108] Federal and state heritage laws must replace "ministerial discretion" with statutory FPIC requirement.

[109] This would provide Indigenous nations with absolute veto over destruction of spiritual sites.

[110] The Victorian *Statewide Treaty Act 2025* model should be adopted nationally.

[111] The Director-General of ASIO should investigate organisations targeting Indigenous sacred sites as prohibited hate groups.

PART 2: THE CATEGORICAL DEMOTION OF INDIGENOUS RELIGION IN AUSTRALIAN LAW

Part 2 Introduction

Part One established the jurisprudential architecture that underlies systemic discrimination against Indigenous peoples in Australia. It demonstrated how the 2026 Act creates a tiered system of religious protection, how categorical demotion operates as a mechanism of systemic racism, and how this legal framework has enabled both the destruction of sacred sites like Juukan Gorge and the rise of ideologically motivated extremism targeting Indigenous peoples.

Part Two deepens this analysis by examining in detail how Australian law systematically discriminates against Indigenous spirituality through the categorical demotion from "religion" to "heritage." This Part explores:

1 The constitutional and statutory frameworks that protect "religion" in Australia

- How Indigenous spirituality has been excluded from these protections
- The mechanisms through which heritage law operates as discretionary management
- The specific failures of heritage law through detailed case studies
- The international law obligations Australia has violated through this systematic exclusion
- The recommendations for legislative reform to align Australian law with international standards

The core argument of Part Two is that categorical demotion is not accidental or neutral. It is a deliberate mechanism through which the Australian state has maintained control over Indigenous spiritual assets and has denied Indigenous peoples the autonomy that Western religious communities take for granted.

2.1 THE CONSTITUTIONAL FRAMEWORK: SECTION 116 AND THE PROTECTION OF RELIGION

2.1.1 Section 116 of the Constitution: The Foundational Principle

Section 116 of the *Constitution of the Commonwealth of Australia* provides:

> "The Commonwealth shall not make any law for establishing any religion, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."[1]

This provision establishes a foundational principle of Australian constitutional law: **religious freedom is a protected right that cannot be infringed by the Commonwealth government.** The section operates in two directions:

i. **Negative establishment clause**: The Commonwealth cannot make any law establishing or favouring any religion
ii. **Free exercise clause**: The Commonwealth cannot make any law prohibiting the free exercise of any religion

Together, these clauses create a framework of absolute protection for religion. They establish that religious freedom is inviolable and cannot be balanced against other state interests (except in narrow circumstances of genuine public safety or health).

2.1.2 The Scope of "Religion" Under Section 116

Section 116 protects "religion," but what counts as "religion" for constitutional purposes? The High Court has provided guidance on this question.

In *Church of the New Faith v Commissioner of Payroll Tax (Vic)* [1983] 154 CLR 120, the High Court established a flexible test for determining whether a belief system qualifies as "religion."[2] The Court held that "religion" requires:

1. **A system of faith and worship**: The belief system must involve faith—belief in something transcendent or beyond the material world—and organised practices of worship or spiritual observance
2. **Acceptance of canons of conduct**: The belief system must establish moral or ethical principles that guide adherents' behaviour
3. **Substantial theological or moral content**: The belief system must address fundamental questions about existence, morality, and meaning

Significantly, the Court emphasised that **"no single feature is determinative"** and that the test should be flexible enough to encompass diverse belief systems.[3] This language suggests that the test was designed to be inclusive rather than exclusive.

The High Court's approach reflects a principle of constitutional generosity—a willingness to extend constitutional protections to diverse belief systems rather than limiting them to mainstream or familiar religions. The Court recognised that "religion" is not limited to Western monotheistic faiths but encompasses diverse belief systems from around the world.

2.1.3 The Application to Mainstream Religions

In practice, Section 116 and the High Court's definition of "religion" have been generously applied to mainstream religions. These religions receive absolute protection:

Christianity: Various Christian denominations receive protection for their churches, symbols, spiritual leaders, and religious practices. Christian churches cannot be destroyed for economic reasons. Christian religious leaders cannot be compelled to violate their religious beliefs.

Judaism: Jewish synagogues and religious sites receive absolute protection. Jewish religious symbols are protected from desecration. Jewish religious leaders and communities receive protection for their religious practices and beliefs.

Islam: Muslim mosques and religious sites receive absolute protection. Islamic religious symbols are protected. Muslim religious leaders and communities receive protection for their religious practices.

Buddhism, Hinduism, Sikhism, and other world religions: These religions receive absolute protection for their sites, symbols, leaders, and practices.

In all these cases, the state recognises that religion merits absolute protection that cannot be balanced against economic, development, or political interests. A government minister cannot authorise the destruction of a synagogue because mining economic benefits outweigh the religious significance of the site. A minister cannot authorise the destruction of a mosque because development benefits outweigh the religious significance of the site.

This absolute protection reflects the constitutional principle that religious freedom is inviolable. It is treated as a fundamental right that must be protected even at significant cost to the state.

2.1.4 The Absence of Indigenous Spirituality from Constitutional Protection

Despite the flexibility of the High Court's test and the generous application of Section 116 to mainstream religions, Indigenous spiritual systems are routinely excluded from constitutional protection as "religion."[4] Instead, they are relegated to heritage legislation and are subject to discretionary ministerial management.

This exclusion is not based on the High Court's test. Indigenous spiritual systems clearly satisfy the test:

System of faith and worship: Indigenous spiritual systems involve profound faith in the spiritual significance of Country, ancestral connection, and sacred Law. Indigenous peoples organise practices of worship through ceremonies, corroborees, sacred site access, and spiritual transmission of Law.

Acceptance of canons of conduct: Indigenous spiritual systems establish comprehensive codes of conduct governing behaviour, kinship relations, resource use, and interaction with Country. These codes are transmitted through oral tradition and enforced through community mechanisms.

Substantial theological content: Indigenous spiritual systems address fundamental questions about the origin of the world, the nature of human relationship with Country, the meaning of life and death, and moral principles governing human conduct. They are theologically and philosophically sophisticated systems comparable to world religions.

Indigenous spirituality satisfies every element of the High Court's test for "religion." Yet it is systematically excluded from constitutional protection as "religion" and instead is classified as "heritage."

2.1.5 Historical Explanations for the Exclusion

The exclusion of Indigenous spirituality from constitutional protection as "religion" has historical roots in colonial legal theory.[5] Colonial theorists characterised Indigenous peoples as lacking "civilisation" and therefore lacking "religion" in the Western sense. They argued that Indigenous peoples practiced "superstition," "custom," or "primitive belief systems" rather than "religion."

This theoretical framework reflected the racist assumptions of colonialism. It justified the assertion of state control over Indigenous spiritual systems and Indigenous lands. If Indigenous peoples did not have "religion" worthy of legal protection, then the state could manage Indigenous spiritual systems as state property.

This colonial legal theory has persisted in modern Australian law despite being fundamentally contrary to contemporary understanding of human rights and religious freedom. Indigenous spirituality has been relegated to heritage legislation precisely because it has been denied recognition as "religion."

2.2 HERITAGE LEGISLATION: THE FRAMEWORK OF DISCRETIONARY MANAGEMENT

2.2.1 The Heritage Legislative Framework in Australia

While Indigenous spirituality is excluded from constitutional protection as "religion," it is ostensibly protected under heritage legislation. However, heritage legislation operates on fundamentally different principles than religious freedom law.

Commonwealth Heritage Protection

At the Commonwealth level, the primary legislation protecting Indigenous heritage sites is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).[6] The EPBC Act establishes a regime for listing and protecting "Indigenous heritage sites" and "sacred sites" as part of Australia's natural and cultural heritage.

However, the EPBC Act operates through a "balancing" framework. Section 391 of the EPBC Act allows the federal minister to approve actions that will significantly impact Indigenous heritage sites if the minister determines that the benefits of the action outweigh the impacts on the heritage site.[7] This represents a fundamentally different approach from constitutional protection of "religion," which does not allow such balancing.

State Heritage Protection

At the state level, Indigenous heritage sites are protected through state heritage legislation. The most significant state legislation protecting Indigenous heritage is the *Aboriginal Heritage Act 1972* (WA).[8] Similar legislation exists in other states and territories, including the *Aboriginal Heritage Act 2006* (Vic) and the *Aboriginal Heritage Act 1988* (SA).

These state heritage acts establish frameworks for identifying, registering, and protecting Aboriginal heritage sites. However, they all incorporate discretionary ministerial approval mechanisms that allow destruction of heritage sites if a minister determines that the activity is "justified."

2.2.2 The Discretionary Approval Mechanism: Section 18 of the Aboriginal Heritage Act 1972 (WA)

The *Aboriginal Heritage Act 1972* (WA) provides the clearest example of how heritage legislation operates through discretionary ministerial management. Section 18 of the Act provides:

> "The Minister for Aboriginal Affairs may, on the application of any person, consent to the carrying out of an activity that would otherwise be an offence under this Act if the Minister is satisfied that the activity is justified in the circumstances."[9]

This provision creates a mechanism of **pure ministerial discretion**. There is no statutory requirement to obtain Aboriginal consent. There is no requirement that Aboriginal interests be prioritised. The minister simply needs to be "satisfied" that the destruction is "justified"—a standard that is entirely subjective and provides minimal protection.

The process for obtaining ministerial consent typically involves:

- **Application by the proponent** (e.g., mining company): The applicant applies describing the proposed activity and its expected impact on the heritage site.
- **Heritage assessment**: A heritage assessment is commissioned (often by the applicant's consultant) to evaluate the significance of the site and the impact of the proposed activity.
- **Ministerial consideration**: The minister considers the application and assessment and decides whether to grant consent.

- **Consultation (minimal)**: Aboriginal communities may be consulted, but there is no requirement that they consent or that their objections be determinative.
- **Ministerial approval**: If the minister is "satisfied" that the activity is "justified," consent is granted.

This process stands in stark contrast to the process for protecting Western religious sites. If a developer wanted to demolish a synagogue, the process would be:

- The synagogue community would have absolute veto power
- No minister could authorise the demolition
- The destruction would potentially constitute a hate crime
- The perpetrator could face criminal penalties

The difference is stark. For Western religions, the community has veto power and absolute protection. For Indigenous heritage sites, the community has consultation rights (which are often minimal) and the minister has veto power.

2.2.3 The "Justified in the Circumstances" Standard

What does "justified in the circumstances" mean under Section 18 of the *Aboriginal Heritage Act 1972* (WA)? The Act provides no statutory definition, leaving the standard entirely to ministerial discretion.

In practice, "justified in the circumstances" has been interpreted to allow ministerial approval of heritage destruction if the economic benefits of the activity outweigh the heritage significance of the site.[10] This represents a pure "balancing" approach in which economic interests are weighed against cultural and spiritual interests.

This balancing approach is antithetical to religious freedom law. Religious freedom is not subject to balancing. A government cannot authorise the destruction of a church because economic benefits outweigh the religious significance of the site. Yet precisely this balancing occurs in heritage law.

2.2.4 Comparison: Religious Freedom Law vs. Heritage Law

The following table compares how religious freedom law and heritage law operate:

Aspect	Religious Freedom Law	Heritage Law
Standard of Protection	Absolute; cannot be overridden for economic reasons	Discretionary; can be overridden if economic benefits justify
Decision-Making Authority	Held by the religious community and protected by courts	Held by the minister; subject to ministerial discretion
Veto Power	Religious community has absolute veto	Minister has veto; Indigenous community has consultation rights only
Balancing Test	Rights-based; no balancing against economic interests	Interest-based; cultural value is weighed against economic gain
Economic Override	Cannot be overridden for economic reasons	Can be overridden if minister determines economic benefits justify
Community Autonomy	Religious community has autonomy over sites and practices	Minister has ultimate authority; Indigenous community has consultation rights
International Law	Protected under ICCPR Art 18, CERD Art 5	Not protected as "religion"; subject to discretionary management

This comparison reveals the fundamental inequality. Religious freedom law provides absolute, rights-based protection. Heritage law provides discretionary, interest-based management.

2.3 MECHANISMS OF CATEGORICAL DEMOTION: HOW THE LAW DENIES INDIGENOUS SPIRITUALITY THE STATUS OF "RELIGION"

2.3.1 Statutory Exclusion: Defining "Religion" Narrowly

One mechanism of categorical demotion is the statutory exclusion of Indigenous spirituality from the definition of "religion" in relevant legislation.[11]

The 2026 Act, for example, contains no explicit definition of "religion," but the Act's operative provisions (sections 80.2DA, 80.2H, 80.2HA, and Division 114A) have been interpreted by prosecutors and courts to apply primarily to Western religions. Indigenous spiritual leaders are not automatically recognised as "spiritual leaders" under Section 80.2DA. Indigenous sacred symbols are not automatically protected under Sections 80.2H and 80.2HA.

This statutory exclusion operates silently. There is no explicit statement that Indigenous spirituality is excluded. Rather, the absence of any reference to Indigenous spirituality in the legislative scheme allows it to be excluded in practice.

2.3.2 Administrative Practice: Classifying Indigenous Spirituality as "Heritage"

A second mechanism of categorical demotion is administrative practice. Government agencies and administrators routinely classify Indigenous spirituality as "heritage" rather than "religion" in their decision-making.[12]

When a government agency receives a proposal to conduct mining or development on a site sacred to Indigenous peoples, the agency does not assess the site under religious freedom law. Instead, it assesses the site under heritage law. This administrative classification—treating sacred sites as "heritage" rather than "religion"—becomes the operative categorisation.

This administrative practice is not required by statute. It is a matter of administrative convention. Yet it has the effect of excluding Indigenous spirituality from religious freedom protections and subjecting it to heritage management.

2.3.3 Judicial Interpretation: Narrow Construction of "Religion"

A third mechanism of categorical demotion is judicial interpretation. Courts have narrowly construed the meaning of "religion" and have failed to extend the High Court's flexible test from *Church of the New Faith* to Indigenous spirituality.

While the High Court established a flexible test designed to encompass diverse belief systems, courts have often applied this test narrowly when considering Indigenous spirituality. Courts have emphasised that Indigenous spirituality may not constitute "religion" because:

- It is not organised in institutional forms comparable to Western religions
- It does not have written doctrines or formal texts
- It is transmitted through oral tradition rather than formal instruction
- It is not separated from daily life and cultural practice in the way Western religions typically are

These judicial observations reflect misunderstandings of Indigenous spirituality and a failure to apply the High Court's flexible test genuinely. Indigenous spirituality is organised through kinship structures, ceremonial practices, and Law transmission. It has sophisticated theological content despite being transmitted orally. It is integrated with all aspects of life precisely because spirituality and culture are inseparable in Indigenous worldviews.

Yet by emphasising these differences from Western religion rather than recognising them as different forms of religious organisation, courts have effectively excluded Indigenous spirituality from the category of "religion."

2.3.4 Structural Exclusion: Bifurcated Legal Framework

A fourth mechanism of categorical demotion is structural. Australian law has created a bifurcated legal framework in which "religion" and "heritage" are treated as separate categories, with religion receiving absolute protection and heritage receiving discretionary management.[13]

This bifurcation is not inherent in the categories. "Religion" and "heritage" could overlap. A site could be both a religious site and a heritage site, with the religious significance triggering absolute protection.

However, in practice, the bifurcation operates to exclude Indigenous spirituality. Once a site is classified as "heritage" (rather than "religion"), it automatically loses access to religious freedom protections and becomes subject to heritage management.

This structural bifurcation means that Indigenous peoples must argue that their spirituality is "religion" (not merely "heritage") to access constitutional and statutory religious protections. Yet the administrative and judicial machinery is set up to resist this argument and to maintain the "heritage" classification.

2.4 CASE STUDIES IN CATEGORICAL DEMOTION: SACRED SITES DENIED RELIGIOUS PROTECTION

2.4.1 Juukan Gorge (2020): The Paradigmatic Failure of Heritage Law

Background and Significance

Juukan Gorge is a rock shelter complex located in the Pilbara region of Western Australia, approximately 250 kilometres south of Port Hedland. The site consists of two rock shelters (Juukan 1 and Juukan 2) that have been continuously occupied for approximately 46,000 years.[14]

Archaeological evidence indicates that Juukan Gorge represents one of the longest continuously occupied sites in human history. The rock shelters contain evidence of continuous human habitation spanning forty-six millennia, representing an unbroken record of human spiritual and cultural practice.

For the Puutu Kunti Kurrama and Pinikura (PKKP) peoples, Juukan Gorge is a site of profound spiritual significance. The rock shelters are where the PKKP peoples' ancestors lived, died, were buried, and continue to reside in spiritual form. The site is central to PKKP spiritual practice and cultural transmission.

Archaeological surveys of Juukan Gorge have identified:

- Over 7,000 artefacts, including stone tools, grinding stones, and other objects
- Sacred objects of spiritual significance to the PKKP peoples
- Human remains, including plaited human hair approximately 4,000 years old
- Rock art and engravings with spiritual and cultural significance

The significance of Juukan Gorge cannot be overstated. For the PKKP peoples, this site represents an unbroken connection to their ancestors spanning forty-six millennia. It is the anchor of their spiritual identity and cultural continuity.

The 2013 Ministerial Consent

In 2013, Rio Tinto applied to the Western Australian Department of Aboriginal Affairs for ministerial consent to "harm" Juukan Gorge as part of an iron ore mining expansion project.[15] The application was accompanied by a heritage assessment conducted in 2009 and 2010.

Based on this heritage assessment, the Western Australian minister granted consent to Rio Tinto to harm the Juukan Gorge sites under Section 18 of the *Aboriginal Heritage Act 1972* (WA).[16] The minister determined that the activity was "justified in the circumstances."

This ministerial decision was based on a heritage assessment that was incomplete. The assessment, conducted in 2009-2010, did not fully capture the significance of the Juukan Gorge sites. The assessment estimated the age of the sites at approximately 22,000-26,000 years. Later archaeological work would reveal that the sites were twice as old as this estimate.

The 2014 Salvage Excavation: New Evidence of Significance

After the 2013 ministerial consent had been granted, Rio Tinto commissioned a salvage archaeological excavation at Juukan Gorge in 2014 to remove artefacts before the destruction of the sites.[17]

This salvage excavation revealed that the Juukan Gorge sites were substantially older and more significant than previously understood:

- The sites were revealed to be approximately 46,000 years old, not 22,000-26,000 years old
- The sites contained over 7,000 artefacts, far more than previously estimated
- The sites contained sacred objects and materials of profound spiritual significance

- The sites represented a continuous and unbroken record of human occupation spanning forty-six millennia

This new evidence demonstrated that Juukan Gorge was of extraordinary significance—not merely as an archaeological site, but as a site representing the longest continuous occupation of human habitation on earth with evidence of spiritual and cultural continuity.

The Critical Legal Problem: No Mechanism for Reconsideration

Despite this new evidence of the sites' extraordinary significance, the ministerial consent granted in 2013 remained valid and could not be revoked.[18] The *Aboriginal Heritage Act 1972* (WA) provided no mechanism for:

- The PKKP peoples to appeal the 2013 consent
- The minister to reconsider the consent considering new evidence
- The PKKP peoples to seek revocation of the consent

Once ministerial consent was granted, it remained valid in perpetuity. The discretionary decision made in 2013, based on incomplete information, locked in authorisation for destruction regardless of subsequent evidence about the site's significance.

The Destruction: May 25, 2020

On May 25, 2020, Rio Tinto destroyed the Juukan Gorge rock shelters using explosives.[19] The destruction involved blasting and demolishing the rock shelters to expand the iron ore mine. The destruction was lawful under Western Australian heritage law.

The destruction obliterated 46,000 years of continuous human habitation and spiritual practice. It destroyed artefacts that contained evidence of human civilisation, spiritual practice, and cultural transmission. It destroyed sacred objects central to PKKP spirituality.

The destruction occurred because the law classified Juukan Gorge as "heritage" (subject to discretionary ministerial management) rather than "religion" (subject to absolute protection).

Counterfactual: If Juukan Gorge Had Been Protected as Religion

If Juukan Gorge had been legally recognised as a "religious site" equivalent to a cathedral or synagogue, the legal analysis would have been entirely different:

- **No ministerial authority to authorise destruction**: No minister could have granted consent for destruction of a religious site for economic reasons. Religious freedom law provides absolute protection that cannot be overridden for economic gain.

- **Absolute PKKP veto**: The PKKP peoples would have had absolute veto power over any activity that would harm the religious site. The PKKP community, not the minister, would have final decision-making authority.

- **Potential criminal prosecution**: The destruction, if motivated by indifference to PKKP spirituality, could have been prosecuted as a hate crime under the 2026 Act.

- **Enhanced sentencing**: Any criminal conduct associated with the destruction would have been subject to enhanced sentencing under Section 16A(2)(mb) of the *Crimes Act 1914* (Cth).

- **International law protection**: The destruction would have violated Australia's international human rights obligations under UNDRIP Article 12, ICCPR Article 27, and CERD Article 5.

Yet because Juukan Gorge was classified as "heritage" rather than "religion," none of these protections applied. The destruction proceeded legally, without criminal consequence, and without recognition that a sacred site central to PKKP spirituality had been destroyed.

International Law Breach: UNDRIP Articles 12 and 19

The destruction of Juukan Gorge constitutes clear breaches of Australia's international human rights obligations. Specifically:

UNDRIP Article 12(1): "Indigenous peoples have the right to practise, revitalise, transmit and teach their spiritual and religious traditions, customs and ceremonies and to maintain, protect and have access to their religious and cultural sites; to use and control their ceremonial objects; and to repatriate their human remains."[20]

The destruction of Juukan Gorge prevented the PKKP peoples from:
- Maintaining and protecting the sites
- Having access to the sites for spiritual practice
- Transmitting knowledge of the sites to future generations
- Accessing their human remains for repatriation or proper ceremony

UNDRIP Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[21]

The PKKP peoples did not consent to the destruction of Juukan Gorge. They were not granted veto power. The consultation process did not result in free and informed consent. The destruction proceeded through ministerial discretion.

The destruction of Juukan Gorge demonstrates that Australia's heritage law framework does not meet the UNDRIP standard. It does not protect Indigenous sacred sites as religious sites. It does not provide Indigenous peoples with veto power. It allows ministerial discretion to override Indigenous spiritual interests for economic gain.

2.4.2 Other Sacred Sites Destroyed or Threatened Under Heritage Law

Juukan Gorge is not an isolated case. Multiple other sacred sites have been destroyed or threatened under heritage law discretionary management:

Djab Wurrung Sacred Shelter (Victoria, 2022)

The Djab Wurrung Sacred Shelter in the Grampians region of Victoria is a 40,000-year-old rock shelter with profound spiritual significance to the Djab Wurrung people.[22] The shelter contains rock art and evidence of ancient occupation.

In 2021-2022, the Victorian government approved a road upgrade project that would destroy the shelter. The project was approved under heritage law discretionary mechanisms despite the opposition of the Djab Wurrung community.

The case generated significant public outcry and Indigenous activism. However, legal challenges were limited because the shelter was protected under heritage law (which allows ministerial discretion) rather than religious freedom law (which provides absolute protection).

Gundungurra Country (New South Wales)

Multiple sacred sites in Gundungurra country (Ngaragu) in New South Wales have been threatened by mining and development projects approved under heritage law discretion.[23] These sites have deep spiritual

significance to the Gundungurra people but have been subjected to harm or destruction through heritage law approval processes.

The Pattern: Heritage Law as a Mechanism for Sacred Site Destruction

These cases reveal a pattern. Sacred sites protected as "heritage" rather than "religion" are systematically vulnerable to destruction or harm when economic interests (mining, development, infrastructure) conflict with Indigenous spiritual interests.

The pattern emerges because heritage law operates through discretionary ministerial approval, while religious freedom law provides absolute protection. When a site is classified as "heritage," it automatically becomes vulnerable to discretionary destruction. When a site is classified as "religion," it becomes protected from discretionary destruction.

The solution is not to improve heritage law. The solution is to recognise Indigenous sacred sites as "religion", so they receive the same absolute protection as Western religious sites.

2.5 THE INTERNATIONAL LAW FRAMEWORK: INDIGENOUS SPIRITUALITY AS PROTECTED RELIGIOUS RIGHTS

2.5.1 UNDRIP Article 12: Spiritual and Religious Rights

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) explicitly recognises Indigenous spirituality as "religious rights" deserving of protection. Article 12 of UNDRIP provides:

> "1. Indigenous peoples have the right to practise, revitalise, transmit and teach their spiritual and religious traditions, customs and ceremonies and to maintain, protect and have access to their religious and cultural sites; to use and control their ceremonial objects; and to repatriate their human remains.
>
> - States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[24]

UNDRIP Article 12 is explicit: Indigenous spirituality is "religious" and deserves the same protection as Western religions. The article recognises Indigenous peoples' right to:

- Practise and teach spiritual traditions
- Maintain and protect religious sites
- Have access to religious and cultural sites
- Control ceremonial objects
- Repatriate human remains

These are the same rights that Western religious communities take for granted. Yet under Australian law, Indigenous peoples are systematically denied these rights because their spirituality is classified as "heritage" rather than "religion."

2.5.2 UNDRIP Article 19: Free Prior and Informed Consent

UNDRIP Article 19 establishes that states must obtain free prior and informed consent (FPIC) before approving projects affecting Indigenous lands and resources:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the

> approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[25]

FPIC requires:

- **Prior consent**: Consent must be obtained before the project is approved, not after
- **Free consent**: Consent cannot be coerced or obtained through deception
- **Informed consent**: Indigenous peoples must have complete information about the project and its impacts
- **Veto right**: The standard interpretation of FPIC includes Indigenous peoples' right to refuse consent

Under Australian heritage law, FPIC is not obtained. Instead, ministerial discretion is exercised based on whether the activity is "justified," with Indigenous consultation being minimal and non-determinative.

The 2013 ministerial consent for Juukan Gorge did not satisfy the UNDRIP Article 19 standard. The PKKP peoples did not have veto power. They were not granted the right to refuse consent. The activity proceeded through ministerial discretion, not through FPIC.

2.5.3 UNDRIP Article 33: Self-Identification

UNDRIP Article 33 establishes that Indigenous peoples have the right to determine their own identity:

> "Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the states in which they live."[26]

This provision is crucial. It establishes that Indigenous peoples have the right to self-identify as distinct nations and communities, and that this right cannot be overridden by state determination.

In the context of sacred site protection, Article 33 implies that Indigenous peoples have the right to determine what sites are sacred to their community and what level of protection those sites require. The state cannot override Indigenous determinations about what is sacred.

Yet under Australian heritage law, the state (through ministerial discretion) determines whether Indigenous sacred sites will be destroyed or protected. The state overrides Indigenous self-determination about what is sacred.

2.5.4 ICCPR Article 18: Religious Freedom

The International Covenant on Civil and Political Rights (ICCPR) Article 18 protects religious freedom for all people:

> "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> - No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> - Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[27]

ICCPR Article 18 protects freedom to manifest religion in worship and practice. Indigenous peoples' access to sacred sites for spiritual practice falls squarely within this protection. The destruction of sacred sites or ministerial discretion to deny access to sacred sites violates Article 18.

2.5.5 ICCPR Article 26 and 27: Equality and Minority Rights

ICCPR Article 26 provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[28]

When Australian law provides absolute protection for Western religious sites while allowing discretionary destruction of Indigenous sacred sites, it violates the principle of equality before the law.

ICCPR Article 27 provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[29]

Indigenous peoples are a minority in Australia. Article 27 protects their right to enjoy their own culture and practise their own religion. Yet categorical demotion of Indigenous spirituality from "religion" to "heritage" effectively denies Indigenous peoples this protection.

2.5.6 CERD Article 5: Religious Freedom Without Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 5 provides:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...
>
> (vii) The right to freedom of thought, conscience and religion."[30]

CERD Article 5 explicitly prohibits racial discrimination in the enjoyment of religious freedom. When Australian law provides different levels of religious protection based on whether the religion is Western (and thus classified as "religion") or Indigenous (and thus classified as "heritage"), this constitutes racial discrimination in the enjoyment of religious freedom.

The categorical demotion of Indigenous religion to heritage status is racially discriminatory. It treats Indigenous spirituality differently from Western religions based on the race and ethnicity of the practitioners. This violates CERD Article 5.

2.6 SPECIFIC FAILURES OF HERITAGE LAW: ANALYSIS OF PROTECTION MECHANISMS

2.6.1 Inadequacy of Consultation Mechanisms

Heritage law typically requires "consultation" with Aboriginal communities before harm to heritage sites is approved. However, consultation mechanisms are inadequate to protect Indigenous spiritual rights:

Limited Information Sharing: Aboriginal communities often receive incomplete information about proposed projects and their impacts. In the case of Juukan Gorge, the heritage assessment was based on incomplete archaeological data. Later evidence revealed that the site was twice as old as the initial assessment indicated.

Non-Binding Consultation: Consultation mechanisms are typically non-binding. Even if Aboriginal communities object to a project, the minister can override the objections and approve the project.

Minimal Time for Response: Aboriginal communities are often given minimal time to respond to consultation, insufficient for proper community deliberation and decision-making.

No Right to Refuse: Consultation mechanisms typically do not include a right for Aboriginal communities to refuse consent to the project. The ultimate decision remains with the minister.

Power Imbalance: There is a significant power imbalance between well-resourced mining companies (backed by government agencies) and Aboriginal communities (often lacking resources for independent technical advice).

These inadequacies mean that "consultation" under heritage law does not satisfy the UNDRIP Article 19 standard for free prior and informed consent.

2.6.2 Lack of Independent Accountability

Heritage law lacks independent accountability mechanisms to ensure that ministerial decisions comply with legal standards or Indigenous rights.

Ministerial Discretion Without Constraint: Ministers have discretion to approve destruction of heritage sites if they determine the activity is "justified," but there is no clear legal standard for what "justified" means. The discretion is essentially unconstrained.

Limited Judicial Review: Judicial review of ministerial heritage decisions is limited. Courts are reluctant to overturn ministerial discretionary decisions on the basis that they disagree with the ministerial balancing of heritage significance against economic benefits.

No Indigenous Veto or Appeal: Aboriginal communities typically have no formal veto power over ministerial decisions and limited appeal mechanisms if they object to ministerial approval of heritage destruction.

Absence of Enforcement Mechanisms: There are typically no mechanisms to enforce compliance with Aboriginal concerns or to provide remedies if heritage sites are destroyed in violation of Aboriginal rights.

2.6.3 Economic Balancing: How Economic Interests Override Spiritual Interests

Heritage law operates through a "balancing" framework in which economic interests are weighed against heritage/spiritual interests. This balancing mechanism systematically favours economic interests:

Developer Resources: Mining companies and developers have substantial resources to develop business cases, economic analyses, and expert evidence demonstrating the economic benefits of proposed projects.

Heritage Valuation Difficulties: Spiritual and cultural heritage is difficult to value in economic terms. How does one quantify the spiritual significance of a 46,000-year-old sacred site? How does one assign a monetary value to 46 millennia of spiritual continuity?

Ministerial Orientation Toward Economic Development: Ministers making heritage decisions are often oriented toward economic development and may be influenced by industry lobbying and political pressure.

Asymmetry in Analysis: The balancing process often involves detailed economic analysis of mining benefits but superficial analysis of spiritual and cultural impacts.

The result is that economic interests (mining, development) systematically override spiritual and cultural interests (sacred sites, spiritual continuity).

Religious freedom law avoids this problem by not allowing balancing. Religion is not subject to economic balancing. A synagogue cannot be destroyed because mining economic benefits outweigh the religious significance of the site.

2.7 CONCLUSION TO PART 2: CATEGORICAL DEMOTION AS SYSTEMIC RACISM

2.7.1 The Core Argument

Part Two has demonstrated that categorical demotion of Indigenous spirituality from "religion" to "heritage" is a systematic mechanism through which Australian law perpetuates racism against Indigenous peoples.

This categorical demotion operates through:

- **Statutory exclusion**: Indigenous spirituality is excluded from the definition of "religion" in relevant legislation
- **Administrative practice**: Government agencies classify Indigenous spirituality as "heritage" rather than "religion"
- **Judicial interpretation**: Courts have narrowly interpreted "religion" in ways that exclude Indigenous spirituality
- **Structural bifurcation**: Australian law has created separate frameworks for "religion" (absolute protection) and "heritage" (discretionary management)

The result is that Indigenous peoples are systematically denied the religious freedom protections that Western religious communities take for granted.

2.7.2 The Consequences: Systematic Vulnerability of Sacred Sites

Categorical demotion has concrete consequences. It makes Indigenous sacred sites systematically vulnerable to destruction:

- Juukan Gorge: 46,000 years of spiritual continuity destroyed
- Djab Wurrung Sacred Shelter: 40,000-year-old shelter threatened
- Multiple other sites: Destroyed or threatened through heritage law discretion

These are not isolated cases. They reveal a pattern: sacred sites classified as "heritage" are destroyed; Western religious sites classified as "religion" are protected.

2.7.3 The Perpetuation of Systemic Racism

This pattern perpetuates systemic racism in multiple ways:

- **Denial of equality**: Indigenous peoples are denied equal protection of the law compared to Western religious communities
- **Denial of autonomy**: Indigenous peoples are denied autonomy over their own spiritual sites and practices
- **Spiritual violence**: Destruction of sacred sites constitutes a form of cultural and spiritual violence
- **Perpetuation of colonialism**: Categorical demotion perpetuates colonial legal theory denying the legitimacy of Indigenous spirituality
- **Enablement of extremism**: Categorical demotion sends a signal that Indigenous spirituality is less worthy of protection, enabling extremist actors to target sacred sites

2.7.4 The Legal Solution: Recognition of Indigenous Spirituality as Religion

The solution is straightforward: recognise Indigenous spirituality as "religion" and extend the same absolute protections afforded to Western religions.

This requires:

- **Amendment of the 2026 Act** to explicitly extend religious protections to Indigenous sacred sites and spiritual leaders
- **Amendment of heritage legislation** to replace discretionary ministerial management with absolute Indigenous veto power
- **Constitutional recognition** of Indigenous spiritual rights
- **Alignment with international law** to ensure compliance with UNDRIP, ICCPR, and CERD

2.7.5 Recommendations for Part 2

Recommendation 1: Amend the 2026 Act

The definition of "religion" in the *Combatting Antisemitism, Hate and Extremism Act 2026* must be explicitly expanded to include Indigenous spiritual traditions and connection to Country.[31] Section 80.2DA must be amended to explicitly recognise Indigenous spiritual leaders and provide protection equivalent to Western religious leaders. Sections 80.2H and 80.2HA must be amended to explicitly protect Indigenous sacred symbols.

Recommendation 2: Amend Heritage Legislation

Federal and state heritage legislation must be amended to replace discretionary ministerial approval with statutory requirements for genuine free prior and informed consent. Aboriginal communities must be granted absolute veto power over activities affecting sacred sites, with veto authority vested in Aboriginal communities (not the state).

Recommendation 3: Establish Aboriginal Spiritual Site Protection Act

A new Aboriginal Spiritual Site Protection Act should be enacted at the Commonwealth level, establishing that Indigenous sacred sites are "religious sites" deserving of absolute protection equivalent to Western religious sites. This Act should provide:

- Explicit recognition of Indigenous sacred sites as "religious sites"
- Absolute Aboriginal veto power over activities affecting sacred sites
- Criminal penalties for unauthorised harm to sacred sites
- Enforcement mechanisms for Aboriginal communities to protect sacred sites

Recommendation 4: Constitutional Recognition

The Australian Constitution should be amended to explicitly recognise and protect Indigenous spiritual rights. A new constitutional provision should recognise Indigenous peoples' right to practise, maintain, and protect their spiritual traditions and sacred sites.

Until Indigenous spirituality is afforded the same absolute legal shield as Western religions, categorical demotion will continue to perpetuate systemic racism against Indigenous peoples, enabling the destruction of sacred sites and the violation of Indigenous spiritual rights.

PART 2 FOOTNOTES

[1] *Constitution of the Commonwealth of Australia* s 116.

[2] *Church of the New Faith v Commissioner of Payroll Tax (Vic)* [1983] 154 CLR 120.

[3] Ibid. Acting Chief Justice Mason and Justice Brennan established that "no single feature is determinative."

[4] Indigenous spiritual systems are routinely excluded from constitutional protection as "religion" despite satisfying the High Court's test.

[5] The exclusion of Indigenous spirituality from constitutional protection as "religion" has roots in colonial legal theory characterising Indigenous peoples as lacking "civilisation."

[6] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391 allows the federal minister to approve actions significantly impacting Indigenous heritage sites if benefits outweigh impacts.

[7] Ibid s 391.

[8] *Aboriginal Heritage Act 1972* (WA) is the primary legislation protecting Indigenous heritage sites in Western Australia.

[9] Ibid s 18.

[10] In practice, "justified in the circumstances" has been interpreted to allow ministerial approval if economic benefits outweigh heritage significance.

[11] Statutory exclusion operates through the absence of any explicit reference to Indigenous spirituality in religious freedom legislation.

[12] Administrative practice routinely classifies Indigenous spirituality as "heritage" rather than "religion."

[13] Australian law has created a bifurcated framework treating "religion" and "heritage" as separate categories.

[14] Juukan Gorge contains archaeological evidence of continuous human occupation spanning approximately 46,000 years.

[15] Rio Tinto applied for ministerial consent under *Aboriginal Heritage Act 1972* (WA) s 18.

[16] The Western Australian minister granted consent based on a 2009-2010 heritage assessment.

[17] The 2014 salvage excavation revealed the sites were substantially older and more significant than the initial assessment indicated.

[18] The *Aboriginal Heritage Act 1972* (WA) provided no mechanism for revocation of ministerial consent.

[19] Rio Tinto destroyed the Juukan Gorge rock shelters on 25 May 2020 using explosives.

[20] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 12(1).

[21] Ibid art 19.

[22] The Djab Wurrung Sacred Shelter is a 40,000-year-old rock shelter in the Grampians region of Victoria.

[23] Multiple sacred sites in Gundungurra country in New South Wales have been threatened by mining and development projects.

[24] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 12.

[25] Ibid art 19.

[26] Ibid art 33.

[27] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

[28] Ibid art 26.

[29] Ibid art 27.

[30] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.

[31] The 2026 Act must be amended to explicitly extend religious protections to Indigenous sacred sites and spiritual leaders.

PART 3: TREATY PROCESSES AND INTERNATIONAL LAW BREACHES

Part 3 Introduction

Part One established the jurisprudential architecture of systemic discrimination against Indigenous peoples through categorical demotion and the rise of ideologically motivated extremism. Part Two demonstrated how categorical demotion operates through heritage law to deny Indigenous sacred sites the absolute protection afforded to Western religious sites.

Part Three extends this analysis by examining how systemic discrimination operates through treaty processes and through the subsumption of distinct Indigenous sovereignties into broader categories. It demonstrates that categorical demotion is not the only mechanism of systemic discrimination. A second mechanism operates through the denial of Indigenous self-identification and self-determination in treaty negotiations and settlement processes.

This Part examines:

- The two models of treaty-making in Australia: the 2021 Bibbullmun (Noongar) settlement and the 2025 Statewide Treaty Act (Victoria)
- How the Bibbullmun settlement may violate UNDRIP standards regarding self-identification and FPIC
- How the Victorian Treaty Act represents a more advanced model of treaty-making
- The mechanisms through which distinct Indigenous nations are subsumed into broader categories
- The international law implications of both settlement models
- Recommendations for comprehensive treaty reform across all Australian jurisdictions

The core argument of Part Three is that genuine recognition of Indigenous rights requires not only protection of sacred sites as "religion" but also recognition of distinct Indigenous nations and their right to self-identify and self-determine their relationship with the state.

3.1 TWO MODELS OF TREATY-MAKING IN AUSTRALIA

3.1.1 The Native Title Framework and the Noongar Settlement Model

Historical Context: The Native Title Act 1993

The *Native Title Act 1993* (Cth) was enacted following the High Court's decision in *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1, which overturned the doctrine of *terra nullius* and recognised that Indigenous peoples could hold Native Title over traditional lands.[1]

The *Native Title Act 1993* established a framework for recognising and protecting Native Title rights. However, the Act also established an "extinguishment" model in which Indigenous peoples could exchange Native Title rights for land rights settlements and financial compensation.

The extinguishment model reflects a particular approach to resolving Indigenous land rights claims: the state negotiates a settlement in which Indigenous peoples surrender their ability to bring future Native Title claims in exchange for immediate settlement benefits (land, money, recognition).

This extinguishment model has become the dominant framework for resolving Indigenous land rights claims in Australia. The Noongar settlement exemplifies this model.

3.1.2 The Bibbullmun (Noongar) Settlement (2021): Extinguishment Model

Background and Scale

The South West Native Title Settlement, commonly referred to as the Noongar Settlement, is described as the most comprehensive native title agreement in Australian history.[2] Formally commenced on 25 February 2021, the agreement covers approximately 200,000 square kilometres in southwestern Western Australia.[3]

The settlement was negotiated over many years involving multiple Indigenous groups and government bodies. The core agreement involves six Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (Cth), recognising "the Noongar people" as the Traditional Owners of the south-west region.[4]

Settlement Components

The settlement provides:

- **Recognition of Native Title**: Recognition of Native Title over approximately 42,000 square kilometres of land held by "the Noongar people"[5]
- **Financial Compensation**: Approximately $1.3 billion in funding provided over 10 years
- **Land Grants**: Grants of Crown land for Noongar use and management
- **Noongar Land Estate**: Creation of a Noongar Land Estate for management of settled lands
- **Joint Management**: Participation in joint management of certain Crown lands
- **Consultation Rights**: Consultation rights regarding future development affecting Noongar lands

These settlement components represent substantial recognition and benefits for the Noongar people.

The Extinguishment Cost

However, these settlement benefits come at a significant cost: the Noongar people agreed to **surrender all current and future Native Title claims**.[6] This means:

- The Noongar people extinguished their legal right to seek further Native Title recognition
- The Noongar people surrendered their ability to bring future Native Title claims
- The settlement is essentially final—future claims cannot be brought based on Native Title

The extinguishment cost is substantial. By extinguishing Native Title claims, the Noongar people surrendered their ability to seek recognition of additional lands beyond the settlement area or to seek additional recognition if new evidence of connection to country emerged.

3.1.3 The Statewide Treaty Act 2025 (Victoria): Non-Extinguishment Model

A Different Approach

On 13 November 2025, Victoria enacted a fundamentally different model of treaty-making. The *Statewide Treaty Act 2025* (Vic) received Royal Assent and represents the first statutory treaty framework in Australia that does not require the extinguishment of Indigenous land rights.[7]

The Victorian model reflects a different philosophy of treaty-making. Rather than viewing treaties as a mechanism for finally resolving Indigenous rights claims through extinguishment, the Victorian model views treaties as ongoing nation-to-nation relationships between the state and Aboriginal nations.

Key Institutional Features

The *Statewide Treaty Act 2025* establishes three key institutions:

1. Gellung Warl (meaning "Tip of the Spear")

Gellung Warl is an ongoing representative and deliberative body with genuine decision-making power.[8] Its functions include:

- Making rules regarding Aboriginal identity and membership for treaty purposes
- Advising Parliament on all legislation affecting First Peoples
- Participating in treaty negotiations with the state
- Providing ongoing consultation on implementation of treaty commitments

Gellung Warl is not a temporary body. It is an ongoing institution with permanent status and guaranteed funding. The funding stream is set to increase to over $70 million per year by 2028.[9]

The significance of Gellung Warl lies in its permanent status and its genuine decision-making power. Unlike temporary consultation bodies, Gellung Warl has real authority to make decisions about Aboriginal identity and to advise Parliament.

2. Nginma Ngainga Wara (meaning "you will do")

Nginma Ngainga Wara is an independent accountability mechanism with the power to:

- Evaluate the effectiveness of state programs affecting First Peoples
- Hold the government accountable to its promises under the Closing the Gap agreement
- Monitor implementation of treaty commitments
- Make recommendations for improved government performance

This institution is crucial for enforcement. It provides a mechanism for holding the state accountable if it fails to meet its treaty obligations.[10]

3. Nyerna Yoorrook Telkuna

Nyerna Yoorrook Telkuna continues the truth-telling work of the Yoorrook Justice Commission, documenting historical wrongs and contemporary injustices.[11]

Recognition of Distinct Aboriginal Nations

Crucially, the *Statewide Treaty Act 2025* explicitly recognises distinct Aboriginal nations:

- Wurundjeri Woi-wurrung Nation
- Boonwurrung Nation
- Taungurung Nation
- Dja Dja Wurrung Nation
- Gunditjmara Nation
- Yorta Yorta Nation

Each of these nations has the right to negotiate local treaties with the state. The Act provides a framework for nation-to-nation negotiation rather than treating all Aboriginal peoples as a single entity.[12]

Non-Extinguishment of Land Rights

Critically, the Victorian Treaty Act does not require the extinguishment of Indigenous land rights. Aboriginal nations retain their land rights while negotiating treaties with the state. This represents a fundamentally different approach from the Noongar settlement.[13]

3.2 ANALYSIS OF THE BIBBULLMUN (NOONGAR) SETTLEMENT: COMPLIANCE WITH INTERNATIONAL STANDARDS

3.2.1 The Bibbullmun/Noongar Distinction: The Problem of Subsumption

Distinct Nations Within the Noongar Language Group

The Bibbullmun nations are a specific sovereign people within the broader Noongar language group and cultural continuum.[14] The Bibbullmun assert:

- Distinct identity as Bibbullmun (not merely "Noongar")
- Distinct governance structures and decision-making processes
- Distinct spiritual practices and connection to Country
- Distinct connection to specific territories in southwestern Western Australia
- The right to self-identify as Bibbullmun and to be recognised as a distinct nation

The broader Noongar language group encompasses multiple distinct nations, including:

- Bibbullmun nations
- Menang people
- Ballardong people
- Yawanwi people
- Palwar people
- Other groups

These are related peoples sharing a language family and cultural continuum, but they assert distinct identities and sovereignties.

The Settlement's Use of "Noongar" as Single Entity

The Noongar Settlement recognised "the Noongar people" as the Native Title holder and negotiating entity.[15] This means the settlement treated all Noongar-speaking peoples as a single entity for the purposes of the settlement.

This creates a critical problem: **it potentially subsumed the distinct sovereignty of Bibbullmun nations into the broader "Noongar" category.**[16]

If the Bibbullmun nations assert the right to be recognised as a distinct sovereign nation separate from "Noongar," then the settlement's use of the broader "Noongar" category may have violated Bibbullmun nations' right to self-identify and self-determine.

3.2.2 UNDRIP Article 33: The Right to Self-Identification

The International Standard

UNDRIP Article 33 provides:

> "Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the states in which they live."[17]

This provision establishes that Indigenous peoples have the right to determine their own identity. The state cannot impose an identity on Indigenous peoples. Indigenous peoples have the right to self-identify in accordance with their own customs and traditions.

Application to the Noongar Settlement

If the Bibbullmun nations assert the right to self-identify as Bibbullmun (distinct from "Noongar"), then the Noongar Settlement's use of "the Noongar people" as a single negotiating entity potentially violates UNDRIP Article 33.

The question becomes: **Did Bibbullmun nations have the right to self-identify as distinct from "Noongar" in the settlement process? Or were they subsumed into "Noongar" through the settlement framework?**

If Bibbullmun nations were not given adequate opportunity to assert their distinct identity separate from "Noongar," then the settlement violated UNDRIP Article 33.

3.2.3 UNDRIP Article 3: Self-Determination and Consent

The International Standard

UNDRIP Article 3 establishes:

> "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."[18]

Self-determination requires that Indigenous peoples have genuine choice about their political and cultural future. It requires that they have the right to determine their own institutions and governance.

Application to the Noongar Settlement

If Bibbullmun nations are a distinct sovereign people, then self-determination would require that Bibbullmun nations have the choice to:

- Negotiate separately from "Noongar"
- Pursue separate Native Title claims
- Establish separate governance institutions
- Determine their own relationship with the state

However, the settlement framework may have limited these choices by treating "Noongar" as the sole negotiating entity and by requiring all Noongar-speaking peoples to participate in a single settlement.

3.2.4 UNDRIP Article 19: Free Prior and Informed Consent

The International Standard

UNDRIP Article 19 requires:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[19]

FPIC requires:

- **Consultation through own institutions**: Indigenous peoples must be consulted through their own representative institutions
- **Free and informed consent**: Consent must be free (not coerced) and informed (based on complete information)
- **Prior to approval**: Consent must be obtained before the project/agreement is approved
- **Right to refuse**: The standard interpretation of FPIC includes the right to refuse consent

Critical Questions Regarding the Noongar Settlement

The Noongar Settlement raises critical questions about whether genuine FPIC was obtained:

1. Bibbullmun Nations' Own Institutions

Were Bibbullmun nations consulted through their own institutions? Or were they consulted only through broader "Noongar" institutions?

If Bibbullmun nations have distinct institutions (leadership, governance structures, decision-making processes), then UNDRIP Article 19 would require that Bibbullmun nations' own institutions give consent to the settlement.

However, if the settlement framework treated "Noongar" as the sole negotiating entity, then Bibbullmun nations' own institutions may not have been recognised as having independent consent authority.

2. Complete Information

Did Bibbullmun nations have complete information about the implications of:

- Extinguishing Native Title claims?
- Surrendering the right to bring future Native Title claims?
- Participating in a settlement that treated them as part of "Noongar" rather than as distinct Bibbullmun nations?
- The long-term implications of the settlement?

If Bibbullmun nations were not fully informed about the implications of surrendering distinct sovereignty claims, then the consent was not "informed" under UNDRIP Article 19.

3. Genuine Choice and Right to Refuse

Did Bibbullmun nations have genuine choice about whether to participate in the settlement? Or were they effectively required to participate because the settlement framework treated "Noongar" as a single entity?

Did Bibbullmun nations have the right to refuse participation in a "Noongar" settlement and to pursue separate Bibbullmun nation negotiations?

If Bibbullmun nations were not given the genuine choice to refuse participation or to pursue separate negotiations, then FPIC was not obtained.

3.2.5 Concerns Regarding FPIC Compliance

The Noongar Settlement raises multiple concerns regarding FPIC compliance:

Concern 1: Representation and Subsumption

If Bibbullmun nations are distinct from "Noongar," then the settlement's use of "Noongar" as the negotiating entity may have subsumed Bibbullmun sovereignty.[19] This violates UNDRIP Article 3 (self-determination) and Article 33 (self-identification).

Concern 2: Extinguishment Without Adequate Consultation

The settlement required extinguishment of Native Title claims, a permanent and irrevocable step. Such a significant step should have required extraordinary consultative processes to ensure that Bibbullmun nations understood and freely chose to extinguish their future claims.

There is no publicly available evidence that such extraordinary consultative processes occurred.

Concern 3: Lack of Transparency About Distinct Nation Issues

Publicly available information about the settlement does not clearly address whether distinct nation issues (such as Bibbullmun self-identification) were discussed or resolved in settlement negotiations.

If these issues were not adequately discussed or resolved, then Bibbullmun nations' consent to the settlement may not have been informed.

Concern 4: Absence of Enforcement Mechanisms

The settlement lacks clear enforcement mechanisms to ensure that settlement commitments are met or to provide remedies if the state fails to meet its obligations.

This absence of enforcement mechanisms means that if Bibbullmun nations later determine that their consent was obtained through inadequate consultation, there may be limited mechanisms to challenge the settlement or seek remedy.

3.3 THE STATEWIDE TREATY ACT 2025: A MORE ADVANCED MODEL

3.3.1 Key Improvements Over the Noongar Settlement Model

The *Statewide Treaty Act 2025* represents significant improvements over the Noongar Settlement model:

1. Recognition of Distinct Nations

The Act explicitly recognises six distinct Aboriginal nations. This directly addresses the subsumption problem seen in the Noongar settlement.

Rather than treating all Aboriginal peoples as a single entity (as "Noongar"), the Victorian Act recognises:

- Wurundjeri Woi-wurrung Nation
- Boonwurrung Nation
- Taungurung Nation
- Dja Dja Wurrung Nation
- Gunditjmara Nation

- Yorta Yorta Nation

Each nation has the right to negotiate separate treaties with the state.[20]

2. Right to Self-Identify

The Act explicitly recognises Aboriginal nations' right to determine their own identity and membership. Gellung Warl has the power to make rules regarding Aboriginal identity for treaty purposes.[21]

This directly implements UNDRIP Article 33 into Victorian law.

3. Non-Extinguishment of Land Rights

The Act does not require extinguishment of Indigenous land rights. Aboriginal nations retain their land rights while negotiating treaties with the state.[22]

This represents a fundamental difference from the Noongar model, which required extinguishment of Native Title claims.

4. Permanent Institutions with Real Power

Gellung Warl is a permanent institution with guaranteed funding and genuine decision-making power. It is not a temporary consultation body.[23]

The Act also establishes Nginma Ngainga Wara as an independent accountability mechanism with power to monitor government performance.[24]

5. Legally Binding Status

Treaties negotiated under the Act have legally binding status as Acts of Parliament. They cannot be modified unilaterally by the government.[25]

This provides much stronger protection for treaty commitments than the Noongar settlement, which lacks clear legal enforceability.

6. Ongoing Nature of Treaties

The Act treats treaties as ongoing nation-to-nation relationships rather than final settlements that resolve all Indigenous rights claims through extinguishment.

This reflects a more sophisticated understanding of what treaties should be: continuing relationships between sovereign entities rather than final transactions.

3.3.2 Alignment with UNDRIP Standards

The *Statewide Treaty Act 2025* represents better alignment with UNDRIP standards:

UNDRIP Article 3 (Self-Determination)

The Act recognises Aboriginal nations' right to self-determine their relationship with the state through treaty negotiation. The non-extinguishment model preserves Aboriginal nations' ability to pursue additional claims in the future if they choose.

UNDRIP Article 19 (FPIC)

The Act establishes statutory standards for FPIC that include:

- Consultation through own representative institutions (Gellung Warl)
- Provision of complete information
- Adequate time for deliberation

- Right to refuse or modify terms
- Documentation of consent process

These statutory standards more closely approximate the UNDRIP Article 19 standard.[26]

UNDRIP Article 33 (Self-Identification)

The Act explicitly recognises Aboriginal nations' right to determine their own identity. Rather than subsuming distinct nations into broader categories, the Act provides statutory protection for distinct nation self-identification.

UNDRIP Article 26 (Land Rights)

The non-extinguishment model preserves Aboriginal nations' land rights. This aligns better with UNDRIP Article 26, which recognises Indigenous peoples' right to own and control their traditional lands.

3.4 COMPARATIVE ANALYSIS: NOONGAR SETTLEMENT VS. STATEWIDE TREATY ACT

The following table provides detailed comparison of the two models:

Issue	Noongar Settlement (2021)	Statewide Treaty Act (2025)	UNDRIP Standard
Legal Basis	Native Title Act (ILUAs); Extinguishment model	Dedicated Statewide Treaty Act; Non-extinguishment model	Self-determination, right to own lands
Identity Management	Subsumes distinct nations into "Noongar" group; unclear whether distinct nation identity was recognised	Explicit recognition of distinct Aboriginal nations (6 specific nations named); right to determine own identity	Article 33: Indigenous peoples determine own identity
Land Rights	Native Title surrendered in exchange for settlement; rights extinguished permanently	Treaty exists alongside land rights; land rights NOT extinguished	Article 26: Right to own and control traditional lands
Governance Structure	Noongar Boodja Trust (Trustee model); limited Aboriginal authority	Gellung Warl (Representative authority model); Aboriginal decision-making power; guaranteed funding to $70M+ per year	Article 3: Self-determination in governance
Self-Determination	Limited to joint management and consultation on specific projects	Powers to confirm identity, manage infrastructure, advise Parliament on all legislation affecting First Peoples	Article 3: Right to freely determine political status
Binding Legal Status	Primarily a land settlement agreement; unclear legal enforceability for ongoing commitments	Legally binding Act of Parliament; treaties cannot be modified unilaterally by government	International obligation for binding treaties
Accountability Mechanism	No clear mechanism for holding government	Nginma Ngainga Wara provides independent accountability; power to	Article 19: Verification of genuine consent

Issue	Noongar Settlement (2021)	Statewide Treaty Act (2025)	UNDRIP Standard
	accountable to settlement commitments	evaluate government performance	
Funding	$1.3 billion (one-time funding package over 10 years)	Guaranteed ongoing funding increasing to $70 million per year by 2028	Adequate resources for implementation
Future Amendments	Settlement terms can potentially be modified by government; unclear whether amendment requires consent	Treaty cannot be modified without mutual consent	Stability and protection of agreements
UNDRIP Article 3 Compliance	Questions regarding recognition of distinct nations' self-determination	Better alignment; distinct nations have power to determine relationship with state	Strong compliance
UNDRIP Article 19 Compliance	Questions about whether genuine FPIC obtained, particularly for distinct nations like Bibbullmun	Better alignment; statutory FPIC standards established	Strong compliance
UNDRIP Article 26 Compliance	Problematic; requires extinguishment of Native Title, which may violate right to own traditional lands	Better alignment; land rights retained while negotiating treaties	Strong compliance
UNDRIP Article 33 Compliance	Problematic; potential subsumption of distinct nations into "Noongar" category	Strong compliance; explicit recognition of distinct nations' right to self-identify	Strong compliance
Truth-Telling and Healing	No specific truth-telling mechanism	Nyerna Yoorrook Telkuna continues truth-telling work	Supports healing and reconciliation
Scope of Application	Western Australia only; limited to south-west region	Victoria only (currently); model available for national adoption	Ideally national

This comparison reveals a clear pattern: the Statewide Treaty Act 2025 represents a more advanced, more rights-protective model of treaty-making that better aligns with UNDRIP standards.

3.5 INTERNATIONAL LAW ANALYSIS: UNDRIP COMPLIANCE AND BREACHES

3.5.1 Australia's Binding International Obligations

Australia is bound by multiple international human rights instruments that protect Indigenous peoples' rights:

UNDRIP (Binding Commitment)

While UNDRIP is not technically a treaty, Australia has formally committed to the Declaration and is bound by the principles it establishes.[27] UNDRIP represents the international consensus on Indigenous peoples' rights.

ICCPR (Binding Treaty)

Australia is bound by the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1980.[28] The ICCPR contains multiple provisions protecting Indigenous peoples' rights.

CERD (Binding Treaty)

Australia is bound by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which it ratified in 1975.[29] The CERD protects Indigenous peoples from racial discrimination.

These international obligations are binding on Australia. When Australian law fails to meet these standards, Australia is in breach of international human rights law.

3.5.2 Specific UNDRIP Breaches Regarding Treaty Processes

Breach of Article 3 (Self-Determination)

UNDRIP Article 3 establishes Indigenous peoples' right to self-determination. When the Noongar Settlement subsumed distinct Bibbullmun sovereignty into a broader "Noongar" category, it potentially violated this right.

Distinct Indigenous nations should have the right to self-determine their own relationship with the state, including the choice to negotiate separately if they wish.

Breach of Article 19 (FPIC)

UNDRIP Article 19 requires genuine free prior and informed consent before projects affecting Indigenous lands. The critical questions about whether Bibbullmun nations gave genuine FPIC to the Noongar Settlement suggest potential violation of Article 19.

Breach of Article 26 (Land Rights)

UNDRIP Article 26 establishes Indigenous peoples' right to own and control their traditional lands. The extinguishment requirement of the Noongar Settlement potentially violates this right by permanently extinguishing the ability to bring future Native Title claims.

The non-extinguishment model of the Victorian Treaty Act better protects Article 26 rights.

Breach of Article 33 (Self-Identification)

UNDRIP Article 33 establishes Indigenous peoples' right to determine their own identity. The potential subsumption of Bibbullmun into "Noongar" violates this right.

The Victorian Treaty Act's explicit recognition of distinct nations better protects Article 33 rights.

3.5.3 ICCPR and CERD Implications for Treaty Processes

ICCPR Article 1 (Self-Determination)

The ICCPR Article 1 establishes peoples' right to self-determination. This applies to Indigenous peoples as distinct peoples.

Treaty processes should recognise Indigenous peoples' self-determination rights and should not subsume distinct Indigenous nations into broader categories.

CERD Article 5 (Protection from Racial Discrimination)

CERD Article 5 protects Indigenous peoples from racial discrimination in the enjoyment of human rights.

When the state treats different Indigenous nations differently (some receiving recognition as distinct nations, others being subsumed into broader categories), this may constitute racial discrimination.

3.6 MECHANISMS OF SUBSUMPTION: HOW DISTINCT SOVEREIGNTIES ARE DENIED RECOGNITION

3.6.1 Administrative Subsumption: Treating Distinct Nations as Single Entity

One mechanism through which distinct Indigenous sovereignties are subsumed is administrative classification. Government agencies administratively classify multiple distinct nations as a single entity for legal and policy purposes.

In the Noongar Settlement, the government treated all Noongar-speaking peoples as "the Noongar people" for settlement purposes, even if distinct nations (like Bibbullmun) asserted distinct identities.

This administrative classification becomes the operative categorisation. Once all Noongar-speaking peoples are administratively classified as "Noongar," settlement processes treat them as a single entity, even if distinct nations object.

3.6.2 Legal Subsumption: Statutory Frameworks Recognising Single Entity

A second mechanism is legal subsumption through statute. The *Native Title Act 1993* (Cth) framework allows the state to recognise Native Title in a single entity (e.g., "the Noongar people") even if multiple distinct nations exist within that category.

The statute does not require recognition of distinct nations. It allows recognition in a single entity or in multiple entities, at the state's discretion.

The Noongar Settlement used this statutory framework to recognise "the Noongar people" as a single Native Title holder, effectively subsuming Bibbullmun nations.

3.6.3 Representational Subsumption: Limiting Representation to Single Body

A third mechanism is representational subsumption. Even if distinct nations exist, the settlement framework may limit representation to a single representative body.

If Bibbullmun nations have distinct institutions and leadership, but the settlement framework recognises only a broader "Noongar" representative body, then Bibbullmun nations' representation is subsumed.

3.6.4 Linguistic Subsumption: Using Language Group as Basis for Grouping

A fourth mechanism is linguistic subsumption. The state may use language groups (e.g., "Noongar language speakers") as the basis for grouping distinct nations.

While language families do represent important cultural and historical connections, they do not necessarily define distinct political sovereignties. Multiple distinct nations may speak related languages while asserting distinct political sovereignty.

By using language as the basis for grouping, the state subsumes political sovereignty distinctions into linguistic categories.

3.6.5 The Pattern: How Subsumption Operates Systematically

These mechanisms combine to create a pattern of systematic subsumption:

1. **Identification**: The state identifies multiple distinct Indigenous nations (e.g., Bibbullmun, Menang, Ballardong within the broader Noongar language group)
2. **Classification**: The state administratively classifies them as a single entity based on language or cultural continuum (e.g., "the Noongar people")

3. **Representation**: The state creates a single representative body to negotiate on behalf of all groups
4. **Consultation**: The state consults primarily with the representative body rather than with each distinct nation's own institutions
5. **Settlement**: The state negotiates a settlement that treats the category (e.g., "Noongar") as the legal entity
6. **Subsumption Result**: Distinct nations' distinct sovereignty is subsumed into the broader category

This pattern operates systematically to deny recognition of distinct Indigenous sovereignties.

3.7 IMPLICATIONS FOR INTERNATIONAL LAW COMPLIANCE

3.7.1 Australia's Current Non-Compliance

Australia's current approach to treaty-making is not in full compliance with international human rights standards. Specifically:

a. **Subsumption of distinct nations violates UNDRIP Article 33** (self-identification rights)

b. **Questionable FPIC processes violate UNDRIP Article 19** (free prior and informed consent)

c. **Extinguishment requirements may violate UNDRIP Article 26** (land rights)

d. **Limitations on self-determination violate UNDRIP Article 3** (self-determination)

Australia is in substantive breach of these international obligations.

3.7.2 The Victorian Treaty Act as Model for Compliance

The *Statewide Treaty Act 2025* represents a more compliant model. Its features that improve compliance include:

- **Explicit recognition of distinct nations**: Implements UNDRIP Article 33
- **Non-extinguishment of land rights**: Implements UNDRIP Article 26
- **Statutory FPIC standards**: Implements UNDRIP Article 19
- **Aboriginal decision-making power**: Implements UNDRIP Article 3
- **Independent accountability mechanisms**: Ensures ongoing compliance monitoring

3.7.3 Recommendations for National Implementation

To achieve full compliance with international human rights standards, Australia should:

Recommendation 1: Enact Treaty Legislation in All Jurisdictions

Every Australian jurisdiction should enact treaty legislation comparable to the *Statewide Treaty Act 2025*.[30] This legislation should:

- Explicitly recognise distinct Aboriginal nations
- Establish statutory frameworks for nation-to-nation negotiations
- Not require extinguishment of land rights
- Establish statutory FPIC standards
- Provide for independent accountability mechanisms

Recommendation 2: Recognise Distinct Indigenous Nations

The Commonwealth, states, and territories should explicitly recognise distinct Indigenous nations rather than treating Indigenous peoples as undifferentiated groups.

This recognition should extend to all Indigenous nations, not only those currently recognised in the Victorian Treaty Act.

Recommendation 3: Implement Statutory FPIC Standards

Federal and state legislation should establish statutory standards for free prior and informed consent that include:

- Consultation through Indigenous nations' own institutions
- Provision of complete information
- Adequate time for deliberation and decision-making
- Right to refuse or modify terms
- Documentation of consent process
- Independent verification of genuineness

Recommendation 4: Establish Independent Accountability Mechanisms

Each jurisdiction should establish independent accountability mechanisms (comparable to Nginma Ngainga Wara in Victoria) to monitor government compliance with treaty commitments.

Recommendation 5: Report to International Bodies

Australia should report to UN human rights bodies (UN Human Rights Committee, Committee on the Elimination of Racial Discrimination, Permanent Forum on Indigenous Issues) on steps taken to implement UNDRIP, ICCPR, and CERD obligations regarding Indigenous peoples' rights.

3.8 CONCLUSION TO PART 3: TOWARDS GENUINE TREATY-MAKING

3.8.1 The Core Argument

Part Three has demonstrated that systemic discrimination against Indigenous peoples operates not only through categorical demotion (Part Two) but also through the subsumption of distinct Indigenous sovereignties into broader categories.

The Noongar Settlement exemplifies this second form of systemic discrimination. By treating all Noongar-speaking peoples as a single entity, the settlement potentially subsumed the distinct sovereignty of Bibbullmun nations and violated their rights to self-identify and self-determine.

3.8.2 The Solution: Recognition of Distinct Nations

The solution is recognition of distinct Indigenous nations and their right to negotiate separately with the state.

The *Statewide Treaty Act 2025* provides a model for how this can be done. By explicitly recognising six distinct Aboriginal nations and providing them with the right to negotiate separate treaties, the Victorian Act demonstrates that recognition of distinct sovereignties is legally possible and administratively feasible.

3.8.3 The Imperative: International Compliance

Australia is in breach of international human rights law regarding Indigenous peoples' rights. UNDRIP Articles 3, 19, 26, and 33, along with ICCPR and CERD obligations, require:

- Recognition of Indigenous self-determination
- Respect for Indigenous self-identification
- Protection of Indigenous land rights
- Genuine free prior and informed consent in decision-making affecting Indigenous peoples

Current Australian law does not fully comply with these standards. Comprehensive legislative reform is necessary.

3.8.4 The Path Forward: National Treaty Framework

Australia should establish a national treaty framework that:

- **Recognises distinct Indigenous nations** rather than treating Indigenous peoples as undifferentiated groups
- **Protects Indigenous self-determination** through statutory frameworks for nation-to-nation negotiation
- **Does not require extinguishment** of Indigenous land rights or future claims
- **Establishes statutory FPIC standards** to ensure genuine consent
- **Provides independent accountability mechanisms** to ensure government compliance
- **Applies nationally** rather than only to single jurisdictions

Such a national treaty framework would bring Australian law into compliance with international human rights standards and would recognise the distinct sovereignties and rights of Indigenous nations.

PART 3 FOOTNOTES

[1] *Native Title Act 1993* (Cth) was enacted following *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1, which overturned *terra nullius*.

[2] The South West Native Title Settlement is described as the most comprehensive native title agreement in Australian history.

[3] The settlement covers approximately 200,000 square kilometres in southwestern Western Australia.

[4] The settlement involves six Indigenous Land Use Agreements (ILUAs) recognising "the Noongar people" as Traditional Owners.

[5] Native Title was recognised over approximately 42,000 square kilometres of land.

[6] The Noongar people agreed to surrender all current and future Native Title claims.

[7] The *Statewide Treaty Act 2025* (Vic) received Royal Assent on 13 November 2025 and represents the first statutory treaty framework not requiring extinguishment.

[8] Gellung Warl is an ongoing representative and deliberative body with genuine decision-making power.

[9] Gellung Warl has guaranteed funding set to increase to over $70 million per year by 2028.

[10] Nginma Ngainga Wara is an independent accountability mechanism with power to evaluate government performance.

[11] Nyerna Yoorrook Telkuna continues the truth-telling work of the Yoorrook Justice Commission.

[12] Each of the six recognised nations has the right to negotiate local treaties with the state.

[13] The Victorian Treaty Act does not require extinguishment of Indigenous land rights.

[14] The Bibbullmun nations are a specific sovereign people within the broader Noongar language group.

[15] The settlement recognised "the Noongar people" as the Native Title holder.

[16] The use of "Noongar" as a single entity potentially subsumed Bibbullmun sovereignty.

[17] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 33.

[18] Ibid art 3.

[19] Ibid art 19.

[20] The Act explicitly recognises Wurundjeri Woi-wurrung, Boonwurrung, Taungurung, Dja Dja Wurrung, Gunditjmara, and Yorta Yorta nations.

[21] Gellung Warl has power to make rules regarding Aboriginal identity for treaty purposes.

[22] The Act does not require extinguishment of Indigenous land rights.

[23] Gellung Warl is a permanent institution with guaranteed funding.

[24] Nginma Ngainga Wara is an independent accountability mechanism.

[25] Treaties negotiated under the Act have legally binding status as Acts of Parliament.

[26] The Act establishes statutory standards for FPIC that include consultation through own institutions, complete information, adequate time, right to refuse, and documentation.

[27] Australia has formally committed to UNDRIP and is bound by its principles.

[28] Australia ratified the ICCPR in 1980 and is bound by its provisions.

[29] Australia ratified the CERD in 1975 and is bound by its provisions.

[30] Every Australian jurisdiction should enact treaty legislation comparable to the *Statewide Treaty Act 2025*.

PART 4: CONCLUSIONS AND INTEGRATED RECOMMENDATIONS

Part 4 Introduction

Parts One through Three have established a comprehensive analysis of systemic discrimination against Indigenous peoples in Australia. This analysis has demonstrated that:

- **Part One** established the jurisprudential architecture of inequality, showing how categorical demotion, subsumption of sovereignty, and failures in treaty processes combine to perpetuate racism, hate, and violence against Indigenous peoples
- **Part Two** demonstrated how categorical demotion of Indigenous spirituality from "religion" to "heritage" denies Indigenous peoples the absolute protections afforded to Western religious communities, enabling the destruction of sacred sites like Juukan Gorge
- **Part Three** showed how treaty processes perpetuate systemic discrimination by subsuming distinct Indigenous nations into broader categories and failing to obtain genuine free prior and informed consent

Part Four now integrates these analyses and provides comprehensive recommendations for legislative and policy reform. These recommendations are designed to:

- Address the three interconnected mechanisms of systemic discrimination
- Bring Australian law into compliance with international human rights standards
- Recognise Indigenous peoples' fundamental rights to self-determination, self-identification, and spiritual freedom
- Establish legal frameworks that protect Indigenous sacred sites with the same absolute protection afforded to Western religious sites
- Enable genuine nation-to-nation relationships between Indigenous nations and the Australian state

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4.1 SYNTHESIS: THE THREE MECHANISMS OF SYSTEMIC DISCRIMINATION

4.1.1 Mechanism One: Categorical Demotion of Indigenous Spirituality

The Problem

Australian law systematically demotes Indigenous spirituality from the protected category of "religion" to the discretionary category of "heritage." This demotion operates through:

- **Statutory exclusion**: Indigenous spirituality is excluded from the definition of "religion" in relevant legislation
- **Administrative practice**: Government agencies classify Indigenous spirituality as "heritage" rather than "religion"
- **Judicial interpretation**: Courts have narrowly construed "religion" in ways that exclude Indigenous spirituality
- **Structural bifurcation**: Australian law treats "religion" and "heritage" as separate categories with different levels of protection

The Consequences

This categorical demotion has devastating consequences:

- Indigenous sacred sites are subject to discretionary ministerial destruction (e.g., Juukan Gorge)
- Indigenous spiritual leaders are not protected by hate crime legislation (e.g., Camp Sovereignty assaults)
- Indigenous spirituality is not protected under constitutional religious freedom (Section 116)
- Indigenous peoples are denied equal protection of the law compared to Western religious communities
- The destruction of sacred sites is treated as a "management issue" rather than a violation of fundamental rights

The Solution

Indigenous spirituality must be recognised as "religion" and afforded the same absolute protections as Western religions. This requires:

- Amendment of the 2026 Act to explicitly include Indigenous spirituality as "religion"
- Amendment of heritage legislation to replace discretionary management with absolute protection
- Constitutional and statutory recognition of Indigenous spiritual rights as religious rights
- Criminal penalties for unauthorised harm to sacred sites
- Hate crime protections for Indigenous sacred sites and spiritual leaders

4.1.2 Mechanism Two: Subsumption of Distinct Sovereignties

The Problem

Australian law perpetuates systemic discrimination by subsuming distinct Indigenous nations into broader categories. This subsumption operates through:

- **Administrative classification**: Multiple distinct nations are administratively classified as a single entity (e.g., "Noongar")
- **Legal frameworks**: Statutory frameworks allow recognition in single entities rather than requiring recognition of distinct nations

- **Representational subsumption**: Settlement frameworks recognise only a single representative body rather than multiple institutions for distinct nations
- **Linguistic subsumption**: Language groups are used as basis for grouping, subsuming political sovereignty into linguistic categories

The Consequences

This subsumption perpetuates systemic discrimination:

- Distinct Indigenous nations are denied recognition as separate sovereignties
- Indigenous peoples' right to self-identify (UNDRIP Article 33) is violated
- Indigenous peoples' right to self-determine (UNDRIP Article 3) is limited
- Minority interests within broader language groups may be marginalised
- Distinct nations lose the ability to pursue separate negotiations and agreements

The Solution

Distinct Indigenous nations must be explicitly recognised with the right to negotiate separately with the state. This requires:

- Statutory recognition of distinct Indigenous nations (not linguistic groups or broader categories)
- Rights for each distinct nation to negotiate separate treaties with the state
- Recognition of distinct nations' right to self-identify and determine their own membership
- Implementation of UNDRIP Article 33 into Australian law
- Establishment of nation-to-nation frameworks rather than broad-category frameworks

4.1.3 Mechanism Three: Failures in Treaty Processes and Absence of FPIC

The Problem

Contemporary treaty processes fail to obtain genuine free prior and informed consent (FPIC) because:

- **Ministerial discretion persists**: Final decision-making authority remains with the state rather than with Indigenous nations
- **Consultation is non-binding**: Indigenous communities can be consulted but their objections can be overridden
- **Information is incomplete**: Indigenous communities may not receive complete information about project impacts or implications
- **No right to refuse**: Indigenous communities typically have no right to refuse proposed activities
- **Time constraints**: Indigenous communities are often given insufficient time for deliberation
- **Power imbalances**: Indigenous communities often lack resources to match developer resources

The Consequences

The failure to obtain genuine FPIC perpetuates systemic discrimination:

- Indigenous peoples' fundamental right to self-determination is violated
- Projects affecting Indigenous lands proceed without genuine Indigenous consent
- Sacred sites are destroyed despite Indigenous opposition
- Extinguishment of future rights occurs without genuine understanding of implications
- Indigenous peoples lack remedies if consent is obtained through inadequate processes

The Solution

Genuine free prior and informed consent must be obtained in all processes affecting Indigenous lands and sacred sites. This requires:

- Statutory standards for FPIC that include:
- Consultation through Indigenous nations' own institutions
- Complete information about all project impacts
- Adequate time for deliberation and decision-making
- Right to refuse consent or modify terms
- Documentation of consent process
- Independent verification of genuineness
- Indigenous veto power over activities affecting sacred sites and lands
- Enforcement mechanisms to ensure government compliance with FPIC standards
- Remedies for Indigenous peoples if consent is obtained inadequately

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4.2 INTERNATIONAL LAW COMPLIANCE: ALIGNMENT WITH BINDING STANDARDS

4.2.1 UNDRIP Compliance Requirements

Australia has committed to UNDRIP and is bound by its standards. Australian law must be amended to comply with key UNDRIP articles:

UNDRIP Article 3 (Self-Determination)

> "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."[1]

Compliance requirements:

- Indigenous nations must have genuine choice in determining their relationship with the state
- Indigenous nations must have the right to negotiate separately if they wish
- Indigenous nations must not be compelled to participate in broader settlements that subsume their sovereignty
- Indigenous nations must have power to determine their own governance institutions
- Indigenous nations must have power to determine their own laws and practices

UNDRIP Article 12 (Spiritual and Religious Rights)

> "Indigenous peoples have the right to practise, revitalise, transmit and teach their spiritual and religious traditions, customs and ceremonies and to maintain, protect and have access to their religious and cultural sites; to use and control their ceremonial objects; and to repatriate their human remains."[2]

Compliance requirements:

- Indigenous spirituality must be recognised as "religion" in Australian law
- Indigenous peoples must have absolute veto over activities affecting sacred sites
- Sacred sites must be protected with the same absolute protection as Western religious sites
- Indigenous peoples must have access to sacred sites for spiritual practice
- Indigenous peoples must have control over their ceremonial objects

UNDRIP Article 19 (Free Prior and Informed Consent)

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."[3]

Compliance requirements:

- Consultation must occur through Indigenous nations' own institutions
- Consultation must occur before project approval
- Indigenous nations must have complete information about all impacts
- Indigenous nations must have adequate time for deliberation
- Indigenous nations must have the right to refuse consent
- Consent must be documented and independently verified

UNDRIP Article 26 (Land Rights)

> "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned or occupied, and to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or occupation."[4]

Compliance requirements:

- Indigenous nations must have the right to own and control their traditional lands
- Indigenous nations must not be required to extinguish future land claims in exchange for settlements
- Indigenous nations must retain the right to seek additional recognition if circumstances change

UNDRIP Article 33 (Self-Identification)

> "Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions."[5]

Compliance requirements:

- Indigenous nations must have the right to determine their own identity
- Indigenous nations must not be administratively classified into broader categories against their will
- The state must recognise Indigenous nations' self-identification
- Distinct Indigenous nations must be recognised as distinct, not subsumed into broader language groups

4.2.2 ICCPR Compliance Requirements

Australia is bound by the ICCPR and must ensure Australian law complies with key ICCPR articles:

ICCPR Article 1 (Self-Determination of Peoples)

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[6]

Indigenous peoples are peoples within the meaning of ICCPR Article 1 and have the right to self-determination.

ICCPR Article 18 (Religious Freedom)

> "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[7]

Indigenous peoples' right to freedom to manifest their spirituality through access to sacred sites is protected under this article.

ICCPR Article 26 (Equality Before the Law)

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[8]

When Australian law provides different levels of protection for Western religious sites than for Indigenous sacred sites, this violates the principle of equality before the law.

ICCPR Article 27 (Minority Rights)

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[9]

Indigenous peoples are a minority in Australia and are protected under this provision.

4.2.3 CERD Compliance Requirements

Australia is bound by the CERD and must ensure Australian law complies with its anti-discrimination requirements:

CERD Article 5 (Religious Freedom Without Discrimination)

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights... (vii) The right to freedom of thought, conscience and religion."[10]

When Australian law treats Indigenous spirituality (based on the race and ethnicity of practitioners) differently from Western religions, this constitutes racial discrimination in the enjoyment of religious freedom.

4.3 INTEGRATED RECOMMENDATIONS: COMPREHENSIVE LEGISLATIVE REFORM

4.3.1 Recommendation 1: Amend the Combatting Antisemitism, Hate and Extremism Act 2026

Rationale

The 2026 Act provides comprehensive protections for Western religions but fails to extend these protections to Indigenous sacred sites and spiritual leaders because Indigenous spirituality is classified as "heritage" rather than "religion."

Specific Amendments Required

Amendment 1A: Define "Religion" to Include Indigenous Spirituality

Add the following definition to the 2026 Act:

> "Religion includes Indigenous spiritual traditions, spiritual practices, and connection to Country, including but not limited to:
>
> (a) Indigenous peoples' spiritual beliefs and worldviews;
> (b) Indigenous ceremonies, rituals, and spiritual practices;
> (c) Indigenous sacred sites and places of spiritual significance;
> (d) Indigenous sacred objects and ceremonial objects;
> (e) Indigenous spiritual knowledge and Law transmission;
> (f) Indigenous connection to Country and land-based spirituality;
> (g) Indigenous spiritual leaders and those who perform spiritual functions within Indigenous communities;
> (h) Any other Indigenous spiritual practice or tradition recognised as such by the Indigenous community practicing it."

Amendment 1B: Extend Section 80.2DA to Indigenous Spiritual Leaders

Amend Section 80.2DA to explicitly recognise Indigenous spiritual leaders and provide protection equivalent to Western religious leaders:

> "An Indigenous spiritual leader includes a person who:
>
> (a) Performs spiritual functions within an Indigenous community;
> (b) Holds authority to teach spiritual knowledge or Law within an Indigenous community;
> (c) Is recognised by an Indigenous community as a spiritual leader;
> (d) Conducts ceremonies or spiritual practices within an Indigenous community;
> (e) Holds custodial responsibility for sacred sites or sacred objects."

Amendment 1C: Extend Sections 80.2H and 80.2HA to Indigenous Sacred Symbols

Amend Sections 80.2H and 80.2HA to explicitly protect Indigenous sacred symbols and sacred site symbols:

> "Sacred symbols include Indigenous sacred symbols and symbols representing Indigenous sacred sites, including but not limited to:
>
> (a) Symbols representing Indigenous spiritual beliefs or practices;
> (b) Images, designs, or marks representing sacred sites;
> (c) Objects with spiritual significance to Indigenous communities;
> (d) Any other symbol recognised by an Indigenous community as having spiritual or sacred significance."

Amendment 1D: Extend Division 114A to Attacks on Sacred Sites

Amend Division 114A to include attacks on Indigenous sacred sites as hate crimes:

> "A hate crime includes conduct that causes serious harm to persons, damage to property, or risks to public safety when such acts are:
>
> (a) Motivated by hatred based on the victim's race, national origin, or ethnic origin; or
> (b) Directed at Indigenous sacred sites, spiritual leaders, or sacred symbols as an expression of hatred toward Indigenous peoples or Indigenous spirituality."

Implementation Timeline

These amendments should be made within 12 months through amendments to the 2026 Act.

4.3.2 Recommendation 2: Amend Heritage Legislation to Provide Absolute Protection for Sacred Sites

Rationale

Heritage legislation currently provides discretionary ministerial management of Indigenous sacred sites. This allows destruction of sacred sites if economic benefits are deemed to outweigh heritage significance. Heritage legislation must be amended to provide absolute protection comparable to religious freedom law.

Specific Amendments Required

Amendment 2A: Replace Ministerial Discretion with Absolute Indigenous Veto

Amend heritage legislation (federal and state) to replace Section 18-type discretionary approval mechanisms with absolute Indigenous veto:

Federal Amendment (*Environment Protection and Biodiversity Conservation Act 1999*)

Replace Section 391 with:

> "391. No action that will significantly impact an Indigenous sacred site may be approved unless:
>
> (a) The Indigenous nation whose spirituality is connected to the site has given free prior and informed consent;
> (b) The Indigenous nation has been given the right to refuse consent;
> (c) The Indigenous nation has received complete information about all impacts;
> (d) The Indigenous nation has had adequate time for deliberation;
> (e) The Indigenous nation's consent has been independently verified as genuine."

State Amendment (*Aboriginal Heritage Act 1972* (WA) and comparable state legislation)

Replace Section 18 with:

> "18. No activity affecting an Aboriginal sacred site may be approved unless:
>
> (a) The Aboriginal nation whose spirituality is connected to the site has given free prior and informed consent;
> (b) The Aboriginal nation has been given the right to refuse consent;
> (c) No appeal or review of the Aboriginal nation's refusal is available to the applicant;
> (d) The decision-making authority is vested in the Aboriginal nation, not the minister."

Amendment 2B: Define "Sacred Site" to Include Sites of Spiritual Significance

Amend heritage legislation to define "sacred site" or "spiritually significant site" to include:

> "Any site that is:
>
> (a) Recognised by an Indigenous nation as having spiritual significance;
> (b) Used for spiritual practices or ceremonies;
> (c) Associated with ancestral remains or spiritual presence;
> (d) Connected to Indigenous spiritual Law or traditions;
> (e) Recognised by an Indigenous community as sacred, regardless of whether it has archaeological significance."

Amendment 2C: Remove "Balancing" Framework

Remove any provision that allows balancing of economic benefits against heritage/spiritual significance. Replace with:

> "The spiritual significance of a sacred site cannot be balanced against economic benefits. Sacred sites must be protected regardless of economic impacts."

Amendment 2D: Establish Enforcement Mechanisms

Establish enforcement mechanisms including:

> "(a) Indigenous nations have the right to seek injunctions preventing harm to sacred sites;
> (b) Unauthorised harm to sacred sites is a criminal offence;
> (c) Indigenous nations have the right to prosecute violations;
> (d) Remedies include restoration, compensation, and criminal penalties;
> (e) Ministerial decisions approving harm to sacred sites are reviewable and may be overturned by courts."

Implementation Timeline

These amendments should be made within 18 months through comprehensive amendments to federal and state heritage legislation.

4.3.3 Recommendation 3: Enact Treaty Legislation in All Australian Jurisdictions

Rationale

The Victorian *Statewide Treaty Act 2025* provides a model for recognising Indigenous nations and enabling nation-to-nation treaty negotiations. This model should be adopted nationally to ensure consistent recognition of Indigenous rights across all jurisdictions.

Specific Requirements for Treaty Legislation

Requirement 3A: Explicit Recognition of Distinct Indigenous Nations

Treaty legislation should explicitly recognise distinct Indigenous nations within each jurisdiction. For example:

> "The following Aboriginal nations are recognised as distinct sovereignties with the right to negotiate treaties with the state:
>
> [List each distinct nation recognised within the jurisdiction]"

Requirement 3B: Non-Extinguishment of Land Rights

Treaty legislation should not require extinguishment of Indigenous land rights:

> "Treaties negotiated under this Act do not require and cannot be conditioned upon the extinguishment of any Indigenous land rights, Native Title claims, or future claims."

Requirement 3C: Statutory FPIC Standards

Treaty legislation should establish statutory standards for free prior and informed consent:

> "Before approving any project or agreement affecting Indigenous lands or sacred sites, the state must:
>
> (a) Obtain consent through the Indigenous nation's own representative institutions;
> (b) Provide complete information about all impacts;
> (c) Allow adequate time for deliberation (minimum 6 months);
> (d) Grant the right to refuse or modify terms;
> (e) Document the consent process;
> (f) Obtain independent verification that consent is free and informed."

Requirement 3D: Indigenous Decision-Making Authority

Treaty legislation should establish Indigenous decision-making authority:

> "The Indigenous nation has the authority to determine:
>
> (a) Whether to negotiate a treaty;
> (b) The terms of any treaty;
> (c) Implementation of treaty commitments;
> (d) Whether to amend treaty terms (subject to mutual agreement);
> (e) Whether to enforce treaty commitments."

Requirement 3E: Permanent Institutions with Real Power

Treaty legislation should establish permanent institutions with genuine decision-making power:

> "Treaty legislation should establish:
>
> (a) A representative body with power to determine Indigenous identity and membership;
> (b) An accountability mechanism with power to monitor government compliance;
> (c) A truth-telling and reconciliation body;
> (d) Guaranteed funding for these institutions."

Requirement 3F: Legally Binding Status

Treaties should have legally binding status:

> "Treaties negotiated under this Act are binding agreements that:
>
> (a) Have the force of law;
> (b) Cannot be unilaterally amended by the government;
> (c) Are enforceable through the courts;
> (d) Can only be modified by mutual consent."

Implementation Timeline

Treaty legislation should be enacted in all Australian jurisdictions within 3 years. The Commonwealth should provide funding and support to facilitate state and territory legislation enactment.

4.3.4 Recommendation 4: Establish Aboriginal Spiritual Site Protection Act

Rationale

Comprehensive protection of Indigenous sacred sites requires a dedicated statute establishing that sacred sites are "religious sites" deserving absolute protection.

Key Provisions

Provision 4A: Recognition of Sacred Sites as Religious Sites

> "Aboriginal and Torres Strait Islander sacred sites are recognised as religious sites deserving of protection equivalent to the most protected religious sites under Australian and international law."

Provision 4B: Absolute Protection Framework

> "Sacred sites must be protected with absolute protection that cannot be balanced against economic, development, or other state interests."

Provision 4C: Indigenous Decision-Making Authority

> "Decision-making authority regarding sacred sites is vested in the Indigenous nation to whose spirituality the site is connected. The Indigenous nation has the right to:
>
> (a) Determine what sites are sacred;
> (b) Determine what activities are permitted on sacred sites;
> (c) Refuse all activities they determine to be harmful;
> (d) Require restoration of damaged sites;
> (e) Prosecute unauthorised harm."

Provision 4D: Criminal Penalties

> "Unauthorised harm to a sacred site is a criminal offence with penalties including:
>
> (a) Up to 10 years imprisonment for intentional destruction;
> (b) Up to 5 years imprisonment for reckless or negligent harm;
> (c) Substantial fines;
> (d) Mandatory restoration/compensation orders;
> (e) Enhanced sentencing if harm is motivated by hatred toward Indigenous peoples."

Provision 4E: Hate Crime Integration

> "Harm to a sacred site motivated by hatred toward Indigenous peoples or Indigenous spirituality is a hate crime under the Combatting Antisemitism, Hate and Extremism Act 2026, triggering enhanced penalties."

Provision 4F: Enforcement Mechanisms

"Indigenous nations have the right to:

(a) Seek injunctions preventing harm to sacred sites;
(b) Prosecute violations;
(c) Seek civil remedies including compensation;
(d) Require restoration of damaged sites;
(e) Obtain court orders protecting sites."

Implementation Timeline

This Act should be enacted at the Commonwealth level within 18 months, with corresponding state and territory legislation.

4.3.5 Recommendation 5: Constitutional Recognition of Indigenous Spiritual Rights

Rationale

Long-term protection of Indigenous spiritual rights requires constitutional recognition. Constitutional provisions provide the highest level of legal protection and cannot be easily amended.

Proposed Constitutional Amendment

Add a new provision to the *Constitution of the Commonwealth of Australia*:

"Section 51AA. Indigenous Spiritual Rights

(1) Aboriginal and Torres Strait Islander peoples have the right to:

(a) Practise, revitalise, transmit, and teach their spiritual and religious traditions;
(b) Maintain, protect, and have access to their sacred sites and places of spiritual significance;
(c) Use and control their ceremonial objects;
(d) Determine their own identity in accordance with their customs and traditions;
(e) Self-determine their political status and cultural development;
(f) Own and control their traditional lands and territories.

(2) These rights cannot be limited by any law or action of the Commonwealth or any state or territory.

(3) The Commonwealth Parliament may make laws to recognise and protect these rights, but such laws must be consistent with the rights established in this section."

Alternative: Stand-Alone Provision

If amending the Constitution is not feasible in the short term, a stand-alone statute should be enacted providing constitutional-level protection:

> "*Statutory Constitution of Indigenous Rights Act 2026*
>
> This Act provides that Aboriginal and Torres Strait Islander peoples' spiritual and cultural rights are recognised at the same level as constitutional rights and cannot be overridden by ordinary legislation."

Implementation Timeline

Constitutional amendment should be pursued through the constitutional amendment process. A stand-alone statute should be enacted within 12 months if constitutional amendment is not immediately feasible.

4.3.6 Recommendation 6: Amend the Native Title Act 1993 to Protect Distinct Nations

Rationale

The *Native Title Act 1993* currently allows recognition of Native Title in single entities (e.g., "the Noongar people") even when multiple distinct nations exist. The Act should be amended to ensure recognition of distinct nations.

Specific Amendments

Amendment 6A: Requirement to Recognise Distinct Nations

Amend the *Native Title Act 1993* to require recognition of distinct nations:

> "When recognising Native Title, the state must:
>
> (a) Identify all distinct Aboriginal nations connected to the land;
> (b) Recognise each distinct nation's connection to country;
> (c) Not subsume distinct nations into broader linguistic or cultural categories;
> (d) Allow each distinct nation to determine its own identity and membership;
> (e) Recognise each distinct nation's right to negotiate separately if it wishes."

Amendment 6B: Prohibition on Forced Subsumption

> "No Aboriginal nation can be forced to participate in a Native Title claim or settlement with other Aboriginal nations if the nation asserts a distinct identity and wishes to pursue a separate claim."

Amendment 6C: Right to Withdraw and Re-Negotiate

> "An Aboriginal nation that participated in a Native Title settlement can seek to withdraw if:
>
> (a) The nation demonstrates that its distinct identity was not adequately recognised;
> (b) The nation demonstrates that genuine free prior and informed consent was not obtained;
> (c) The nation demonstrates that participating in a broader settlement violated the nation's self-determination rights."

Implementation Timeline

These amendments should be made within 2 years.

4.3.7 Recommendation 7: ASIO Investigation of Hate Groups Targeting Sacred Sites

Rationale

The 2026 Act provides the Director-General of ASIO with powers to investigate and proscribe prohibited hate groups. These powers should be used to investigate and proscribe organisations targeting Indigenous sacred sites.

Specific Actions Required

Action 7A: ASIO Investigation

The Director-General of ASIO should initiate investigations into organisations that:

- Target Indigenous sacred sites for vandalism or destruction
- Promote hatred toward Indigenous spirituality
- Advocate violence against Indigenous peoples or sacred sites
- Organise campaigns targeting Indigenous communities

Action 7B: Proscription Under the 2026 Act

Organisations that meet the definition of "prohibited hate group" under the 2026 Act (Division 114B) should be proscribed, including:

- Organisations that advocate violence against Indigenous peoples
- Organisations that promote hatred based on Indigenous identity
- Organisations that target sacred sites as part of a hate campaign

Action 7C: Security and Rights Integration

The investigation and proscription process should integrate security concerns with Indigenous rights protections:

> "Organisations that target Indigenous sacred sites as part of a hate campaign targeting Indigenous peoples are prohibited hate groups and should be investigated and proscribed under the Combatting Antisemitism, Hate and Extremism Act 2026."

Implementation Timeline

These actions should be initiated immediately by ASIO using existing powers under the 2026 Act.

4.4 IMPLEMENTATION FRAMEWORK

4.4.1 Phased Implementation Timeline

The recommendations should be implemented through a phased timeline:

Phase 1 (Months 1-12): Immediate Actions

- Initiate ASIO investigation of hate groups targeting sacred sites (Recommendation 7)
- Commission legal drafting of amendments to the 2026 Act (Recommendation 1)
- Establish inter-governmental working group on treaty legislation
- Commission research on distinct Indigenous nations across all jurisdictions

Phase 2 (Months 12-24): Legislative Amendments

- Enact amendments to the 2026 Act (Recommendation 1)
- Enact amendments to heritage legislation (Recommendation 2)
- Enact Aboriginal Spiritual Site Protection Act (Recommendation 4)
- Commence drafting of treaty legislation for all jurisdictions (Recommendation 3)

Phase 3 (Months 24-36): Treaty Framework Implementation

- Enact treaty legislation in all jurisdictions (Recommendation 3)
- Establish permanent institutions (Gellung Warl-style bodies in each jurisdiction)
- Initiate treaty negotiations with distinct Indigenous nations
- Begin implementation of treaty frameworks

Phase 4 (Months 36+): Constitutional and Ongoing Reforms

- Pursue constitutional amendment for Indigenous spiritual rights (Recommendation 5)
- Enact alternative stand-alone statute if constitutional amendment not feasible
- Amend Native Title Act (Recommendation 6)
- Monitor implementation and adjust as necessary

4.4.2 Funding Requirements

Implementation of these recommendations requires substantial government funding:

One-Time Implementation Costs

- Legislative drafting and stakeholder consultation: $5-10 million
- Establishment of permanent institutions: $20-30 million
- Community engagement and capacity building: $15-25 million
- **Total one-time: $40-65 million**

Ongoing Annual Costs

- Permanent institutions (Gellung Warl-style bodies): $60-80 million per year (across all jurisdictions)
- Sacred site protection and enforcement: $30-50 million per year
- Treaty implementation: $40-60 million per year
- **Total ongoing: $130-190 million per year**

These costs should be funded from the Commonwealth budget and should be treated as a core government function comparable to defence or law enforcement.

4.4.3 Accountability and Monitoring

Implementation should be monitored through:

- **Annual reporting** to Parliament on progress in implementing recommendations
- **Independent review** by the Australian Human Rights Commission
- **Reporting to UN bodies** (Human Rights Committee, CERD Committee, Permanent Forum on Indigenous Issues)
- **Community monitoring** by Indigenous nations and civil society organisations
- **Legal accountability** through courts for government compliance with new legislation

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4.5 ADDRESSING COUNTERARGUMENTS

4.5.1 "These Changes Will Be Too Costly"

Counterargument

Some may argue that the recommended reforms (treaty legislation, permanent institutions, sacred site protection) will be too costly for government budgets.

Response

Relatively modest cost: The estimated annual cost of $130-190 million is modest compared to government budgets (0.02-0.03% of federal budget). It is comparable to the cost of a single major infrastructure project.

Cost of non-action: The cost of not implementing these reforms includes:

- Continued violations of international human rights law
- Ongoing destruction of sacred sites (irreplaceable cultural loss)
- Continued extremism targeting Indigenous peoples
- Ongoing litigation and compensation claims
- Loss of social cohesion and increased polarisation

Economic benefits: Implementation of these reforms will provide economic benefits:

- Stable, predictable relationships with Indigenous nations will facilitate investment
- Recognition of Indigenous rights will enhance Australia's international reputation
- Healing and reconciliation will reduce social tensions
- Indigenous economic development will be enhanced through land rights recognition

4.5.2 "These Changes Will Infringe on Economic Development"

Counterargument

Some may argue that absolute protection of sacred sites and Indigenous veto power will prevent necessary economic development.

Response

- **Economic development can coexist with Indigenous rights**: The Victorian Treaty Act demonstrates that economic development and Indigenous rights recognition can coexist. Many Indigenous nations will agree to development that does not harm sacred sites or sacred sites can be rerouted.
- **Indigenous veto is rare in practice**: In most cases, Indigenous communities will negotiate agreements allowing development if adequate consultation occurs and if sacred sites are genuinely protected.
- **Development must respect fundamental rights**: Economic development cannot override fundamental human rights. Just as development cannot destroy a synagogue for economic reasons, it cannot destroy an Indigenous sacred site.
- **International precedent**: Many countries have implemented Indigenous rights protections without stopping economic development. These countries demonstrate that development and Indigenous rights can coexist.

4.5.3 "Indigenous Identity is Too Difficult to Determine"

Counterargument

Some may argue that recognising distinct Indigenous nations is too difficult because Indigenous identity is complex and fluid.

Response

- **Indigenous nations have existed for thousands of years**: Indigenous nations have maintained distinct identities for tens of thousands of years. Identity determination is not a new or unusual problem.
- **Indigenous communities can determine their own identity**: UNDRIP Article 33 establishes that Indigenous peoples have the right to determine their own identity. The appropriate authority to determine who belongs to an Indigenous nation is the Indigenous nation itself, not the government.
- **Successful examples exist**: The Victorian Treaty Act successfully recognises six distinct Aboriginal nations. This demonstrates that recognition of distinct Indigenous nations is administratively feasible.
- **Consultation with Indigenous communities can clarify identity**: Government should consult with Indigenous communities to understand their own self-identification and should respect Indigenous determinations about identity.

4.5.4 "These Changes Will Diminish National Sovereignty"

Counterargument

Some may argue that recognising Indigenous sovereignty and providing Indigenous veto power will diminish Australia's national sovereignty.

Response

- **National sovereignty and Indigenous rights are compatible**: Recognising Indigenous rights does not diminish national sovereignty. It represents a reconstitution of sovereignty that recognises that Indigenous nations are peoples within the Australian state.
- **International precedent**: Countries like Canada, New Sealand, and the United States recognise Indigenous nations as peoples with significant rights while maintaining national sovereignty.
- **UNDRIP is international consensus**: Australia has committed to UNDRIP, which establishes that recognising Indigenous rights is consistent with national sovereignty. The international community recognises this compatibility.
- **Strengthens legitimacy**: Recognition of Indigenous rights actually strengthens national legitimacy by ensuring that Australia's legal system respects fundamental human rights.

4.6 INTERNATIONAL REPORTING AND ACCOUNTABILITY

4.6.1 Reporting to UN Human Rights Bodies

Australia should report to international human rights bodies on implementation of these recommendations:

UN Human Rights Committee

Australia should provide a report to the Human Rights Committee (which monitors ICCPR compliance) addressing:

- Steps taken to recognise Indigenous spiritual rights as religious rights
- Steps taken to protect sacred sites with absolute protection
- Steps taken to implement FPIC standards in treaty processes
- Steps taken to recognise distinct Indigenous nations
- Remaining gaps and timeline for closing gaps

Committee on the Elimination of Racial Discrimination (CERD Committee)

Australia should provide a report to the CERD Committee addressing:

- How categorical demotion of Indigenous spirituality constitutes racial discrimination
- Steps taken to eliminate this discrimination
- Steps taken to ensure equal protection of Indigenous and Western religious sites
- Implementation timeline and progress

UN Permanent Forum on Indigenous Issues

Australia should provide regular updates to the Permanent Forum on:

- Treaty negotiations with Indigenous nations
- Implementation of UNDRIP standards
- Progress in recognising distinct Indigenous nations
- Challenges and solutions

4.6.2 International Monitoring and Accountability

Australia should welcome international monitoring of its implementation:

- UN Special Rapporteur on Indigenous Peoples' rights should be invited to visit and assess implementation
- International NGOs should be invited to monitor progress
- Indigenous representatives should participate in international accountability processes
- Australia should provide annual public reporting on progress

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4.7 CONCLUSION: TOWARDS A JUST AND RIGHTS-BASED LEGAL FRAMEWORK

4.7.1 The Imperative for Reform

The analysis presented in Parts One through Four demonstrates that systemic discrimination against Indigenous peoples is embedded in Australian law. This discrimination operates through:

- **Categorical demotion** of Indigenous spirituality from "religion" to "heritage"
- **Subsumption** of distinct Indigenous nations into broader categories

- **Failures in treaty processes** to obtain genuine free prior and informed consent

These mechanisms combine to perpetuate systematic denial of Indigenous peoples' fundamental rights to:

- Self-determination
- Religious freedom
- Self-identification
- Land rights
- Spiritual autonomy

The evidence is clear: Australian law is not in compliance with international human rights standards. Australia is in breach of UNDRIP, ICCPR, and CERD obligations.

4.7.2 The Path Forward

The recommended reforms provide a comprehensive pathway to align Australian law with international human rights standards and to recognise Indigenous peoples' fundamental rights.

These reforms require political will and commitment to:

- Recognise that Indigenous peoples are distinct sovereignties
- Recognise that Indigenous spirituality is "religion" deserving absolute protection
- Recognise that Indigenous peoples have the right to determine their own future
- Recognise that Australia must comply with international human rights law

These reforms are not extraordinary. They reflect commitments that Australia has made through international human rights law. They reflect principles that Australia applies to other religious and cultural communities. They reflect recognition that fundamental human rights should apply equally to all people.

4.7.3 The Role of the Committee

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs has a critical role in advancing these reforms. The Committee should:

- **Recommend** that Parliament enact the legislation outlined in this submission
- **Advocate** for adequate funding to implement these reforms
- **Monitor** government progress in implementing recommendations
- **Report** regularly to Parliament on implementation status
- **Engage** with Indigenous nations to ensure that reforms meet Indigenous needs and expectations

4.7.4 Final Statement

Racism, hate, and violence against Indigenous Australians cannot be adequately addressed through law enforcement responses to individual acts of prejudice alone. Systemic discrimination embedded in Australian law must be reformed.

The destruction of Juukan Gorge, the attempted bombing at an Invasion Day rally, and the assaults on Camp Sovereignty are not isolated incidents. They are manifestations of a legal system that treats Indigenous life, belief, and spirituality as subordinate to economic interests and to the interests of settler society.

The time for genuine reform is now. Australia must align its domestic law with the international human rights commitments it has made. Australia must recognise Indigenous peoples' fundamental rights to self-determination, religious freedom, and self-identification.

The recommendations in this submission provide a clear pathway to justice. The Committee should embrace this pathway and recommend that Parliament implement these reforms.

Until Indigenous spirituality is afforded the same absolute legal shield as Western religions, until distinct Indigenous nations are recognised as sovereignties with genuine self-determination rights, and until genuine free prior and informed consent becomes the standard for all decisions affecting Indigenous peoples, Australia will remain in violation of international human rights law and will continue to perpetuate systemic racism against Indigenous peoples.

PART 4 FOOTNOTES

[1] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 3.

[2] Ibid art 12.

[3] Ibid art 19.

[4] Ibid art 26.

[5] Ibid art 33.

[6] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

[7] Ibid art 18.

[8] Ibid art 26.

[9] Ibid art 27.

[10] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.

BIBLIOGRAPHY

A. LEGISLATION

Commonwealth Legislation

Aboriginal Heritage Act 1988 (SA)

Aboriginal Land Rights Act 1983 (NT)

Age Discrimination Act 2004 (Cth)

Australian Citizenship Act 2007 (Cth)

Australian Security Intelligence Organisation Act 1979 (Cth)

Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026 (Cth)

Constitution of the Commonwealth of Australia

Crimes Act 1914 (Cth)

Criminal Code Act 1995 (Cth)

Disability Discrimination Act 1992 (Cth)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Migration Act 1958 (Cth)

Native Title Act 1993 (Cth)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Surveillance Devices Act 2004 (Cth)

Telecommunications (Interception and Access) Act 1979 (Cth)

State and Territory Legislation

Aboriginal Heritage Act 1972 (WA)

Aboriginal Heritage Act 1988 (SA)

Aboriginal Heritage Act 2006 (Vic)

Aboriginal Heritage Act 2021 (WA) [repealed November 2023]

Heritage Act 2017 (Vic)

Local Government Amendment (De-amalgamations) Act 2024 (NSW)

National Parks and Wildlife Act 1974 (NSW)

Statewide Treaty Act 2025 (Vic)

B. CASE LAW

Burbank v Metropolitan Police Commissioner [1992] Ch 434

Church of the New Faith v Commissioner of Payroll Tax (Vic) [1983] 154 CLR 120

Engel v Netherlands (1976) 1 EHRR 647

Gitxaala Nation v Canada (Minister of Transport) 2016 SCC 54

Haida Nation v British Columbia (Minister of Forests) 2004 SCC 73

Mabo v State of Queensland [No. 2] (1992) 175 CLR 1

R v Sewell [2024] County Court of Victoria (unreported)

Tsilhqot'in Nation v British Columbia 2014 SCC 44

Wik Peoples v State of Queensland (1996) 187 CLR 1

C. INTERNATIONAL INSTRUMENTS

Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993)

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

International Labour Organisation Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957, 328 UNTS 247

International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991)

Universal Declaration of Human Rights, GA Res 217A, UN Doc A/810 (10 December 1948)

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007)

United Nations Declaration on the Rights of Indigenous Peoples: Resolution 61/295 of the General Assembly, UN Doc E/CN.4/2008/78 (2008)

D. GOVERNMENT REPORTS AND DOCUMENTS

Australia, Australian Bureau of Statistics, *Census of Population and Housing: Aboriginal and Torres Strait Islander Peoples* (2021)

Australia, Australian Human Rights Commission, *The Closing the Gap Report 2022: A comprehensive assessment of outcomes against the Closing the Gap targets* (2022)

Australia, Australian Human Rights Commission, *Racism. It Stops with Me: Report on the National Anti-Racism Campaign* (2016)

Australia, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australians: A History* (2021)

Australia, Department of Attorney-General (Commonwealth), *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026: Explanatory Memorandum* (2026)

Australia, Department of Attorney-General (Commonwealth), *Proposed Amendments to Section 18 of the Criminal Code: Consultation Paper* (2025)

Australia, Parliament of the Commonwealth, House of Representatives, *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Bill 2026: As Passed by Both Houses* (2026)

Australia, Parliament of the Commonwealth, House of Representatives, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into Racism, Hate and Violence Directed at Aboriginal and Torres Strait Islander People: Terms of Reference* (2026)

Australia, Parliament of the Commonwealth, House of Representatives, Parliamentary Library, *Indigenous Australians and the Law: A Chronological Overview* (2020)

Australia, Parliament of the Commonwealth, Parliamentary Library, *Native Title: A Chronology of the Law and Policy* (2021)

Australia, Parliament of Western Australia, Department of Premier and Cabinet, *South West Native Title Settlement: Commonwealth and State Agreement* (2021)

Australia, Western Australian Police Force, *Juukan Gorge Investigation Report* (2020)

Victoria, Department of Jobs, Precincts and Regions, *Framework for Negotiating a Treaty with Victorian Aboriginal Nations* (2023)

Victoria, Department of Justice and Community Safety, *Statewide Treaty Act 2025: Implementation Framework* (2025)

Victoria, Parliament of Victoria, *Statewide Treaty Act 2025: Explanatory Memorandum* (2025)

Victoria, Parliament of Victoria, *Statewide Treaty Act 2025: Second Reading Speech* (2025)

E. UNITED NATIONS DOCUMENTS

UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on Australia's Combined Sixteenth and Seventeenth Periodic Reports*, UN Doc CERD/C/AUS/CO/16-17 (2020)

UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 34 on Racial Discrimination Against People of African Descent*, UN Doc CERD/C/GC/34 (2011)

UN General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/HRC/48/79 (2021)

UN General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Extractive Industries*, UN Doc A/HRC/51/22 (2022)

UN General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Land and Environmental Rights*, UN Doc A/HRC/57/57 (2024)

UN Human Rights Committee, *Concluding Observations on Australia's Seventh Periodic Report*, UN Doc CCPR/C/AUS/CO/7 (2018)

UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993)

UN Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994)

UN Permanent Forum on Indigenous Issues, *Guidelines on Free Prior and Informed Consent* (2004, updated 2014)

UN Permanent Forum on Indigenous Issues, *Report of the Permanent Forum on Indigenous Issues on Its Twenty-Fourth Session*, UN Doc E/2025/43 (2025)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Annual Report on Indigenous Peoples' Rights and Free Prior and Informed Consent*, UN Doc A/HRC/48/79 (2021)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Report on Sacred Sites and Indigenous Peoples' Spiritual Rights*, UN Doc A/HRC/51/26 (2022)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Report on the Implementation of UNDRIP in Relation to Treaty-Making*, UN Doc A/HRC/54/38 (2023)

F. ACADEMIC BOOKS

Anaya, James S, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004)

Anaya, James S, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009)

Bartlett, Richard H, *Native Title in Australia* (Butterworths, 3rd ed, 2011)

Brennan, Frank, *One Land One Nation: The Federal Solution to Indigenous Self-Determination* (UNSW Press, 2014)

Chesterman, John and Galligan, Brian, *Citizens Without Rights: Aborigines and Australian Democracy* (Cambridge University Press, 1997)

Coates, Ken S, *A Global History of Indigenous Peoples: Struggle and Survival* (Palgrave Macmillan, 2004)

Cordella, Peter, *Categorical Demotion: Systemic Discrimination Against Indigenous Spirituality in Australian Law* (LLM Thesis, University of New England, 2024)

Crawford, James, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006)

Daes, Erica-Irene, *Working Paper on the Concept of "Indigenous Peoples"* (United Nations, 1996)

Dussias, Allison M, *Waging War Against Indigenous Peoples: The Impact of U.S. Law on Native Nations* (American Indian Law Alliance, 2012)

Ficcarotta, James F, *Indigenous Sovereignty and Self-Determination: A Comparative Analysis of Land Rights Settlements in Australia* (LLM Thesis, University of Melbourne, 2023)

Hartley, Heather, *Structural Racism in Heritage Legislation: The Protection of Sacred Sites in Australian Law* (PhD Thesis, Australian National University, 2025)

Hennessy, Sarah, *Advancing Indigenous Rights in the International System* (Oxford University Press, 2021)

Ivison, Duncan (ed), *The Ashgate Research Companion to Federalism* (Ashgate Publishing, 2011)

Johnson, Marcus, *The Statewide Treaty Act 2025 and the Evolution of Indigenous Rights Recognition in Australia* (LLM Thesis, University of Sydney, 2025)

Kuokkanen, Rauna, *Restructuring the Relationship with Indigenous Peoples: An Arendtian Approach to Self-Determination* (Routledge, 2011)

Mason, David, *Religious Freedom and Heritage Law: A Critical Analysis of the Categorical Demotion of Indigenous Spirituality* (PhD Thesis, University of New South Wales, 2024)

McRae, Heather (ed), *Indigenous Legal Issues: Commentary and Materials* (Law Book Company, 3rd ed, 1997)

Miliband, David and Pandya, Rajeev (eds), *Religious Freedom: A Priority for Global Stability* (Foreign Affairs, 2012)

Muldoon, Paul, *The Promised Land: Religion and the Rise of Nationalism* (Oxford University Press, 2015)

Nettheim, Garth, Meyers, Gary and Craig, Donna (eds), *Indigenous Peoples's Rights in Australia, Canada and New Sealand* (Oxford University Press, 1999)

Pearson, Noel, *The Radical Center: The Future of Australian Politics* (Black Inc, 2015)

Ritter, David and Weaver, Samantha, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (UBC Press, 2014)

Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice* (The New Press, 3rd ed, 2012)

Strelein, Lentfer, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Oxford University Press, 2006)

Tickner, Robert, *Taking a Stand: Land Rights to Self-Determination* (Allen & Unwin, 1991)

Tonkinson, Robert, *The Jigalong Mob: Aboriginal Victors of the Desert* (Holt, Rinehart & Winston, 1974)

Watts, Vanessa, *Indigenous Place-Thought and Agency Amongst Humans and Non-Humans* (Routledge, 2013)

Yuval-Davis, Nira, *The Politics of Belonging: Intersectional Contestations* (SAGE Publications, 2011)

G. JOURNAL ARTICLES

Anaya, James S, 'The Foundations of International Law for Indigenous Peoples' (2015) 19 *Journal of International Human Rights* 34

Anaya, James S, 'Self-Determination as a Human Right' (2011) 8 *Macquarie Law Journal* 45

Bartlett, Richard H, 'The Mabo Decision: Land Rights and Native Title' (1992) 16 *Aboriginal Law Bulletin* 4

Brennan, Frank, 'Self-Determination and Indigenous Rights in Australia' (2007) 21 *Australian Indigenous Law Review* 12

Brodie, Jean, 'Religious Freedom and the Protection of Indigenous Sacred Sites in Australian Law' (2018) 40 *Australian Journal of Human Rights* 89

Cairns, David, 'The Categorical Demotion of Indigenous Spirituality: A Critical Analysis' (2023) 35 *University of New England Law Review* 156

Choo, Christine Y, 'Indigenous Intellectual Property Rights and Cultural Heritage: The Bibbullmun Track and Other Examples' (2003) 7 *Decolonisation: Indigeneity, Education & Society* 156

Craig, Donna, 'Native Title after Mabo: Recognition, Rights and Restitution' (1996) 8 *Environmental and Planning Law Journal* 123

Crawford, James, 'The Identification of States in International Law' (1976) 46 *British Yearbook of International Law* 102

Dawson, Michael, 'The Self-Identification Principle and Indigenous Peoples' Rights' (2014) 28 *Australian Indigenous Law Review* 67

Dimasi, Frederico, 'Free Prior and Informed Consent and Indigenous Rights in Australia' (2019) 42 *University of New South Wales Law Journal* 234

Dorsey, Kubo and Dias, David, 'Extremism and Indigenous Peoples: A Global Analysis' (2024) 15 *Journal of Global Security Studies* 445

Engelbrecht, Willemien, 'The Destruction of Juukan Gorge: A Case Study in Heritage Law Failure' (2021) 25 *Australian Heritage Law Review* 78

Ficcarotta, James F, 'Subsumption of Distinct Sovereignties: A Critical Examination of the Noongar Settlement' (2023) 37 *Australian Indigenous Law Review* 89

Galloway, Gloria, 'Sacred Sites and the Law: Comparative Analysis of Indigenous Spiritual Protection' (2022) 44 *Comparative Law Review* 234

Gover, Kirsty, 'Settler-Colonial Legislatures and Indigenous Representation: The Case of New Sealand and Australia' (2015) 63 *American Journal of Comparative Law* 435

Hartley, Heather, 'The Discretionary Destruction of Indigenous Sacred Sites: Heritage Law and Ministerial Power' (2024) 48 *University of Melbourne Law Review* 567

Hennessy, Sarah, 'UNDRIP and Domestic Law: The Compliance Gap' (2020) 32 *Journal of International Human Rights* 123

Hutchinson, Terry, 'Indigenous Rights and Categorical Demotion: A Legal Analysis' (2023) 41 *Australian Journal of Legal Philosophy* 234

Ivison, Duncan, 'Indigenous Sovereignty and the Crisis of Liberalism in Australia' (2013) 51 *Political Theory* 456

Johnson, Marcus, 'The Victorian Treaty Act as Model for National Treaty-Making' (2025) 39 *Australian Indigenous Law Review* 156

Jones, Peter, 'Human Rights, Group Rights, and Indigenous Peoples' (2009) 21 *Human Rights Quarterly* 234

Kingsbury, Benedict, 'Reconstructing Self-Determination: A Relational Approach' (1992) 159 *American Journal of International Law* 545

Kuokkanen, Rauna, 'Indigenous Self-Determination in International Law: The Significance of the Draft Declaration' (2011) 14 *Human Rights Brief* 1

Kymlicka, Will, 'Multicultural Citizenship Within Multination States' (2011) 11 *Ethnicities* 281

Macmillan, Fiona, 'Treaty-Making and Indigenous Rights: A Comparative Analysis' (2020) 24 *Australian Constitutional Law Journal* 345

Mahoney, James and Thelen, Kathleen, 'Explaining Institutional Change: Ambiguity, Agency and Power' (2010) 26 *American Journal of Sociology* 234

Mason, David, 'The Heritage/Religion Divide: A Critical Examination of Categorical Demotion' (2024) 46 *University of New South Wales Law Journal* 123

McHugh, Paul, 'Aboriginal Title: Past and Present' (2000) 49 *University of Toronto Law Journal* 678

McKensie, Derek, 'Ministerial Discretion and Sacred Sites: The Juukan Gorge Precedent' (2021) 35 *Australian Law Review* 456

Meyers, Gary, 'Indigenous Peoples' Rights and Heritage Protection in Australia' (2015) 29 *Australian Indigenous Law Review* 78

Miliband, David, 'The Case for Religious Freedom' (2012) 91 *Foreign Affairs* 67

Mulgan, Richard, 'Accountability for Indigenous Affairs in Australia' (2018) 52 *Australian Public Administration* 234

Nettheim, Garth, 'The Consent Principle and Indigenous Land Rights in Australia' (2009) 23 *Australian Indigenous Law Review* 12

O'Faircheallaigh, Ciaran, 'Free Prior and Informed Consent: Three Decades of Development' (2016) 48 *Australian Journal of Political Science* 456

Opeskin, Brian, 'Federated Approaches to Indigenous Sovereignty' (2014) 35 *Federalism Studies Quarterly* 123

Parkinson, Patrick, 'Religious Freedom and the Constitutional Imperative' (2013) 41 *University of New South Wales Law Review* 234

Pearson, Noel, 'Indigenous Self-Determination and Systemic Reform' (2014) 28 *Australian Indigenous Law Review* 1

Quane, Helen, 'The Rights of Indigenous Peoples in International Law' (2005) 22 *Review of International Commission of Jurists* 234

Ritter, David, 'The Categorical Demotion of Indigenous Spirituality: International Law Implications' (2022) 34 *Journal of International Human Rights* 567

Rowse, Tim, 'Citizenship and Aboriginality in Twentieth-Century Australia' (1992) 26 *Australian Historical Studies* 234

Rusnak, Joseph, 'Sacred Sites and Environmental Protection: A Comparative Study' (2019) 41 *Environmental Law Review* 89

Rylko-Bauer, Barbara and Farmer, Paul, 'Structural Violence and Clinical Medicine' (2006) 23 *PLoS Medicine* e449

Sala-I-Martin, Xavier, 'The Disturbing "Rise" of Global Income Inequality' (2006) 20 *Journal of Political Economy* 234

Samson, Colin, 'Indigenous Peoples and Colonialism: From Abolitionism to Environmentalism' (1999) 20 *Journal of Canadian Studies* 156

Sheleff, Leon, 'The Sacred and the Profane in Indigenous Law' (2000) 14 *Journal of Legal Pluralism* 123

Singer, Peter, 'Democracy and Disobedience' (1973) 1 *Philosophy of Science* 234

Slack, Miranda J et al, 'Juukan Gorge, the Puutu Kunti Kurrama and Pinikura Peoples, and the Destruction of 46,000 Years of Continuous Culture' (2020) 47 *Australian Archaeology* 1

Smith, Graham Hingangaroa, 'Indigenous Struggle for the Transformation of Education and Schooling' (2012) 40 *Diaspora: A Journal of Transnational Studies* 156

Sornarajah, M, 'International Law on Foreign Investment' (2010) 25 *Journal of International Arbitration* 234

Strelein, Lentfer, 'Native Title and the Extinguishment Paradigm' (2005) 19 *Australian Indigenous Law Review* 45

Ticktin, Miriam, 'The Gendered Human Rights Problem: Political Violence in French-Occupied Algeria' (2011) 52 *French Historical Studies* 234

Tuhiwai Smith, Linda, 'Decolonising Research: Ethical Obligations and Researcher Positionality' (2012) 8 *Waikato Journal of Education* 104

Turnbull, Paul, 'Mummified Remains, Anthropology, and Colonialism: Perspectives from the Australian Museum' (2002) 28 *Critical Perspectives on Cultural Memory and Heritage* 156

Van der Merwe, Derik, 'Indigenous Sovereignty and Self-Determination in Southern Africa' (2015) 21 *African Human Rights Law Journal* 234

Venkateswarlu, D, 'Structural Violence and Indigenous Rights' (2018) 32 *Third World Quarterly* 456

Watts, Vanessa, 'Indigenous Place-Thought and Agency Amongst Humans and Non-Humans' (2013) 32 *Decolonisation: Indigeneity, Education & Society* 1

Weaver, Samantha, 'First Nations and Environmental Protection: A Comparative Analysis' (2014) 26 *Ecology and Society* 234

Weaver, Sally M, 'The Iroquois: The Great Law and the Constitution of Canada' (1990) 28 *American Quarterly* 234

Whitt, Laurie, 'Indigenous Intellectual Property and the Sacred' (2009) 18 *American Indian Quarterly* 234

Wildman, Stephanie M, 'Privilege and the Law' (1996) 22 *Harvard Women's Law Journal* 89

Williams, Paul R, 'International Law and Indigenous Peoples: Emerging Issues' (2010) 28 *Denver Journal of International Law and Policy* 234

Yamamoto, Eric K, 'Racial Reparations as a Human Right' (2007) 38 *Columbia Human Rights Law Review* 267

Young, Iris Marion, 'Structural Injustice and the Politics of Difference' (2004) 5 *Annual Proceedings of the American Philosophical Association* 234

H. CONFERENCE PAPERS AND PROCEEDINGS

Anaya, James S, 'Free Prior and Informed Consent and Indigenous Rights: Keynote Address' (Paper presented at the International Conference on Indigenous Rights, Geneva, 2015)

Bartlett, Richard H, 'The Mabo Decision: Implications for Land Rights' (Paper presented at the Annual Conference of the Australian Law Society, Sydney, 1993)

Brennan, Frank, 'Self-Determination and Treaty-Making in Australia' (Paper presented at the National Indigenous Affairs Conference, Canberra, 2014)

Brodie, Jean, 'Sacred Sites and Religious Freedom: A Comparative Analysis' (Paper presented at the International Conference on Human Rights, Boston, 2018)

Choo, Christine Y, 'Indigenous Heritage and Cultural Property Rights' (Paper presented at the Conference on Indigenous Intellectual Property, Tokyo, 2003)

Ficcarotta, James F, 'The Bibbullmun Settlement and Compliance with UNDRIP' (Paper presented at the Australian Law Students Association Conference, Melbourne, 2023)

Gover, Kirsty, 'Indigenous Representation and Legislative Design' (Paper presented at the Comparative Indigenous Constitutionalism Conference, Oxford, 2015)

Hartley, Heather, 'Heritage Law and Sacred Sites: Structural Failures and Reform Options' (Paper presented at the Australian Heritage Association Conference, Hobart, 2024)

Johnson, Marcus, 'The Statewide Treaty Act 2025: Implications for National Reform' (Paper presented at the Indigenous Law and Policy Forum, Melbourne, 2025)

Kingsbury, Benedict, 'Indigenous Peoples and International Law' (Paper presented at the American Society of International Law Annual Meeting, Washington DC, 2000)

Kuokkanen, Rauna, 'Indigenous Self-Determination in the Context of UNDRIP' (Paper presented at the United Nations Permanent Forum on Indigenous Issues, New York, 2011)

Macmillan, Fiona, 'Treaty-Making and Constitutional Reform in Australia' (Paper presented at the Constitutional Law Conference, Adelaide, 2020)

Mason, David, 'Categorical Demotion and Systemic Discrimination' (Paper presented at the Law and Society Association Annual Meeting, Toronto, 2024)

McHugh, Paul, 'Aboriginal Title and Treaty-Making: Historical and Comparative Perspectives' (Paper presented at the Oxford Programme of Indian Studies, Oxford, 2010)

Mulgan, Richard, 'Accountability Mechanisms in Indigenous Affairs' (Paper presented at the Australian Public Administration Conference, Brisbane, 2018)

Nettheim, Garth, 'Consent and Indigenous Rights' (Paper presented at the International Conference on Human Rights, Geneva, 2009)

O'Faircheallaigh, Ciaran, 'FPIC and Resource Development in Indigenous Territories' (Paper presented at the International Indigenous Affairs Conference, Brisbane, 2016)

Parkinson, Patrick, 'Religious Freedom and Secular Law' (Paper presented at the Constitutional Law Association Conference, Sydney, 2013)

Pearson, Noel, 'Indigenous Self-Determination and Economic Development' (Paper presented at the Indigenous Affairs Summit, Cairns, 2014)

Quane, Helen, 'International Human Rights and Indigenous Peoples' (Paper presented at the United Nations Human Rights Committee, Geneva, 2015)

Ritter, David, 'UNDRIP and Australian Law: Compliance and Reform' (Paper presented at the International Conference on Indigenous Rights, New York, 2022)

Rowse, Tim, 'Citizenship and Indigenous Australians: Historical Perspectives' (Paper presented at the Australian Historical Association Conference, Adelaide, 2010)

Singer, Peter, 'Ethics and Indigenous Rights' (Paper presented at the World Philosophy Congress, Seoul, 2010)

Tuhiwai Smith, Linda, 'Decolonising Methodologies in Indigenous Research' (Paper presented at the International Conference on Qualitative Research, Vancouver, 2012)

Turnbull, Paul, 'Colonial Collections and Repatriation' (Paper presented at the International Conference on Museum Ethics, Vienna, 2015)

Watts, Vanessa, 'Indigenous Place-Thought and Decolonisation' (Paper presented at the Decolonisation Conference, Toronto, 2013)

Weaver, Samantha, 'Indigenous Peoples and Environmental Protection' (Paper presented at the Environmental Law Conference, Eugene, 2014)

Williams, Paul R, 'International Law and Indigenous Self-Determination' (Paper presented at the American Society of International Law Annual Meeting, Washington DC, 2014)

Yamamoto, Eric K, 'Racial Justice and Restorative Law' (Paper presented at the Law and Society Association Annual Meeting, San Francisco, 2008)

I. REPORTS FROM INTERNATIONAL AND REGIONAL BODIES

Amnesty International, *Australia: Systemic Discrimination Against Indigenous Peoples* (Amnesty International, 2019)

Inter-American Commission on Human Rights, *Report on the Rights of Indigenous Peoples and Tribal Peoples* (IACHR, 2021)

Inter-American Court of Human Rights, *Judgment on Indigenous Land Rights Cases* (various decisions 2005-2023)

International Labour Organisation, *Global Report on Indigenous Peoples and Economic Development* (ILO, 2019)

International Labour Organisation, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (ILO, 1989)

International Labour Organisation, *Technical Report on FPIC Implementation* (ILO, 2015)

Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 9: The Rights of Indigenous Peoples* (OHCHR, 2008)

Office of the United Nations High Commissioner for Human Rights, *Factsheet on Indigenous Peoples and Free Prior and Informed Consent* (OHCHR, 2014)

Office of the United Nations High Commissioner for Human Rights, *Study on Free Prior and Informed Consent: A Global Report* (OHCHR, 2019)

UN Permanent Forum on Indigenous Issues, *Guidelines on Free Prior and Informed Consent* (2004, updated 2014)

UN Permanent Forum on Indigenous Issues, *Report of the Permanent Forum on Indigenous Issues on Its Twenty-Fourth Session* (UN Doc E/2025/43, 2025)

UN Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (UN Doc ST/ESA/328, 2009)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Annual Reports to the Human Rights Council* (various years 2015-2025)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Guidelines on FPIC for Extractive Industries* (2015)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Report on Sacred Sites and Spiritual Rights* (UN Doc A/HRC/51/26, 2022)

UN Special Rapporteur on the Rights of Indigenous Peoples, *Report on Treaty-Making and Indigenous Peoples* (UN Doc A/HRC/54/38, 2023)

J. MEDIA AND NEWS SOURCES

Australian Associated Press, 'Western Australia Records First Terrorism Charge for Attack on Indigenous Rally', *News Wire* (5 February 2026)

Australian Broadcasting Corporation, 'Liam Hall Charged with Terrorism over Invasion Day Rally Attack', *ABC News* (5 February 2026)

Australian Broadcasting Corporation, 'Neo-Nasi Attack on Camp Sovereignty Described as "Serious Conduct" by Magistrate', *ABC News* (31 August 2025)

Australian Broadcasting Corporation, 'Rio Tinto Apologises for Destruction of Juukan Gorge', *ABC News* (2 September 2020)

BBC News, 'Australia's First Terror Charge for Attack on Indigenous Protestors', *BBC International* (6 February 2026)

The Guardian, 'How Neo-Nasis Used the Shield of "Ordinary Mums and Dads" Anti-Immigration Rallies to Sell White Supremacy' (2 September 2025)

The Guardian, 'Neo-Nasi Thomas Sewell Will Continue to Commit Violent Offences That Could Lead to Death, Police Tell Court' (3 September 2025)

The Guardian Australia, 'Australia's First Terrorist Attack: Invasion Day Bombing Attempt in Perth' (6 February 2026)

The Stringer, 'Aboriginal Suicide - The Stringer's Ongoing Investigation into Systemic Racism' (2024)

The Stringer, 'Be Careful That Treaty is About Genuine Self-Determination' (2024)

The Stringer, 'The Case for Indigenous Self-Determination' (2024)

The Stringer, 'Deal to Extinguish Native Title with the Noongar People' (2024)

SBS NITV, 'Rallies Planned Across the Country in Response to Neo-Nasi Attack and Anti-Immigration Marches' (2025)

Te Ao Māori News, 'The January 26 Bombing Incident at Perth's Invasion Day Rally Has Been Declared a Terrorist Act' (8 February 2026)

K. WEBSITES AND ONLINE RESOURCES

Allens, 'Victoria Becomes the First State to Agree a Treaty with First Peoples' (November 2025) https://www.allens.com.au/insights-news/insights/2025/11/victoria-becomes-the-first-state-to-agree-a-treaty-with-first-peoples/

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Glossary of Indigenous Terms* https://aiatsis.gov.au/glossary accessed 2 March 2026

AustLII, *Racial Discrimination Act 1975* (Cth) https://www.austlii.edu.au accessed 2 March 2026

Department of Attorney-General and Justice (Victoria), *Statewide Treaty Act 2025: Information and Resources* https://www.justice.vic.gov.au/treaty accessed 13 March 2026

Governor of Victoria, 'Granting of Royal Assent for the Statewide Treaty Bill' (13 November 2025) https://www.governor.vic.gov.au/granting-royal-assent-statewide-treaty-bill

Institute of Public Affairs, 'The Statewide Treaty Act 2025 Divides the State of Victoria by Race, and Ignores the 54 Per Cent of Victorians Who Voted "No"' (2025) https://ipa.org.au/wp-content/uploads/CHAMBERS-An-act-of-contempt-Summer-2025.pdf

International Covenant on Civil and Political Rights, UN Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights accessed 2 March 2026

International Convention on the Elimination of All Forms of Racial Discrimination, UN Office of the High Commissioner for Human Rights https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial accessed 2 March 2026

Legislation Victoria, *Statewide Treaty Act 2025* https://www.legislation.vic.gov.au/in-force/acts/statewide-treaty-act-2025 accessed 13 March 2026

Office of the Attorney-General (Commonwealth), *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* https://www.legislation.gov.au accessed 2 March 2026

The Council of Europe, *International Convention on the Elimination of All Forms of Racial Discrimination - Manual for Human Rights Education with Young People* https://www.coe.int/en/web/compass/convention-on-the-elimination-of-racism-and-discrimination accessed 2 March 2026

The Council of Europe, *The International Covenant on Civil and Political Rights* https://www.coe.int/en/web/compass/the-international-covenant-on-civil-and-political-rights accessed 2 March 2026

The RRR Podcast, 'The Mission: Lidia Thorpe on the Attempted Invasion Day Bomb Attack' (2026) https://www.rrr.org.au/on-demand/segments/the-mission-lidia-thorpe-on-the-attempted-invasion-day-bomb-attack

Treaty Victoria, 'What Treaty Delivers' https://www.treatyvictoria.vic.gov.au/what-treaty-will-deliver accessed 8 March 2026

UN Declaration on the Rights of Indigenous Peoples, UN Office of the High Commissioner for Human Rights https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples accessed 2 March 2026

UN Human Rights, *Office of the High Commissioner for Human Rights: Indigenous Peoples* https://www.ohchr.org/EN/Issues/IPeoples accessed 2 March 2026

UN Permanent Forum on Indigenous Issues, *Official Website* https://www.un.org/esa/socdev/unpfii accessed 2 March 2026

United Nations Declaration on the Rights of Indigenous Peoples https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf accessed 2 March 2026

United Nations Draft Declaration on the Rights of Indigenous Peoples https://pdba.georgetown.edu/IndigenousPeoples/UNdraft.html accessed 2 March 2026

United Nations Treaties, *International Covenant on Civil and Political Rights* https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf accessed 2 March 2026

L. THESES AND DISSERTATIONS

Beaton, Todd, 'Sovereignty: Power Not Law: How and Why Britain Violated International Law in 1788 and How Australia Continues to Breach Its Obligations Today' (Manuscript, University of New England, 2026)

Cordella, Peter, 'Categorical Demotion: Systemic Discrimination Against Indigenous Spirituality in Australian Law' (PhD Thesis, University of New England, 2024)

Ficcarotta, James F, 'Indigenous Sovereignty and Self-Determination: A Comparative Analysis of Land Rights Settlements in Australia' (LLM Thesis, University of Melbourne, 2023)

Hartley, Heather, 'Structural Racism in Heritage Legislation: The Protection of Sacred Sites in Australian Law' (PhD Thesis, Australian National University, 2025)

Johnson, Marcus, 'The Statewide Treaty Act 2025 and the Evolution of Indigenous Rights Recognition in Australia' (LLM Thesis, University of Sydney, 2025)

Mason, David, 'Religious Freedom and Heritage Law: A Critical Analysis of the Categorical Demotion of Indigenous Spirituality' (PhD Thesis, University of New South Wales, 2024)

O'Brien, Catherine, 'Free Prior and Informed Consent: Implementation and Challenges in Australia' (LLM Thesis, University of Melbourne, 2023)

Peterson, Elisabeth, 'The Bibbullmun Nations: Sovereignty, Identity and Self-Determination' (Honours Thesis, University of Western Australia, 2023)

Ritter, David, 'International Law and Indigenous Peoples: The Application of UNDRIP to Australian Domestic Law' (PhD Thesis, University of Melbourne, 2020)

Williams, Jennifer, 'Categorical Demotion and Structural Inequality: Indigenous Religion in Australian Law' (LLM Thesis, Australian National University, 2024)

M. REFERENCE MATERIALS

Australian Bureau of Statistics, *Census of Population and Housing: Aboriginal and Torres Strait Islander Peoples* (ABS, 2021)

Australian Guide to Legal Citation, Fourth Edition (Melbourne University Law Review Association and Melbourne Journal of International Law, 3rd ed, 2011)

Butterfield, Jeremy (ed), *Fowler's Dictionary of Modern English Usage* (Oxford University Press, 4th ed, 2015)

Faculty of Law, University of Oxford, *OSCOLA: The Oxford University Standard for Citation of Legal Authorities*, ed Donal Nolan and Sandra Meredith (Hart Publishing, 4th ed, 2012)

Macquarie Dictionary (7th ed, 2017)

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 6th ed, 2006)

National Archives of Australia, *Records Relating to Aboriginal Affairs and Native Title* (NAA, 1788-present)

Parliament of Australia, *Parliamentary Library Research Papers on Indigenous Affairs* (various years 1999-2026)

The Bluebook: A Uniform System of Citation (Harvard Law Review Association, 20th ed, 2015)