



Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia

Submission to Senate Legal and Constitutional Affairs Committee

1 June 2022

Save the Children Australia makes this submission in a spirit of humility and respect for the leadership, knowledge and authority of Aboriginal and Torres Strait Islander peoples in all matters relating to them and their children.

Our submission is based on our perspective as Australia's leading child rights organisation, with a deep commitment to the international human rights framework and its application in Australia.

Our approach is based in our experience working directly with children and their families and communities in every State and Territory across Australia for many decades, and in our long-term advocacy for policy reform and system change to promote and fulfil all children's rights. Through our work, we witness egregious breaches of Aboriginal and Torres Strait Islander children's rights on a daily basis, with the impacts felt by individuals, families and communities. We know that these breaches are institutional and systemic in nature. We keenly feel our responsibility to address these daily, ongoing violations of children's rights.

Our positions are strongly informed by what has been shared with us by the Aboriginal and Torres Strait Islander led and controlled organisations and leaders from whom we have had the privilege to learn. We seek to support their leadership by amplifying what we have heard, drawing on our expertise in children's rights.

Our positions are also strongly informed by the views of Aboriginal and Torres Strait Islander members of our own organisation. We have sought to reflect their knowledge and perspectives and we honour the importance of their voices and leadership to our position.

We also recognise that the issues covered in this submission are matters of live debate and support this debate occurring with Aboriginal and Torres Strait Islander leadership and, ultimately, decision-making.

Children's rights in Australia and UNDRIP

UNDRIP has particular significance for children's rights in Australia.

The current generation of Aboriginal and Torres Strait Islander children experiences significant inequities in outcomes and in accessing their rights across all aspects of their lives, as have all previous generations since colonisation. This manifests across health, education, housing, employment, social and emotional wellbeing, safety from violence, maintenance of connection to family, community and culture, access to appropriate and safe services, and opportunities to participate in decisions shaping their lives.

Australia falls far short of meeting UNDRIP and its principles. This is all too visible when it comes to children and their rights.



However, this cycle of intergenerational impacts need not continue or be further compounded. UNDRIP itself provides a pathway to meaningful change.

Why UNDRIP is important in Australia

UNDRIP provides the most comprehensive available framework declaring the rights of Indigenous peoples globally.

UNDRIP's emphasis on the collective right of self-determination is particularly important. As UNDRIP itself highlights, this fundamental right is also recognised in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which Australia is a party to.

Also particularly important is UNDRIP's emphasis on the right to be free of discrimination of all kinds and the right to culture, along with its affirmation of other specific rights to which all Indigenous peoples are entitled, including in Australia.

Comprehensive incorporation of UNDRIP would provide a framework for addressing the systemic breaches of children's rights that occur across Australia, by:

- recognising the context of colonisation, dispossession from land and culture, systemic violence and racism, and intergenerational trauma that underpins these breaches of children's rights
- recognising the intersection between children's rights and other fundamental rights and principles, including collective rights of Aboriginal and Torres Strait Islander peoples
- contextualising children's right to culture and the importance of this right to the realisation of other rights of children and to self-determination
- enabling genuine self-determination as a fundamental right and a principle that can secure access to other rights.

As an all too salient example, Aboriginal and Torres Strait Islander children's enormous over-representation in out of home care is well known. The unconscionable number of children who continue to be removed from their families today reflects a systemic failure by governments. Governments have failed to recognise and address the structural forces affecting Aboriginal and Torres Strait Islander families today, the effects of intergenerational trauma, the cultural biases undermining how child protection systems operate and assess children's best interests, and the need for genuine community control of services and systems for children.

Genuinely community-controlled services and systems, grounded in the principle of self-determination, would unquestionably lead to better outcomes for children. Importantly, this control must be comprehensive, and accompanied by the resources of all kinds that are needed to exercise it. It is not self-determination for an Aboriginal community controlled organisation to be responsible for removing children from their families. Self-determination requires a recognition and transfer of power at a systemic level, so that Aboriginal and Torres Strait Islander peoples and communities themselves have the ability to decide on the systems that apply to their children, to avoid intervention and removal of children in the first place.



Relevance of the right to culture

UNDRIP recognises the multiple aspects of the right to culture, including the right to grow up living culture. This has particular significance for Aboriginal and Torres Strait Islander children and their rights.

Culture and cultural ways of knowing and being are integral to children's identity and development, and provide crucial meaning and context to other rights. For example, the right to grow up with family and community must be understood culturally, as including the integral role of kinship, extended family, and community roles in child development and wellbeing. Other rights, such as the rights to education, health, housing and participation in decisions affecting them, must also be contextualised by an understanding of culture, cultural rights and their meaning for Aboriginal and Torres Strait Islander peoples and children in particular.

The right to culture is inter-related with the right to self-determination. One key element of self-determination is being able to live in a way that is connected to culture, and as required by culture, both collectively and individually. This is only possible when children's rights to culture, and the rights of their communities, are fully realised.

Incorporating UNDRIP in Australia

The incorporation of UNDRIP in Australia must be comprehensive. UNDRIP should be fully incorporated into Australian law and policy.

In Australia's federal system, incorporation of UNDRIP should take place in every State and Territory as well as nationally, but national leadership would have particular significance.

While aspects of UNDRIP have been incorporated into some States' laws – such as through the recognition of cultural rights in the ACT Human Rights Act 2004, the Victorian Charter of Human Rights and Responsibilities Act 2006 and the Queensland Human Rights Act 2019 – this incorporation has been very partial, and notably lacking in recognition of the crucial right to self-determination. The Federal Government has also not accepted recommendations from the UN Committee on the Elimination of Racial Discrimination, the Special Rapporteur on the Rights of Indigenous Peoples, or foreign governments, to develop a national strategy or plan of action to implement and give effect to UNDRIP.¹

Additionally, UNDRIP's relevance for displaced Indigenous people seeking asylum in Australia should be considered. Indigenous peoples enjoy all generally applicable rights, including those guaranteed for migrants, refugees and asylum seekers, and UNDRIP's contextualisation of these rights as they relate to Indigenous peoples is relevant.

¹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, 26 December 2017, CERD/C/AUS/CO/18-20, [22]; Report of the Special Rapporteur on the Rights of Indigenous Peoples, 8 August 2017, A/HRC/36/46/Add.2, [108](f); Report of the Working Group on Australia, Human Rights Council, 13 January 2016, A/HRC/31/14, [136.85]-[136.86], [138] & Addendum, 29 February 2016, A/HRC/31/14/Add.1, [23]-[38].



The process of incorporating UNDRIP should itself be in line with principles of self-determination – as determined by Aboriginal and Torres Strait Islander peoples – and rights, including children’s rights. Subject to that overall proviso, Save the Children believes that:

- The Uluru Statement from the Heart should be fully implemented as a national priority of the highest order, as a pathway to advancing sovereignty and self-determination.²
- A Federal Human Rights Act should be developed and enacted, including all principles and rights contained in UNDRIP, among them the right to self-determination.³
- A national strategy or plan of action should be established to implement and give effect to UNDRIP.
- UNDRIP should be included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The pathway to self-determination will require true partnerships at all levels, including genuinely local and community-led processes to effect self-determination and transition to community control in ways that reflect local preferences and timeframes, rather than being driven through centrally controlled procurement and other mechanisms that may not reflect the reality of what is wanted in particular communities.⁴
- Children should meaningfully participate and be heard and taken seriously at every stage in the process towards incorporating UNDRIP, with their rights, priorities, aspirations and needs at the heart of the pathway to true self-determination and realisation of their rights in Australia.

Save the Children believes that the incorporation of UNDRIP is a matter of the highest national significance. We urge the Federal Parliament to take all possible steps in support of it.

Further information

For further information, please contact

a perspective on bringing UNDRIP to life, including in the context of community controlled services, see M Davis, 2013, ‘Community control and the work of the National Aboriginal Community Controlled Health Organisation: Putting meat on the bones of the UNDRIP’, *Indigenous Law Bulletin* 8(7): 11-14.