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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING THE APPLICATION OF THE UNITED  
NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN AUSTRALIA

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Committee Secretary of the Senate Legal and Constitutional Affairs Committee.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission deals broadly with the terms of reference regarding the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia. The submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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## I. BRIEF BACKGROUND & CONTEXT

On 13 September 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration recognised that First Nations peoples' rights to education, health, housing and other basic needs are inextricably linked to their rights to self-determination, sociopolitical engagement and protection from discrimination.<sup>1</sup> Enshrined in UNDRIP is the rights of all First Nations peoples to emancipation from colonial institutions and historical atrocities, to be unburdened by the systemic discrimination of post-colonial societies, and to make free and uncoerced decisions for themselves and their communities.<sup>2</sup> In 2007, 144 nations of the UN General Assembly voted in favour of adopting the declaration, while only four nations, including Australia, voted against the resolution.<sup>3</sup> Although Australia ultimately agreed to support UNDRIP in 2009, this support has been largely tokenistic.

The UNDRIP is a non-binding convention. However, Australia should still adopt measures that more comprehensively recognise the rights of First Nations Australians. The current legislative measures only go part way. As Australia operates under a dualist system, whereby international treaties must be enshrined in domestic law to become operative, further changes to domestic legislation to implement UNDRIP and actions beyond the scope of the declaration is essential to ensuring a lasting change.

## II. HISTORY AND TRACK RECORD OF AUSTRALIAN GOVERNMENT'S SUPPORT AND APPLICATION OF UNDRIP

In international forums, the Australian Government has pledged to take steps to implement UNDRIP and enhance First Nations Australians' enjoyment of their rights.<sup>4</sup> However, the Australian Federal and State governments have failed to follow through on these promises; the principles of UNDRIP have not been implemented into domestic law, policy and practice,

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<sup>1</sup> Dorothee Cambou, 'The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective' (2019) 23(1) *The International Journal of Human Rights* 34, 37.

<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/ RES 61/295 (adopted 2 October 2007).

<sup>3</sup> Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 19.

<sup>4</sup> Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons From Emerging Negotiations in Australia' (2018) 23(1) *The International Journal of Human Rights* 174, 175.

and existing laws and policies have not been reviewed for compliance with the declaration.<sup>5</sup> The Australian Government has also failed to negotiate a National Action Plan to implement UNDRIP in consultation with First Nations peoples.<sup>6</sup>

### ***A. Autonomy and self-determination (article 3)***

The government has demonstrated a failure to adequately provide autonomy, self determination and substantial engagement with First Nations voices in their decision to largely ignore the outcomes and Referendum Council recommendations<sup>7</sup> of the Uluru Statement from the Heart. These recommendations would have seen the establishment of a First Nations voice to Parliament responsible for monitoring legislation pertaining to First Nations affairs, the use of s 51(xxvi) and s 122 of the Australian *Constitution*, as well as constitutional recognition. Implementing these changes would have placed Australia much closer in line with the principles of UNDRIP, allowing for greater self determination of First Nations people in affecting the broader implementation of UNDRIP. The creation of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples provided more meaningful engagement with First Nations voices, garnering further strong recommendations echoing those of the Uluru Statement from the heart. However, the government's response with a commitment to a referendum on constitutional recognition has not been adhered to.

This submission notes that efforts to give effect to the UNDRIP are made with good intentions, however, as Jeffes highlights, they often seek to 'work *for* Indigenous communities not *with* them.' In the absence of any substantive legislative backing for UNDRIP, the Closing the Gap strategy is the principal policy that Australia has enacted to give effect to the UNDRIP.<sup>8</sup> The Closing the Gap initiative is aimed at meeting seven targets relating to the life expectancy, child mortality, education and employment of First Nations people.<sup>9</sup> All of these areas are acknowledged by Article 21 of UNDRIP, which states that

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<sup>5</sup> Australian Human Rights Commission, 'Implementing UNDRIP' (Report, 13 September 2021).

<sup>6</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 March 2022, 399 (Lidia Thorpe).

<sup>7</sup> Referendum Council, Pat Anderson and Mark M Leibler, *Final Report of the Referendum Council*. (2017) 2.

<sup>8</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 366.

<sup>9</sup> Department of the Prime Minister and Cabinet, *Closing the Gap Report* (2019) 9.

First Nations have the right to improve their economic and social conditions, including in the areas of education, employment and health.<sup>10</sup>

However, the strategy has significantly failed to engage First Nations communities<sup>11</sup> and enable them to actively contribute to the planning and delivery of the initiative.<sup>12</sup> Its effectiveness has also been impeded by cuts to the Indigenous Affairs budget and changing governments.<sup>13</sup> Additionally, in the fourteen years since Closing the Gap was adopted, only two out of seven targets were on track to be met.<sup>14</sup> This has contributed to Australia's poor track record in implementing the UNDRIP, and it has limited the ability for First Nations peoples to exercise basic rights that they deserve to have. In response, the Government has established the 2019 National Partnership Agreement on Closing the Gap which involves the First Nations being partners and decision makers. However, there needs to be a robust structural mechanism to ensure the continued involvement of First Nations people in providing advice for any policy or law that affects them. This submission notes that there are clear deficiencies in the Australian Government's approach to meeting its obligations under UNDRIP.

### ***B. Other government initiatives***

Rather than optimistically discussing the implementation of the UNDRIP as a task that can be accomplished with little groundwork or resistance, we must consider the long held suspicion and distrust of government initiatives, even those that are ostensibly meant to assist First Nations and rectify inequality.

The below examples captures those contradictions and reflects a persistent failure of the Australian Government to adequately consider First Nations interests even when deploying initiatives with a beneficial goal in mind, and emphasise the need to consider impact over intent.

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<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, opened for signature 13 September 2007, 934 UNTS 3, article 21.

<sup>11</sup> Australian Human Rights Commission, 'Implementing UNDRIP' (Report, 13 September 2021).

<sup>12</sup> Australian Human Rights Commission, 'Implementing UNDRIP' (Report, 13 September 2021).

<sup>13</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 379.

<sup>14</sup> Department of the Prime Minister and Cabinet, *Closing the Gap* (Report, 2019) 10.

Constitutional 'race power'

These contradictions have been observed for decades, with the debate over the true purpose and scope of the constitutional 'race power'<sup>15</sup> being a prominent example. Initially devised as a way for the Australian government to allow for states to control and manage what was thought to be the problem of indigeneity, the 1967 referendum aimed to reform it and re-interpret it to be a power to discriminate in favour of First Nations people.<sup>16</sup> Importantly, the Government was simultaneously defending legislation used to enact measures such as the Stolen Generation policies by arguing that, under this power, it was 'beneficial in intent'.<sup>17</sup> Evidently, there has been a significant discrepancy between what the Government deems to be beneficial and what actually assists First Nations people.

Northern Territory Emergency Response 2007

Whilst the proactive implementation of the Northern Territory Emergency Response in 2007 was welcomed by many prominent members of First Nations communities, some elements of the response such as its exemption from the *Racial Discrimination Act 1975*, alcohol bans and the restricted use of welfare funds have been widely criticised as discriminative and overly paternalistic.<sup>18</sup> The Response established a variety of coercive measures (such as income management, lease acquisition and a drastically increased police and military presence) in 73 remote First Nations communities in response to a report that highlighted the issues of child sexual abuse and widespread substance abuse, and called for community-driven solutions in order to deal with the complex and nuanced social issues at play.<sup>19</sup> However, the sheer extremity of these measures, and the incorrect and alarmist approach of treating the situation as a 'national emergency' rather than attempting community-based rehabilitative measures meant that outcomes were generally very poor. The UN special rapporteur on human rights ultimately criticised the Intervention for its breaches of human rights obligations and racially discriminatory policies, particularly as

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<sup>15</sup> *Australian Constitution* s 51(xxvi).

<sup>16</sup> George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 643, 647.

<sup>17</sup> *Kruger v Commonwealth* (1997) 190 CLR 1.

<sup>18</sup> Jessie Dorfmann, 'Undermining Paternalism: UNDRIP and Aboriginal Rights in Australia' (2015) 37(1) *Harvard International Review* 13, 13.

<sup>19</sup> Diana Perche, 'Ten Years on, It's Time We Learned the Lessons from the Failed Northern Territory Intervention', *The Conversation* (online, 26 June 2017)

<<http://theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198>>

these measures were highly unlikely to have been (and to date have not) been implemented in non-Indigenous communities.

### **III. THE POTENTIAL TO ENACT UNDRIP IN AUSTRALIA**

Taking the above into consideration, this submission contends that the following recommendations would significantly benefit the enactment of UNDRIP in Australia.

#### ***A. Uluru Statement From the Heart***

This submission recommends that the Uluru Statement from the Heart should be implemented, as it will ensure that First Nations peoples' right to self-determination is exercised at the highest levels of decision-making, which will contribute to policies and laws that are more effective in giving a practical effect to the principles in the UNDRIP. The Uluru Statement from the Heart calls 'the establishment of a 'First Nations Voice' in the *Australian Constitution* and a 'Makarrata Commission to supervise' treaty-making and truth-telling between the Australian Government and First Nations.

#### ***B. Establishing a Constitutional Voice to Parliament***

A constitutionally enshrined Voice to Parliament would solidify First Nations peoples' right to self-determination, as representatives elected from their communities advise Parliament on the impacts of laws and policies that would affect their communities.<sup>20</sup> It is necessary for the Government to call a referendum to amend the *Constitution* accordingly; the lack of consultation with First Nations people has created a structural gap in policymaking in First Nations affairs, perpetuating the significant power imbalance between First Nations peoples and the state.<sup>21</sup> The resultant lack of a First Nations voice has contributed substantially to the poor track record of the successive governments in implementing the UNDRIP. As Delaney, Maguire and McGaughey argue, the policies which attempt to give effect to the principles in the Declaration have contradicted 'the right of Indigenous peoples to self-determination by adopting paternalistic strategies that erode' their capacity to 'freely pursue their economic,

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<sup>20</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 385.

<sup>21</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 389.

social and cultural development'.<sup>22</sup> This is largely due to the belief that First Nations are in need of salvation and are 'incapable of self-sufficiency', which culminates in an excessively controlling approach that echoes the 'long history of colonial management'.<sup>23</sup> Hence, it is imperative for those in Government to reflect on their approach towards First Nations which the truth-telling process in a Makarrata Commission would facilitate by assisting all Australians to 'acknowledge the truth of Australia's history, stimulate healing and reconciliation' and remain 'conscious of the past'.<sup>24</sup>

The ineffectiveness and inadequacy of past policies in implementing the UNDRIP, signifies the need for a First Nations Voice to Parliament as it may specifically advise Parliament regarding the legislative changes that needs to occur in order for the UNDRIP to be implemented more effectively in Australia. This is a valuable and necessary change, as First Nations peoples 'know and understand the best way to deliver real and practical change in their communities',<sup>25</sup> and it would ensure that their views and advice are included in the decision-making process even when the political landscape changes. Hence, this recommendation is more likely to translate into policies that truly benefit these communities. Additionally, the 'Voice would be able to act as a front-line defence' for racially discriminatory laws, such as the Intervention, by challenging their merit and necessity before they pass in Parliament, which could prevent significant harm and the erosion of rights.<sup>26</sup> Therefore, this submission recommends that the Australian Government should take urgent action to implement the principles enshrined in the UNDRIP, by calling a referendum to establish a Voice to Parliament and supporting the development of the Makarrata Commission.

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<sup>22</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/ RES 61/295 (adopted 2 October 2007) art 3; Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 368.

<sup>23</sup> Emily Jeffes, 'Who Knows Best? Paternalism in Aboriginal Policy' (2020) 5(1) *NEW: Emerging Scholars in Australian Indigenous Studies* 1, 6.

<sup>24</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 386.

<sup>25</sup> 'What is a Voice to Parliament?', *From the Heart* (Web Page) <<https://fromtheheart.com.au/what-is-a-voice-to-parliament/>>.

<sup>26</sup> Kishaya Delaney, Amy Maguire and Fiona McGaughey, 'Australia's Commitment to "Advance the Human Rights of Indigenous Peoples Around the Globe" on the United Nations Human Rights Council' (2020) 41(2) *Adelaide Law Review* 363, 385.



### *C. Passing UNDRIP into legislation*

There is wide scope for UNDRIP to be enacted in Australia. A promising means of doing so is by passing the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (**the Bill**), introduced by Senator Lidia Thorpe on 29 March 2022.<sup>27</sup> The Bill provides a framework for implementing UNDRIP into domestic law. If passed, the Bill would compel the Federal Government to take measures to ensure consistency between Commonwealth laws and UNDRIP, and prepare and implement a national action plan to achieve the obligations prescribed by UNDRIP.<sup>28</sup> In addition, the Prime Minister would be obligated to present an annual report to each House of Parliament on the progress of these actions.<sup>29</sup> In essence, this Bill would impose more stringent requirements on the Commonwealth Government regarding its law and policy approach to meeting its obligations under UNDRIP.

Echoing the concerns raised in regard to the Closing the Gap framework, the active and ongoing participation of First Nations communities in policies affecting their welfare is of utmost importance. Sections 7, 8(b) and 9(2)(b) of the Bill impose obligations to take certain measures in ‘consultation and cooperation with Indigenous peoples’.<sup>30</sup> These measures include the auditing of Commonwealth laws for consistency with UNDRIP, the development of an action plan to achieve the objectives of the declaration, and the preparation of the annual report.<sup>31</sup> However, the Bill does not stipulate what type of communication amounts to ‘consultation and cooperation’. This may give rise to a loose interpretation of the term by Parliament, and prevent First Nations peoples from being given a genuine platform in which to voice opinions on matters which impact them. To ensure that First Nations involvement in these measures is not tokenistic or cosmetic in nature, this submission recommends that the term ‘consultation and cooperation’ should be clearly defined in the Bill.

### *D. Recommendations: summary*

The current framework adopted by the Australian Parliament in establishing the critical recommendations of the UNDRIP is ineffective in recognising its main principles, particularly the right to self-determination is suggested to be adapted and applied in a western colonial-education context.

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<sup>27</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 March 2022, 399 (Lidia Thorpe).

<sup>28</sup> *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (Cth) s 5.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* ss 7, 8(b) and 9(2)(b).

<sup>31</sup> *Ibid.*

In order to ensure substantial alignment with the UNDRIP, this submission recommends the following:

- 1) Implement the recommendations of the Uluru Statement from the Heart and the Referendum Council into the constitutional framework of Australia, furthering the adoption of principles under Article 3 of UNDRIP and recognising the capacity of First Nations people to self-determine.<sup>32</sup>
- 2) Holding a referendum for the establishment of a First Nations Voice to Parliament, which would serve to create a permanent voice for First Nations Australians in legal and political decision making.<sup>33</sup>
- 3) Ensure the response is legislated and enforced federally with some scope for state flexibility. In particular, the Australian Federal Government takes steps to implement the UNDRIP into law, policy and practice by passing the UNDRIP Bill 2022.
  - a) A clear definition of ‘consultation and cooperation’ should be stated in the Bill.
  - b) The Bill should compel the Federal Government to negotiate with First Nations Australians a National Action Plan to implement UNDRIP.
- 4) Existing laws, policies and practices should be audited for compliance with UNDRIP.
- 5) Ensure that voices to parliament and formal First Nations advisory groups are involved in the provision of self-determination in all policy programs affecting First Nations Peoples, particularly those deemed to be restrictive and paternalistic.

Other recommendations that may be considered are:

- 6) To unequivocally support the Declaration and engage with multilateral processes affecting First Nations to address health, education, and social justice outcomes by setting up permanent forums on important First Nations issues.<sup>34</sup>

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<sup>32</sup> Australian National Audit Office, ‘Indigenous Advancement Strategy’ (Performance Audit Report, No 35, 3 February 2017).

<sup>33</sup> Australian Human Rights Commission, *Australia’s Universal Periodic Review* (Report, 19 December 2014) 8; Australian Human Rights Commission, ‘Australia’s Second Universal Periodic Review’, Submission to the Universal Periodic Review Working Group (15 April 2015) 6; Australian NGO Coalition, ‘Australia’s Second Universal Periodic Review’, Submission to the Universal Periodic Review Working Group (March 2015) 6; United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN GAOR, 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [34]–[36], [107] (*Report of the Special Rapporteur*).

<sup>34</sup> Permanent Mission of Australia to the United Nations, *Note Verbale Dated 14 July 2017 from the Permanent Mission of Australia to the United Nations Addressed to the President of the General Assembly*, UN GAOR,

- 7) To improve the current consultation process with First Nation Elders, communities, and relevant organisations to ensure First Nations can provide direct and ongoing feedback to determine the roadmap of the Indigenous Australians Agency's funding priorities. While the Indigenous Advancement Strategy (IAS) already focuses on supporting First Nation Australians, it is critical to ensure the government eliminates the competitive bidding processes and subsequently eliminates the number of First Nations institutions set up to support the First Nations population.<sup>35</sup>

#### **IV. INTERNATIONAL EXPERIENCES OF ENACTING AND ENFORCING UNDRIP**

The 2007 adoption of the UNDRIP in the UN General Assembly was a “historic moment when the UN member states and First Nations peoples have reconciled with their painful histories and are all resolved to move forward together on the path of human rights, justice and development for all”.<sup>36</sup> However, the countries of Australia, Canada, New Zealand and the United States, which comprise prominent First Nations populations, originally voted against the convention. Australia’s ambassador, Robert Hill, expressed that the Federal Government was dissatisfied with the references to self-determination, as it places the customary law above national law.<sup>37</sup> In addition to self-determination concerns, the other nations expressed that they could not support the convention because of the need for existing land and resources which may be reallocated and returned to First Nations people under the UNDRIP.

Whilst Australia has been a signatory to the UNDRIP for over a decade, there remains much more to be done to ensure that the rights of First Nations people are recognised. In particular, domestic legislation enacting UNDRIP or broader human rights legislation.

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72nd sess, Provisional Agenda Item 115(d), UN Doc A/72/212 (24 July 2017) [18] (‘Australian UNHRC Pledge’).

<sup>35</sup> Irene Watson, ‘Aboriginal(ising) International Law and Other Centres of Power’ (2011) 20(3) *Griffith Law Review* 619, 638.

<sup>36</sup> AFP, ‘Australia opposes UN rights declaration’, *ABC News* (online, 14 September 2007) <<https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>>.

<sup>37</sup> AFP, ‘Australia opposes UN rights declaration’, *ABC News* (online, 14 September 2007) <<https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>>.

By observing the pathways adopted by Canada, New Zealand, the United States, as well as Bolivia's successful implementation of the UNDRIP, we may ascertain the potential of implementing UNDRIP principles in Australia. Since 2007, research shows that Canada has made significant progress in recognising and acknowledging not only the rights of First Nations peoples, but more importantly, encouraging participation of First Nations peoples in the decision-making and preparation of action plans. Although not to the same extent as Canada, New Zealand and the US have made positive strides in this area through a more holistic consideration of their First Nations communities' wellbeing, and ratification of treaties, respectively.

### *A. New Zealand*

The New Zealand government originally opposed the UNDRIP on the grounds that it was inconsistent with the Treaty of Waitangi. This position was subsequently changed in 2010, recognising that the declaration is consistent with the treaty of Waitangi.<sup>38</sup> The most recent development in New Zealand involves the Cabinet agreement to the next steps for drafting the Declaration plan.<sup>39</sup> The plan is currently in development but the summary features for monitoring the Declaration plan include:<sup>40</sup>

- a. considering First Nations international frameworks,
- b. being independent of government, being legislated,
- c. reporting from government including impacts on whānau, hapū and iwi led,
- d. measuring collective, whanāu<sup>41</sup> and environmental wellbeing; and
- e. monitoring the establishment and resourcing of kaupapa<sup>42</sup> Māori authority and institutions.

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<sup>38</sup>Pita Sharples, 'Supporting UN Declaration restores NZ's mana', *Beehive.govt.nz* (online, 20 April 2010) <<https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nzs-mana>>.

<sup>39</sup> 'UN Declaration on the Rights of Indigenous Peoples', *Te Puni Kokiri* (Web Page, 22 April 2022) <<https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>>.

<sup>40</sup> Minister for Maori Development, *Appendix 2: Key themes From Targeted Engagement on a Plan to Implement the United Nations Declaration of the Rights of Indigenous Peoples* (Report, April 2022) 38.

<sup>41</sup> *Ibid.* Meaning 'extended family'.

<sup>42</sup> *Ibid.* Meaning 'topic, matter for discussion, program and initiatives'.

### ***B. Canada***

On 21 June 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and came into force.<sup>43</sup> This legislation advances the implementation of UNDRIP. This act assists in the advanced implementation of the declaration at the federal level. Similarly, the Legislative Assembly of British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act 2019*,<sup>44</sup> the first jurisdiction in Canada to enshrine UNDRIP into law. These acts require the government to prepare and implement action plans in cooperation with First Nations peoples to make progress toward implementing measures in the action plan. Moreover, it enables the government to share statutory authority with indigenous entities.<sup>45</sup>

### ***C. United States of America***

The United States announced its support for UNDRIP in 2010.<sup>46</sup> In addition, US Agencies are currently engaged in numerous initiatives to address the concerns by Native American leaders, including those contained in the White House Tribal Nations Conference Progress Report in June 2010.<sup>47</sup> Moreover, in 2016, the Organisation of American States ratified the American Declaration on Rights of Indigenous Peoples, including a suite of human and civil rights relative to first peoples of the American States, and ratified the American Declaration on the Rights of Indigenous Peoples.<sup>48</sup>

### ***D. Bolivia***

One of the underlying principles of the UNDRIP is that states obtain “free, prior and informed consent” (FPIC) of First Nations peoples for a range of issues, such as forcible removal from their lands or territories (Article 10) or the implementation of legislative or administrative measures that may affect them (Article 19).<sup>49</sup> Obtaining FPIC from First Nations Australians

<sup>43</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act* SC 2021, c 14.

<sup>44</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

<sup>45</sup> ‘2019 - UNDRIP Legislation Enacted’, Legislative Assembly of British Columbia (Web Page)

<https://www.leg.bc.ca/dyl/Pages/2019-UNDRIP-Legislation-Enacted.aspx#:~:text=On%20November%2028%2C%202019%2C%20the,to%20enshrine%20UNDRIP%20into%20law>.

<sup>46</sup> Department of State (United States), ‘Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous People’ (Media Release, 12 January 2011) 2.

<sup>47</sup> Department of State (United States), ‘Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous People’ (Media Release, 12 January 2011) 2.

<sup>48</sup> *American Declaration on the Rights of Indigenous Peoples 2016* (United States).

<sup>49</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

affords greater self-determination and ensures they are given a voice in social, economic and political decisions that affect them.

Bolivia has adopted a very comprehensive approach to implementing the UNDRIP, having constitutionalised much of the UNDRIP in 2009, including FPIC principles.<sup>50</sup> The usefulness and outworking of FPIC was particularly exemplified in 2011, when the Bolivian government announced plans to construct a road through the Isiboro Sécore National Park and Indigenous Territory (TIPNIS).<sup>51</sup> Incorporating FPIC into the *Bolivian Constitution* obliged the government to seek the FPIC of the First Nations peoples of Bolivia before making any such decision. However, the Bolivian government did not seek consent, let alone consult its First Nations peoples. This resulted in a “mass-mobilisation by lowland Indigenous peoples”, drawing international attention that pressured the government to consult Bolivia’s First Nations peoples before moving forward with the project.<sup>52</sup>

The Bolivian experience of enacting and enforcing the FPIC principle of the UNDRIP reveals how constitutional protection of FPIC enhanced government accountability by safeguarding First Nations rights and interests in the face of adverse government action or inaction. The mass-mobilisation highlights how constitutionalising FPIC also afforded clear grounds upon which First nations peoples could voice their concerns. In Australia, where a consistent failure to consider First Nations voices has led to discriminatory and harmful policies, ratifying FPIC principles provides clear grounds for First Nations people to take action when their rights and autonomies are silenced or unacknowledged.

The Bolivian TIPNIS conflict also revealed how a failure to establish the necessary institutions and processes alongside FPIC can exacerbate social cleavages and tensions, rather than restoring relations. Academics Fontana and Grugel observe three crucial lessons from the Bolivian case study, arguing that, to successfully implement FPIC, there must be: a strengthening of democratic institutions at a local level; an improvement of the state’s capacity for conflict resolution; and a consideration of the social and political boundaries

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<sup>50</sup> Lorenza Fontana and Jean Grugel, ‘*The Politics of Indigenous Participation Through “Free Prior Informed Consent”*: Reflections from the Bolivian Case Study’ (2016) 77 *World Development* 1, 10.

<sup>51</sup> *Ibid*, 11.

<sup>52</sup> Roberta Rice, *UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada* (Research Report, Centre for International Governance Innovation, Terry Mitchell, 1 January 2014), 61.

around ethnic participation.<sup>53</sup> Holistically implementing such procedures and institutions will enhance the success of FPIC in improving First Nations rights and representations, whilst also maintaining social harmony and state unity.

### *E. Recommendations*

The above countries' response to enacting and enforcing the UNDRIP provides invaluable takeaways that the Australian Government, or even state governments, could potentially adopt as a means of adhering to the principles of UNDRIP. Some possible recommendations include:

1. First Nations entities and statutory authorities collaboratively design action plans that consider each First Nations group's wellbeing and resources, as well as their independence from government.
2. Incorporating FPIC into the *Australian Constitution* as means of enforcing the Australian Government to take into account the FPIC of First Nations peoples during decision-making.
3. Strengthening of democratic institutions at state and federal level, particularly the discourse around the social and political boundaries around ethnic participation.
4. Improvement of the conflict resolution processes and remediation procedures with First Nations peoples.

## **V. LEGAL ISSUES RELEVANT TO ENSURING COMPLIANCE WITH UNDRIP**

### *Ensuring compliance with international norms*

The issue of compliance is frequently cited as the central problem for international law. It is often argued that organisations like the UN lack the coercive power and jurisdiction necessary for ensuring that its treaties and declarations are properly observed by member states, and that no reliable system of legally binding checks and balances exists to create an

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<sup>53</sup> Lorenza Fontana and Jean Grugel, 'The Politics of Indigenous Participation Through "Free Prior Informed Consent": Reflections from the Bolivian Case Study' (2016) 77 *World Development* 1, 23.

appropriate balance between international norms and state sovereignty.<sup>54</sup> Australia, in particular, has an exceptionally mediocre track record in relation to compliance with international treaties.<sup>55</sup> This is despite the fact that Australia is a signatory to all core UN human rights treaties.<sup>56</sup> As of 2021, Australia has received 344 recommendations from 122 countries to improve its human rights record;<sup>57</sup> and of the mere 177 that have been accepted, few have seen full implementation.<sup>58</sup> Such shortcomings, as evident in the present submission, have been especially conspicuous in failure of successive Australian governments to adequately adhere to the provisions laid out in UNDRIP.

To ensure that UNDRIP is consistently and effectively observed in domestic policy, a reliable system of enforceable checks and balances must be established; in its absence, real compliance is unlikely to be maintained.<sup>59</sup> This submission proposes three main recommendations in this regard:

- 1) *Incorporate UNDRIP into domestic law*. Instilling international treaties into Australian legislation effectively addresses the issue of enforceability, ensuring that their normative influence is reinforced by coercive power and binding legislation. There has been an abundance of similar recommendations, from various authoritative institutions, on this issue in recent years; the Australian Human Rights Commission, for instance, advocated strongly for the instilling of UNDRIP into legislation in a 2021 publication, citing the recent success of such initiatives in New Zealand and Canada.<sup>60</sup>

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<sup>54</sup> Hannah Moscrop, 'Enforcing International Human Rights Law: Problems and Prospects' (2014) *Cardiff University*.

<sup>55</sup> Evan Young, 'Australia has delivered 'strikingly poor' results on a new human rights scorecard', *SBS* (online, 24 June 2021) <<https://www.sbs.com.au/news/article/australia-has-delivered-strikingly-poor-results-on-a-new-human-rights-scorecard/bqgf3letc>>.

<sup>56</sup> Law Council of Australia, *Australia's International Human Rights Obligations*, (Web Page, 7 August 2019) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/australias-international-human-rights-obligations>>.

<sup>57</sup> Human Rights Law Centre, *Australian government ignores key recommendations from major UN human rights review*, (Web page, 08 July 2021) <<https://www.hrlc.org.au/news/2021/7/6/australian-government-ignores-key-recommendations-from-major-un-human-rights-review>>.

<sup>58</sup> *Ibid*.

<sup>59</sup> Katherine Vorderbruggen, 'A Rules-Based System? Compliance and Obligation in International Law' (2018) *London School of Economics and Political Science*.

<sup>60</sup> Australian Human Rights Commission, 'Incorporating UNDRIP into Australian law would kickstart important progress', (Web Page, 13 September 2021) <<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>>; Australian Human Rights Commission, 'Implementing UNDRIP' (Report, 13 September 2021).



- 2) Establish an independent commission that enforces accountability amongst policymakers and legislatures. In light of Australia's historical failures in upholding First Nations rights and in applying UNDRIP, it is necessary that an independent statutory body is created to ensure current and future compliance. This will allow for present laws and policies to be placed under objective scrutiny and critique, as well as for the continued development of new initiatives to improve Australia's observance of UNDRIP. The effectiveness of this approach is well exemplified by existing independent agencies like the Independent Commission Against Corruption (ICAC) in NSW, which has seen great success in ensuring compliance with anti-corruption laws.<sup>61 62</sup> A similar commission responsible for overseeing the upholding of First Nations rights, if granted coercive power and federal jurisdiction,<sup>63</sup> would likely see significant improvements in Australia's adherence to the principles of UNDRIP.
- 3) Incorporate UNDRIP into a constitutional Bill of Rights. In the absence of a comprehensive and legally binding Bill of Rights, the upholding of human rights in Australia is limited to legislation and a narrow and inadequate set of constitutional provisions. Within the *Australian Constitution*, there are a mere five human rights that are expressly enshrined,<sup>64</sup> none of which sufficiently protect First Nations freedoms and interests. Policymakers and legislatures, under the current system, hold no binding obligation to adhere to the principles in UNDRIP and address longstanding issues such as the poorer health outcomes, higher poverty rates and disproportionate incarceration rates of First Nations people.<sup>65</sup> A constitutional codification of fundamental and universal human rights would ensure the consistent

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<sup>61</sup> Nicholas Cowdery, 'Lessons from the NSW ICAC' (Conference Notes, Accountability and the Law Conference 2017); Richard Ackland, 'Icac has been effective in the fight against corruption in NSW', *The Guardian* (online, 13 November 2015) <<https://www.theguardian.com/australia-news/2015/nov/13/icac-has-been-effective-in-the-fight-against-corruption-in-nsw>>.

<sup>62</sup> Charlie McLean 'Why underfunded ICAC is still best corruption watchdog: special report', *Central News*, (online, 16 November 2021) <<https://centralnews.com.au/2021/11/16/why-underfunded-icac-is-still-best-corruption-watchdog-special-report/>>.

<sup>63</sup> Nicholas Cowdery, 'Lessons from the NSW ICAC' (Conference Notes, Accountability and the Law Conference 2017).

<sup>64</sup> *Ibid* s 117.

<sup>65</sup> Deloitte Access Economics (August 2018). Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody: Department of the Prime Minister and Cabinet (PDF). Deloitte Touche Tohmatsu. pp. 1–780.

upholding of the rights of all individuals, precluding important minority rights and interests from being neglected and overlooked.

## **VI. SYSTEMIC ASPECTS TO CONSIDER IN RELATION TO FIRST NATIONS RIGHTS**

As a point of concern, there are three primary systemic issues that the Australian Government should consider in the discussion of First Nations peoples' rights: health, education and incarceration rates. Relevantly, all existing and future initiatives in relation to the discourse of First Nations peoples' rights must take these systemic and structural issues into account.

### ***A. Health***

Disproportionately poor health and wellbeing outcomes for First Nations peoples in Australia continues to be a pressing and problematic issue for policymakers. First Nations Australians remain fettered and burdened by lower life expectancies, higher rates of mental illnesses, cognitive impairment, physical disabilities and numerous other systemic socioeconomic disadvantages that pervade communities and persist across generations.<sup>66</sup> A wide range of worrying statistics have been observed in recent years; for instance, over 40% of First Nations Australians had at least one chronic condition that posed a significant health problem in 2018-19 compared to 40% in 2012-13; subpar levels of mental wellbeing are also evident in young First Nations Australians, whose suicide rates were 3.2 times higher than that of non-First Nations youth between 2016 to 2020;<sup>67</sup> These severe inequalities in health and wellbeing outcomes, systemic and structural in nature, are but lasting remnants of historical atrocities and injustices, insidious legacies of a colonial past that continue to weigh down on First Nations communities and peoples.<sup>68</sup>

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<sup>66</sup> Australian Human Rights Commission, *Free and equal: An Australian conversation on human rights* (Report, 13 November 2019) 68.

<sup>67</sup> Australian Institute of Health and Welfare, *Suicide and Self-Harm Monitoring* (Statistical Data 14 April 2022) 49.

<sup>68</sup> Pat Dudgeon et al, *Indigenous Lived Experience Project* (Report, November 2018) 14.

## ***B. Education***

Disadvantages in First Nations education remain prominent against current government policies in Australia. Regardless of bipartisan and intergovernmental efforts in addressing the challenge of ‘Closing the Gap’, there continues to be poor First Nations education outcomes. In essence, the policymakers’ initiatives and programmes to improve statistics are evidently ineffective towards satisfying Article 14.<sup>69</sup> As a result of insufficient overview over the socioeconomic environment affecting First Nations students, particularly school attendance rates, this has perpetuated the stark disparity in student achievement.<sup>70</sup> For example, in Glenn Fahey’s report, around 69% of the student achievement gap is accounted for by differences in measurable student, school, and home factors.<sup>71</sup> Additionally, approximately 20% of First Nations students in remote schools attend 9 out of 10 school days, which Fahey indicates is the “threshold at which students’ learning is adversely impacted by non-attendance.”<sup>72</sup> Ultimately, it is the policymakers’ lack of effective planning and holistic consideration of socioeconomic factors that has complicated attainment of the Closing the Gap attendance targets as a result of declining attendance of First Nations students.

Improving educational attainment is especially important to addressing First Nations disadvantage due to its significant impacts on a wide range of socioeconomic indicators such as labour market success, income levels, health, social class and overall standard of living;<sup>73</sup> it is similarly crucial to reducing the risk of negative social outcomes like criminality and substance abuse.<sup>74</sup> Therefore, the current education gap between First Nations and non-First Nations Australians represents a cyclical, entrenched and systemic form of disadvantage faced by First Nations peoples that perpetuates inequality and injustice ceaselessly across generations.

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<sup>69</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/ RES 61/295 (adopted 2 October 2007) art 14.

<sup>70</sup> Glenn Fahey, ‘Mind the Gap: Understanding the Indigenous education gap and how to close it’ (Research Report, The Centre for Independent Studies, June 2021) 2.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Kuhn P, Sweetman A (2002) *Aboriginals as unwilling immigrants: contact, assimilation and labour market outcomes*. *J Popul Econ* 15(2): 331-355.

<sup>74</sup> Borland J, Hunter BH (2000) *Does crime affect employment status? The case of Indigenous Australians*. *Economics* 67(265): 123-144.

### *C. First Nations incarceration rates*

Disproportionate First Nations incarceration rates has been a longstanding systemic issue in Australia that simultaneously creates, perpetuates and entrenches socioeconomic inequality. The inadequate response by policymakers to address this issue has resulted in a lack of progress in First Nations rights, as well as a failure to make amends for historical wrongs.

In 1987, in response to rising public concern regarding the abnormally high rates of First Nations deaths in custody, the incumbent Hawke government announced a Royal Commission to examine the sociocultural and legal roots of the issue. It was found that, rather than a higher mortality rate amongst First Nations peoples in custody, the disparity lay in the disproportionate rate at which First Nations Australians were incarcerated.<sup>75</sup> The report also included 339 policy recommendations for the Federal Government, all of which aimed at reducing imprisonment rates for First Nations peoples.

Since the release of the final report, 474 First Nations Australians have died in custody.<sup>76</sup> As of 2018, only 64% of the Commission's recommendations had been implemented.<sup>77</sup> Beginning in 2006, researchers at Curtin university conducted a decade-long study of the incarceration rates of First Nations Australians, the finds of which revealed a set of problematic statistics:

- Despite making up just 2% of the national population, First Nations adults constitute 27% of the prison population;<sup>78</sup>
- In 2016, roughly 20 in every 1000 First Nations people were incarcerated;<sup>79</sup>
- First Nations peoples were 7 times more likely to be charged with criminal offences, yet 12.5 times more likely to receive a sentence of imprisonment than non-First Nations people;<sup>80</sup>

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<sup>75</sup> Royal Commission into Aboriginal Deaths in Custody (Final Report, April 1991) vol 5.

<sup>76</sup> Teela Reid, 'Aboriginal lives ought to matter not only when we die, but while we are alive', *The Age* (online, 15 April 2021)

<<https://www.theage.com.au/national/aboriginal-lives-ought-to-matter-not-only-when-we-die-but-while-we-are-alive-20210414-p57j63.html>>.

<sup>77</sup> Deloitte Access Economics (August 2018). Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody: Department of the Prime Minister and Cabinet (PDF). Deloitte Touche Tohmatsu. pp. 1–780.

<sup>78</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

- For offences categorised as ‘acts intended to cause injury’, 60% of First Nations and offenders received a custodial sentence, compared with just 30% of non-First Nations offenders.<sup>81</sup>
- Between 2006 and 2016, First Nations incarceration rates increased by 41%. During the same period, the imprisonment rate for non-First Nations people rose by just 24%.<sup>82</sup>

Therefore, the disproportionate incarceration rates of First Nations Australians remains a highly problematic systemic issue that must be considered in the development of policies dealing with First Nations rights.

## VII. CONCLUSION

In sum, this submission contends that Australia should adopt measures that better reflect the principles laid out in UNDRIP. It argues that more stringent and systematic adherence to the declaration is essential to ensuring that the rights and interests of First Nations Australians are properly recognised. This recognition must manifest in both discourse and practice. The submission draws particular attention to the concerning disregard of First Nations autonomy and self-determination by the policies of successive governments; it considers this a serious violation of First Nations rights and a failure of the Australian Government to uphold the explicit standards of international norms and, more importantly, the implicit principles of human dignity. For these reasons, this submission recommends that immediate domestic reforms be taken to enact and legislate UNDRIP in Australia, including the implementation of the Uluru Statement from the Heart, a constitutionally enshrined Voice to Parliament and legislative action on the federal level. A consideration of relevant international responses to UNDRIP, including those examined above, will significantly aid the refinement of these recommendations. Finally, this submission strongly recommends that all discussions in relations to First Nations policy be conducted with history and context in mind; never should they exist in a vacuum. First Nations peoples, past and present, have been perpetual subjects to greatly destructive and systemic forms of oppression, discrimination and persecution, the ruins of which remain undeniably relevant today. To ignore this reality would

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.



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be to endorse a profoundly harmful form of historical revisionism that would invariably undermine all attempts at reconciliation, reparation and justice.