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The Hon Michael Kirby AC CMG

2 June 2022

Committee Secretary
Legal and Constitutional Affairs References Committee
Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

**Submission to the Inquiry into the Application of the United Nations
Declaration on the Rights of Indigenous Peoples in Australia**

Liberty Victoria

1. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil

liberties organisation in Australia and advocates for human rights and civil liberties. Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government. More information on our organisation and activities can be found at: libertyvictoria.org.au.

2. We welcome the opportunity to provide a submission to the Legal and Constitutional Affairs References Committee's Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australia (the **Inquiry**). The submission and recommendations reflect our experience and expertise as outlined above.
3. We thank the volunteers who assisted with preparing this submission.

Introduction

4. Liberty Victoria is dedicated to the protection, strengthening and promotion of civil liberties and human rights, including those protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and recognised under international law, including UNDRIP.
5. For decades Indigenous rights advocates globally have fought for the implementation of UNDRIP into domestic law in their home countries.¹ International declarations and conventions, like UNDRIP, represent a clear expression of international opinion on the rights of Indigenous peoples. Importantly, UNDRIP sets standards against which our nation can and should be judged. Where the government fails to meet these standards, UNDRIP can be used to highlight such failures.²
6. Australia endorsed UNDRIP in 2009, and should now implement it into domestic law, policy and practice. As recommended by the Australian Human Rights Commission, the Federal Government should develop a national program to implement UNDRIP and schedule it to the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), so that all new legislation is assessed for compatibility with it along with other foundational international human rights instruments.³

¹ Federation of Traditional Owners (2021), 'UNDRIP and enshrining Aboriginal rights', Discussion Paper, p10.

² Ibid, p14.

³ Australian Human Rights Commission (Web Page) https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf.

7. The process of implementing UNDRIP would assist to expose significant problems with our current legal and policy framework, including entrenched discrimination against Australia's First Peoples, and provide a proactive tool to extend their human rights, including the right to self-determination. However, in doing so, these minimum standards should not seek to restrict First Peoples' ability to realise rights that extend beyond those envisaged by UNDRIP, which should be regarded as providing minimum standards under international law.

Summary

8. This submission will focus on terms (b), (f), (d), (h) and (i) of the Inquiry's terms of reference. We have addressed the terms in that order because our response to term (f) informed our response to term (d).
9. A summary of our recommendations and positions are as follows.
10. As noted at the outset of this submission, the Federal Government should develop a national program to implement UNDRIP and schedule it to the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), so that all new legislation is assessed for compatibility with it along with other foundational international human rights instruments.⁴
11. The articles of UNDRIP, such as the right to self-determination, free, prior and informed consent, and the right to economic empowerment, must guide the process that is taken to implement UNDRIP in Australia (term (b)). This can be effectively realised through the Federal Government, amongst other things:
 - a. establishing a constitutionally enshrined Indigenous Voice to Parliament in the form outlined in the Uluru Statement from the Heart (**Uluru Statement**);
 - b. observing and respecting existing decision-making representative organisations in Australia, such as the First Peoples' Assembly of Victoria; and

⁴ Ibid.

- c. establishing a mechanism that affords First Peoples free economic independence and autonomy to ensure First Peoples bodies can negotiate with the State on UNDRIP implementation on a level playing field.

12. Notwithstanding strong community and stakeholder efforts to uphold principles of UNDRIP in Australia, community action alone is insufficient to fully realise the potential of UNDRIP and ensure the basic rights it provides for are upheld (term (h)).

13. The implementation and ongoing realisation of rights under UNDRIP must:

- a. be fully cognisant of government failures since colonisation (term (f));
- b. be accompanied by a strong governmental accountability and monitoring regime to ensure that the government is obliged to invest in implementable building blocks that achieve tangible outcomes. These outcomes must be measured against standards deemed appropriate or set by First Peoples (term (d)); and
- c. take into account and address First Peoples' justifiable distrust towards government structures and initiatives (term (i)).

Term (b): The potential to enact UNDRIP in Australia

14. This submission contends that the articles of UNDRIP must guide how UNDRIP is ultimately considered and implemented in Australia. Unilateral implementation of UNDRIP by the Government would fundamentally contradict a key pillar of UNDRIP, the right to self-determination.⁵

15. We recognise that Australia's current legal and legislative system is grounded in colonial structures and that this presents an inherent challenge with implementing UNDRIP in line with true self-determination. Accordingly, before committing to wholesale legislative or other implementation of UNDRIP, the government must first focus on establishing the following foundational principles:

⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, Article 3.*

- a. the process must do nothing to diminish Aboriginal or Torres Strait Islander sovereignty, and truly adhere to the right to self-determination through adequate involvement of First Peoples (**first principle**); and
- b. First Peoples involved in this process, whether through a single or multiple representative consultative bodies, must be economically empowered to participate in such discussions and negotiations (**second principle**).

First principle

16. In upholding the first principle, this submission emphasises the need for the government to uphold UNDRIP's principle of free, prior and informed consent.⁶ Historically and presently, community consultation efforts by the Federal Government have been consistently criticised by First Peoples as lacking a proper process to determine the body or people with which to consult.⁷ The implementation of UNDRIP must take into account the diversity of First Peoples in Australia and the resultant diversity of opinion held by those groups.

17. The establishment of a constitutionally enshrined Indigenous Voice to Parliament in the form outlined in the Uluru Statement would provide a mechanism for ensuring true free, prior and informed consent is obtained. Liberty Victoria supports the Uluru Statement and believes that First Peoples should have recognition in the Australian Constitution and a meaningful voice to parliament.⁸ We acknowledge and strongly support the recent commitment of the newly elected Federal Government to a referendum to finally establish an Indigenous voice to parliament, and submit that these efforts are essential for true self-determination to be realised and UNDRIP properly implemented.

18. We acknowledge that there are diverse views in First Peoples' communities about the Uluru Statement and the order of a truth-telling commission (Makarrata) and

⁶ Ibid, Article 19.

⁷ Victoria, Yoorrook Justice Commission, *Transcript of hearings - Marcus Stewart* (5 May 2022), 20. Marcus Stewart remarked he had not observed adequate consultation efforts through, for example, the *Children, Youth and Families Act 2005* (Vic), the *Aboriginal Heritage Act 2006* (Vic), and the *Traditional Owner Settlement Act 2010* (Vic).

⁸ Liberty Victoria, Submission to the Joint Select Committee, *Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples*, 11 June 2018.

constitutional recognition. This demonstrates the need for Government to consult widely and with great care.

19. In conjunction with enshrining the Voice, Liberty Victoria submits that the government must also observe and respect the decision-making of representative organisations that already exist within Australia, such as the First Peoples Assembly of Victoria.

Second principle

20. In upholding the second principle, Liberty Victoria submits that establishing a framework for true self-determination in Australia, in the way articulated in UNDRIP, goes hand in hand with establishing a mechanism to afford economic independence and autonomy to First Peoples.
21. An example of a mechanism that promotes economic empowerment of First Peoples, thereby upholding principles of self-determination, is the Self-Determination Fund (**Fund**) that is currently being negotiated between the First Peoples Assembly of Victoria (**Assembly**) and the State of Victoria. The Fund will be an independent revenue source to enable Traditional Owners to enter into Treaty negotiations with the State on a more level playing field, and empower First Peoples to build capacity, wealth and prosperity.⁹
22. Importantly, this Fund will be structured and run in a way that is completely led by community aspirations and consultation, in negotiation with the State. This element is important, as it demonstrates the need, from the position of an Aboriginal-controlled organisation, to uphold principles of UNDRIP (such as free, prior and informed consent and self-determination) in establishing further mechanisms to advance principles of UNDRIP (such as economic empowerment and self-determination).
23. Without a commitment to economic empowerment, implementing and actioning self-determination remains at the will of government policy and policy makers. It would also risk creating a power imbalance between the First Peoples body (or bodies) that are guiding, or being consulted on, how UNDRIP is being implemented, and the State, thereby jeopardising the State's ability to obtain free, prior and informed consent.

⁹ The First Peoples Assembly of Victoria, *Self-Determination Fund*, Fact Sheet (2022).

Term (f): Australian federal and state government’s adherence to the principles of the UNDRIP

24. Liberty Victoria submits that the enactment and continuation of UNDRIP in Australia must occur with full cognisance of the repeated, severe and ongoing failures of the government to respect and promote the rights of First Peoples, including the right to self-determination accorded by UNDRIP.

25. Three key failures are summarised below:

- a. The Northern Territory National Emergency Response (**Intervention**) is a key example of a governmental mechanism that was at complete odds with the key principles of UNDRIP, particularly self-determination. The Intervention coercively deprived First Peoples of their liberty, privacy and freedom of movement, and was driven by the government and implemented by representatives of the government such as police and the army. Though it responded to a report that suggested community led responses were beneficial,¹⁰ the Intervention was overwhelmingly tainted by paternalistic attitudes towards First Peoples, lacking any real substantive consultation with community leaders or members, who were then made subject to the Intervention.¹¹ Notwithstanding the dire outcomes and backlash towards it, the Intervention, interventionalist policies and laws continue to cause harm and diminish autonomy in Aboriginal communities today. The Cashless Debit Card scheme currently operating in various communities has been labelled by community members and peak bodies as “the new intervention” as it creates a “horrific categorisation that is not reflective of reality”.¹² The program, which was introduced with no substantive community consultation, diminishes essential financial autonomy and deprives First Peoples of basic freedoms to

¹⁰ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (NT Government: 2007), generally and p 55.

¹¹ Balint, Evans and McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (*International Journal of Transitional Justice* Vol 8, issue 2).

¹² Rachael Knowles, 'Cashless Debit Card labelled the 'new intervention'', *National Indigenous Times*, 16 October 2020.

control their lives, completely ignoring inherent rights to self-determination and dignity required by UNDRIP;

- b. The Closing the Gap initiative (**CTG**) is another ongoing government program that has been criticised for not responding to calls for self-determination.¹³ The 2019 National Agreement on Closing the Gap Engagement Report acknowledges that CTG, from the beginning, lacked input from First Peoples into decision making. Even within the government parameters which it imposes, it has not succeeded;¹⁴ and
- c. The failure by federal and state governments to implement the majority of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) is another stark failure. One of the key findings of the Royal Commission was that, in order to address national tragedy, governments must allow Aboriginal and Torres Strait Islander peoples to identify and own the solutions on the issues that affect them and their communities, in line with the principles of self-determination. To date, key recommendations of this Royal Commission, including in relation to self-determination, remain unimplemented.¹⁵ First Nations Australians remain grossly overrepresented in Australia's criminal justice system and prisons. It remains a great shame and sadness that, over 31 years after this Royal Commission, over 500 First Nations people have died in custody.

26. The above matters highlight systemic failings by successive federal and state governments in Australia, but are by no means exhaustive.

27. Liberty Victoria recommends the Government closely examine these failures when considering the implementation of UNDRIP. Liberty Victoria supports the establishment of a federal truth-telling commission, like the Yoorrook Justice Commission established in Victoria, to support this self-examination exercise.

¹³ Stephen Cornell, 'Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States' in Robyn Eversole, John-Andrew McNeish and Alberto D Cimadamore (eds), *Indigenous Peoples and Poverty: an International Perspective* (Zed Books, 2005).

¹⁴ For example, Department of Prime Minister and Cabinet (2020) *Closing the Gap: Prime Minister's Report 2020*.

¹⁵ Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody - Department of Prime Minister and Cabinet* (August 2018), 372.

28. A national forum could be paired with local and state commissions, in various forums as determined by First Peoples, all of which must be culturally safe. Truth-telling is one of the three limbs of the Uluru Statement and is a crucial part of improving relationships between the colonial state of Australia and its First Peoples. However, we emphasise that the onus of truth-telling cannot be just on community experiences, but must be paired with an in-depth examination of those failures from a governmental perspective. Such examination will require an analysis of how and why the three failures mentioned above, and other policies beyond the scope of this submission, came about. The government must examine in a public and accountable way the paternalistic attitudes behind the Intervention and CTG, and the reasons behind the inaction that followed the RCIADIC. The combination of truth-telling and the self-reflection that must follow should work towards determining how such damaging failures can be avoided in future.

Term (d): Legal issues relevant to ensure compliance with UNDRIP

29. Any governmental implementation of UNDRIP rights must be accompanied by a strong accountability and monitoring regime. This is crucial to:

- a. re-establish a relationship of trust between the government and Indigenous communities; and
- b. ensure the government is obliged to invest in real implementable building blocks that generate tangible outcomes.

30. It is essential that any accountability regimes used must be developed in close partnership with First Peoples in a truly self-determined way, consistent with principles of UNDRIP.

This will help to ensure that:

- a. the government is held to account to achieve outcomes measured against standards set by First Peoples; and

- b. a strengths-based approach is adopted to data collection and reporting, as opposed to a deficit-based approach which has consistently occurred in government policies to date.¹⁶

31. Historically, Australia's First Peoples have been judged by standards that are largely informed by preconceived notions of inequality and Indigenous inferiority.¹⁷ This method of accountability and monitoring has caused harmful impacts through:

- a. failing to adequately measure the true outcomes of policies and processes; and
- b. continuing to perpetuate poor public perceptions of First Peoples.

32. Primarily, Australia's First Peoples should not be evaluated by inadequate and culturally insensitive metrics and data which ignore Indigenous sovereignty, strength, cultural diversity and are used to undermine self-determination. Liberty Victoria supports a shift towards more culturally appropriate data standards in line with principles of Indigenous Data Sovereignty.¹⁸ Ensuring that First Peoples can guide the way in which progress is monitored will ensure that the metrics developed appropriately recognise important factors, such as Indigenous sovereignty, cultural diversity and self-determination,¹⁹ which will then provide a more precise insight into true governmental adherence to UNDRIP principles.

33. Appropriate government accountability will also be strongly supported through the implementation of the Voice element of the Uluru Statement by ensuring that the Parliament of Australia is accountable to a truly representative First Nations body.

Term (h): Community and stakeholder efforts to ensure application of UNDRIP

34. Despite the Australian Government's failure to date to enshrine UNDRIP into Australian law, UNDRIP has still played an important role in driving the development, recognition

¹⁶ W Fogarty, H Bulloch, S McDonnell and M Davis, 'Deficit Discourse and Indigenous Health: How narrative framings of Aboriginal and Torres Strait Islander people are reproduced in policy', Lowitja Institute. For example: the Overcoming Indigenous Disadvantage: Key Indicators report series (p 11), Closing the Gap reports (p 17) and the Northern Territory Emergency Response (p 22).

¹⁷ Yoorrook Justice Commission (2022) 'Indigenous Data Sovereignty and Data Governance', Information Sheet (https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/04/041922_Yoorrook_DataSovereigntyGuidance.pdf), p 1.

¹⁸ Kukutai, Tahu, and John Taylor. Indigenous Data Sovereignty: Toward an Agenda. ANU press, 2016, p 3.

¹⁹ Ibid, p 1.

and implementation of Indigenous rights in Australia. This work can largely be attributed to strong community and organisational action and advocacy.

35. However, Liberty Victoria emphasises that community action alone is insufficient to fully realise the potential of UNDRIP and ensure the basic rights it provides for are upheld for the following reasons:

- a. community action to implement UNDRIP generally occurs at an organisational and operational level, whereas true realisation of UNDRIP can only occur through holistic and systemic reform;
- b. community organisations and stakeholders lack adequate resourcing to generate sufficient impact that would see a tangible improvement to rights of First Peoples envisaged by UNDRIP; and
- c. the impact of sole community advocacy and implementation is severely undermined by a lack of broader community understanding of Australia's true history, and the connection with systemic injustices experienced by First Peoples today. This in turn diminishes the public perception of the importance of UNDRIP.

36. Strong government action to implement UNDRIP would help address these issues through:

- a. providing scope for holistic and systemic reform;
- b. alleviating a key financial pressure on community and stakeholder groups that have been shouldering the burden of UNDRIP implementation with limited resources;
- c. providing opportunities for greater funding for initiatives and programs of community organisations that could come from these organisations advancing a legislatively backed instrument;
- d. sending a powerful message to the Australian public of:

- (a) validation for existing community actions to uphold UNDRIP to date, which would bolster broader support for community and stakeholder actions in this space; and
- (b) the importance of the instrument itself, which is inherently an acknowledgement of Australia's history of colonisation and institutional racism, and the long-lasting impacts of this history.

Term (i): Current, historical and other aspects to take into consideration regarding the rights of First Peoples in Australia

37. The implementation of UNDRIP must also take into account the current lack of political participation of First Peoples, which stems from the long-standing distrust engendered by the failures outlined above,²⁰ and intergenerational trauma arising from colonisation and the stolen generations. The policies of the Federal Government over time, particularly the Intervention, as well as over-policing, disproportionate imprisonment and deaths in custody, have fostered an understandable distrust by Indigenous people of government and its agencies.²¹ That distrust has led to many First Peoples being reluctant to participate in the political arena, and must be acknowledged, understood, countered and overcome.

Conclusion

38. Thank you for the opportunity to make this submission regarding the important work being undertaken by this Inquiry. This is a public submission and is not confidential.

39. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Michael Stanton or the Liberty Office on 9670 6422 or info@libertyvictoria.org.au.

**Michael Stanton
President, Liberty Victoria**

²⁰ Will Sanders, 'Electoral administration and Aboriginal voting power in the Northern Territory: Reality and potential viewed from the 2019 Federal election' (Australian National University Centre for Aboriginal Economic Policy Research).

²¹ Larissa Behrendt, 'Unfinished Journey - Indigenous Self-Determination' (2002) 58 Arena Magazine 24.