
**Centre for Law and Social Justice**

2 June 2022

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

## Submission on behalf of the Centre for Law and Social Justice, University of Newcastle Law School[1]

Dear Secretary,

## The application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

We thank the Senate Standing Committee on Legal and Constitutional Affairs for inquiring into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia. In this submission we address the inquiry's terms of reference by reporting on the legal and policy settings operating across several contexts that are relevant to the lives and legal rights of Aboriginal and Torres Strait Islander people and communities. This submission firstly reports on terms of reference a), b) and c). Following this, we address terms of reference d), e), f), i) and j) by reference to several discrete issue areas relevant to the legal rights of Aboriginal and Torres Strait Islander people and communities in Australia.

## History of Australia's relationship to the UNDRIP

Inquiry term of reference (a) seeks to explore the history of Australia's support for an application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] The UNDRIP was adopted by the UN General Assembly in 2007 in acknowledgment that

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Student contributors to the submission studied the course Indigenous Peoples, Issues and the Law in Semester 1, 2022. They are acknowledged throughout in the context of their individual contributions and all contributors are listed at the conclusion of this submission.

[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007).

individualistic human rights protections have failed to protect or promote the rights of Indigenous peoples and communities. The UNDRIP was compiled largely from rights statements already existing in general human rights law, however, it places emphasis on the barriers faced by Indigenous peoples in seeking the full realisation of those rights. The Chair of the UN Permanent Forum on Indigenous Issues welcomed the Declaration as the first UN resolution drafted by the rights-holders themselves.[3]

The UNDRIP was adopted with 143 votes in favour, four against, and 11 abstentions. Only four states voted against the adoption of the Declaration by the General Assembly. These were Australia, Aotearoa/New Zealand, Canada and the United States. The protection of the right of Indigenous peoples to self-determination was the key 'sticking point' for these states.[4] Triggs noted that the applicability of self-determination to Indigenous peoples has been controversial, 'because historically it has been equated with the decolonisation process and with an absolute right to form an independent state'.[5] Commonwealth Indigenous Affairs Minister at the time, Mal Brough, rejected the applicability of the UNDRIP and argued: 'What it does is it provides rights to one group of Australians over all else.'[6] In the Senate debate prior to the government's decision to reject the UNDRIP, then Liberal party Senator Mathias Cormann said:

> ...we are quite appropriately concerned that references to [self-determination] in the current text could be misconstrued as conferring the right of secession upon indigenous peoples.[7]

On 3 April 2009, the subsequent Labor government gave its support to the UNDRIP. Notably, however, then Indigenous Affairs Minister Jenny Macklin emphasised the non-binding nature of the declaration: 'While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.'[8] This reflected a lack of commitment to the incorporation of the UNDRIP into Australian law or government policy.

## The potential to enact the UNDRIP in Australia

Term of reference (b) concerns the potential to enact the UNDRIP in Australia. With Australia having adopted the UNDRIP in 2009, the Commonwealth parliament has the capacity to enact legislation to give effect to its substance. There may be significant demonstration and symbolic value in enacting the UNDRIP in its entirety through Commonwealth legislation, however the

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[3] Victoria Tauli-Corpuz, *Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61st session of the UN General Assembly.

[4] Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009), 719.

[5] Gillian D Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)' (1999) 23 *Melbourne University Law Review* 372, 384. See also: S James Anaya, *Indigenous Peoples in International Law* (1996), 86.

[6] ABC Radio, 'Indigenous Australians treated as equals, says Brough', *AM*, 15 September 2007, <http://www.abc.net.au/am/content/2007/s2033694.htm> at 19 October 2010.

[7] Commonwealth, *Parliamentary Debates*, Senate, 10 September 2007, 62 (Mathias Cormann, Senator for Western Australia).

[8] Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Press Release, 3 April 2009) <http://cigj.anu.edu.au/cigj/link_documents/News/Copy%20of%20JENNY%20MACKLIN%20MP.pdf> at 18 October 2010.

approach taken in this submission is to highlight a number of discrete areas in which elements of the UNDRIP could be brought into practical effect in Australian law, policy and practice. In response to term of reference (c), the following two sections consider how the UNDRIP has been incorporated into law and policy in other countries.

## International Experiences - Canada[9]

In recent years, Canada has marched ahead with significant legislative reform to entrench the UNDRIP, leading the way for other colonial-settler states to follow. Whilst initially voting against the Declaration, the Canadian Government has since changed their position, supporting the international instrument as a powerful tool to modify ongoing patterns of colonisation and dispossession that have sought to erase Indigeneity.[10] Canada's commitment to repair historical wrongs is reflected through the ensuing examples, demonstrating a starting point for rebuilding settler-oriented governance.[11]

### Similarities Between Australia and Canada in Historical Context and Legal Framework

As colonial-settler states, both Australia and Canada's respective histories involve complex relationships of exploitation and violence that have had long-lasting and distressing impacts on Indigenous peoples. Similar to Australia, Canada's colonial background has historically been painted as a "peaceful frontier"; a framing that denies cultural genocide and allows for ongoing dispossession.[12] In this way, Australia and Canada face similar challenges, where colonisation manifests in continuing structures rather than a single event, therefore not temporally bound or simply repaired.[13]

In Australia, Indigenous[14] peoples include over 250 individual nations, each with their own language, culture and customs. Similarly, Canada's Indigenous peoples are recognised as the Inuit, Indian, and Metis peoples, each with distinctive ancestry and culture and very different experiences of colonisation.[15] The geographical size and cultural diversity of Australia and Canada present similar challenges when it comes to enacting the UNDRIP. However, this multiplicity also provides significant opportunities to embrace diverse knowledges and experiences to the benefit of Indigenous and non-Indigenous peoples.

### Constitutional Reform and the Courts Interpretation of the UNDRIP

[9] Section authored by Madeleine Howle.
[10] Felipe Gomez Isa, 'The UNDRIP: an Increasingly Robust Legal Parameter' (2019) 23(1-2) *The International Journal of Human Rights* 7, 11.
[11] Raymond O. Fogner, 'The Train to Dunvegan: Implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Public Archives in Canada' (2021) 22 *Archival Science* 209, 211.
[12] Andrew Woolford, 'Canada and Colonial Genocide' (2015) 17(4) *Journal of Genocide Research* 373, 375.
[13] Ibid 380.
[14] The term 'Indigenous' in the Australian context is used to refer to Aboriginal and Torres Strait Islander peoples. This submission respectfully acknowledges the diversity of Aboriginal and Torres Strait Islander identities, cultures, language groups, nations, and histories in Australia.
[15] James A.R. Nafziger, '*Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*' (BRILL, 2009) 81.

In 1982, s 35 was added to the Canadian Constitution,[16] which purported to affirm the existing Aboriginal rights and treaty rights of Aboriginal peoples.[17] In addition, the Canadian Aboriginal peoples have a national representative voice, established in 1985, which comprises of 630 First Nations communities who meet to set national policy in relation to Indigenous rights.[18] These constitutional mechanisms established prior to the signing of the UNDRIP[19] provide a strong foundation for its recognition in Canadian law, reflecting the overarching purpose of the Declaration as well as the following express provisions:

> *Article 1: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*
>
> *Article 18: Indigenous peoples have the rights to participate in decision-making in matters which would affect their rights, through representatives chose by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*[20]

The Constitutional recognition of rights and enshrinement of an Indigenous voice in representative decision-making are fundamental precursors to the ensuing legislative and judicial examples and would be pertinent to Australia's standing in adopting the UNDRIP in a meaningful way.

Despite s 35 of the Canadian Constitution, following Canada's signing of the UNDRIP in 2010 there appeared to be a lack of political will to recognise the UNDRIP in domestic law. This obstacle was considered to have been overcome with a change of government in 2015, with the assertion that s 35 of the Constitution would serve to fulfil the principles of the UNDRIP.[21] However, the 2017 case of *Ktunaxa Nation v British Columbia*[22] demonstrated the Supreme Court's reluctance to fully ensure that the UNDRIP provisions were practically implemented in relation to sacred sites.[23] Despite the Government having signalled that it would support the Courts aligning the law more closely with the UNDRIP, the Supreme Court chose to take a more conservative approach, signifying that legislative action would have to be taken to implement the Declaration's commitments.

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[16] *Constitution Act 1867* (Imp) Part II s 35(1) ('*Constitution Act 1867'*).
[17] Sam Adkins, 'UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects' (2020) 58(2) *Alberta Law Review* 339, 340.
[18] Larissa Behrendt, 'A Framework of Self-Determination' in Larissa Behrendt, Chris Cunneen, Terri Libesman and Nicole Watson (Eds), *Aboriginal and Torres Strait Islander Legal* Relations (Oxford University Press, 2019, 2nd edition) 254, 280.
[19] *Constitution Act 1867* (n 16) s 35(1).
[20] *UNDRIP* (n 2).
[21] Andrew M. Robinson, 'Governments Must not Wait on Courts to Implement UNDRIP Rights Concerning Indigenous Sacred Sites: Lessons from Canada and *Ktunaxa Nation v British Columbia*' (2019) 24(10) *The International Journal of Human Rights* 1642, 1643.
[22] 2017 SCC 54.
[23] Robinson (n 21) 1643.

**The British Colombian Act and the Federal Act**

Article 38 of the UNDRIP establishes the manner in which nation states may seek to implement the Declaration:

> *States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this declaration.*[24]

Recent legislative reform in Canada has occurred at the provincial and federal level, reflected in the *Declaration on the Rights of Indigenous Peoples Act*[25] and the *United Nations Declaration on the Rights of Indigenous Peoples Act*,[26] respectively. The former was developed in collaboration with the First Nations Leadership Council and passed in November 2019, with unanimous approval from all political parties.[27] The Federal Act followed the British Columbia Act, and was developed at the Assembly of First Nations, achieving royal assent in June 2021. Both Acts serve primarily to formally recognise the UNDRIP in domestic law and map out actions to implement the Declaration's provisions. In particular, they require the respective governments to implement an action plan in consultation and cooperation with Indigenous peoples and to take all measures necessary to ensure that their laws are consistent with the Declaration.[28]

Much critique surrounding the BC and Federal Acts draws on the fact that neither Act provides any kind of enforcement mechanism for Indigenous peoples, and in this way, they serve more as symbolic instruments rather than having significant legal impact.[29] However, it is important to note that the incorporation of the UNDRIP into Canadian law is considered to alter regulatory and administrative processes by putting into practice the engagement of Indigenous peoples' participation. It is this kind of framework model established within enabling legislation that is necessary to shape targeted legislation, such that substantive change may occur incrementally over time.[30]

**Challenges, Successes and Opportunities for Australia**

A challenge that has presented itself in both Australia and Canada is the assertion that the UNDRIP is merely aspirational, and that there is no obligation to implement it in domestic law. However, Article 43 of the UNDRIP serves as a call for signatory nations to consider in precise terms the extent to which domestic laws and policies reflect the Declaration's terms:

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[24] *UNDRIP* (n 2) art 38.
[25] SBC 2019 c44 ("The BC Act").
[26] SC 2021 c14 ("The Federal Act").
[27] Lesley Evans Ogden, 'UNDRIP Becomes Law in BC' (2020) 18(1) *Frontiers in Ecology and the Environment* 4, 8.
[28] *The BC Act,* ss 4-5. See also Assembly of First Nations, 'Assembly of First Nations National Leadership Forum on Bill C-15 – Summary Report' (February 2021).
[29] Kerry Welkins, 'So You Want to Implement UNDRIP' (2021) 53(4) *U.B.C. Law Review* 1237, 1246.
[30] Adkins (n 17) 350.

> *The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.*[31]

As the Canadian Federal Act does, enabling legislation that enshrines the Declaration in domestic law would require governments and courts to review domestic law to ensure it aligns with the minimum standards for Indigenous peoples' rights.[32] Many of the standards in the Declaration are already part of customary and treaty international law, which was drawn upon as an argument in favour of the Canadian Government supporting the Declaration in good faith.[33]

Concern around the implications of enacting the UNDRIP has frequently been driven by the idea that the Declaration provides Indigenous peoples with rights that other people do not also enjoy, particularly given the inclusion of a requirement for 'free, prior and informed consent' of Indigenous peoples in relation to a number of provisions in the Declaration. One such example is Article 19:

> *States shall consult and cooperate in good faith with the Indigenous people concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*[34]

This provision has been criticised as establishing a 'veto' power, particularly over resource development projects. However, it has been identified in the Canadian context as analogous to other types of relations we see between governments who work together through a range of mechanisms in order to ensure that the autonomy of both governments is respected.[35] Article 19 is, like all other provisions in the Declaration, subject to the same balancing provisions and must be interpreted in this light. In this way, free, prior and informed consent encapsulates Indigenous peoples' inherent right to self-determination.[36] As such, rather than undermining domestic law, legislative enshrinement of the UNDRIP would allow for a cooperative framework for its ongoing implementation. This is merely a long overdue step in the implementation of the Declaration.

**Recommendations**

Perhaps the most palpable takeaway is that substantial and long-lasting change can only be incited where there is commitment at a constitutional and legislative level to recognise the inherent right of Indigenous peoples to self-determination. The success of Canada's enactment of the UNDRIP so far has rested on valuing Indigenous voices sincerely and consistently; a

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[31] *UNDRIP* (n 2) art 43.
[32] Assembly of First Nations, 'Assembly of First Nations National Leadership Forum on Bill C-15 – Summary Report' (February 2021) 1-2.
[33] Coalition for the Human Rights of Indigenous Peoples, 'Implementing the UN Declaration on the Rights of Indigenous Peoples – Myths and Representations' (October 2020).
[34] *UNDRIP* (n 2) art 19.
[35] Adkins (n 7) 350, quoting Jody Wilson-Raybould, "The Recognition and Implementation of Rights Framework Talk" (Keynote Address Delivered to the Business Council of British Columbia, Vancouver, 13 April 2018).
[36] Coalition for the Human Rights of Indigenous Peoples (n 33) 3.

crucial aspect that Australia must seek to follow in its own enactment of the UNDRIP. The Uluru Statement from the Heart, produced in 2017, provided a statement from the Indigenous people inviting the government and nation to create a better future through constitutional reform.[37] The three key principles of the Statement being Voice, Treaty and Truth. The implementation of this Statement would allow for certain UNDRIP principles to be met.

Australia should follow Canada's example by seeking to enact the UNDRIP through the following measures:

1. Establish an Indigenous voice to parliament through constitutional reform, in line with the first call from the Uluru Statement from the Heart;
2. Through consultation and cooperation with Indigenous peoples, form a treaty between the Government and Indigenous Australians that reflects their existing and ongoing cultural and treaty rights, in line with the second call from the Uluru Statement from the Heart;
3. Enact state and federal legislation to reflect the provisions of the UNDRIP and require Governments to take all necessary steps to ensure that their laws are consistent with its principles;
4. In taking these measures, commit to supporting and facilitating truth-telling processes for Indigenous Australians, in line with the third call from the Uluru Statement from the Heart.

## International Experiences - New Zealand[38]

The New Zealand and Australian experiences with the UNDRIP are similar historically. Both countries were closely involved in Indigenous developments on an international scale and have contributed to drafting instruments, such as the UNDRIP. This section reports on New Zealand's implementation of UNDRIP, to provide Australia with a scaffold allowing for the implementation of a similar mechanism to deliver aspirations from the UNDRIP. In 2007, when proposed to the United Nations General Assembly, Australia and New Zealand were two of the four countries to vote against adopting the Declaration. In 2009-2010, both Australia and New Zealand changed their position and announced support for the Declaration. At this point, the countries began to diverge in approaches. Comparatively, New Zealand has progressed more in protecting the rights of the Māori people.

### Māori Agencies Established

Firstly, New Zealand has committed to undertake measures to implement the UNDRIP. Since the UNDRIP in 2010 was endorsed, the Māori people have called for a monitoring plan to check the implementation of the Declaration into New Zealand law. In 2014, the National Iwi Chairs Forum established an Independent Monitoring Mechanism to monitor and report annually to the United Nations Expert Mechanism on the Rights of Indigenous Peoples in

[37] *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).
[38] Section authored by Brooke Febo.

Geneva.[39] In 2016, the Te Puni Kōkiri[40] agency found that while progress towards the aspirations of the Declaration were happening across government, there was no definite line between the activities and the commitment to the Declaration.[41]

These developments lead to the Te Minita Whanaketanga Māori agency ('the Agency') to seek the establishment of a Cabinet for Māori Crown Relations: Te Arawhiti Committee, which would lead the development of a national plan of action for New Zealand's progression towards the objectives of the UNDRIP.[42] The Agency argued a Declaration plan would provide a concrete action to improve outcomes for Indigenous people by providing a clear display of New Zealand's Indigenous rights journey.[43] The Agency noted that the Declaration plan would provide an opportunity to establish a coherent delivery of the Declaration across government as outcomes for Indigenous people requires coordination and integration across the public sector.[44] The establishment of the Māori Crown Relations: Te Arawhiti committee, a Māori-centric wellbeing approach to support government investments, provided evidence to the Māori people that the New Zealand government takes the UNDRIP commitment seriously.[45] It is important for government agencies to demonstrate alignment with the objectives of the Declaration by taking into consideration the effects the investments will have on the Māori people's living standards such as housing, climate change, connection to country.[46]

**Declaration Plan Endorsement**

In March 2019, Cabinet approved a process to develop a Declaration plan. In June 2021, Cabinet approved the next steps for developing a declaration that included a partnership with leaders of Te Minita Whanaketanga Māori, Pou Tikanga of the National Iwi Chairs Forum and the Human Rights Commission to work together to create and operate a program to engage Māori perspectives on their objectives in a Declaration plan. These engagement programs were conducted in person and, for the most part due to COVID-19, online in October 2021. Many perspectives were gathered from a diverse range of marginalised, often silenced, Indigenous people to support the views and needs of even the most vulnerable Māori people.

Furthermore, in April 2022, feedback from Māori groups, consisting of 69 workshops and 370 participants, prompted publication of a draft of the Declaration plan.[47] To fully understand the aspirations of the targeted groups, three concepts were considered: inamata (looking back), onamata (the present) and anamata (looking forward).[48] These concepts allowed for the

[39] Office of Te Minita Whanaketanga Māori, *Developing a Plan on New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples* (18 March 2019) 13.
[40] The Ministry of Māori Development.
[41] Ibid 14.
[42] Ibid 1.
[43] Ibid 16
[44] Ibid 17.
[45] Ibid 20.
[46] Ibid 20.
[47] 'UN Declaration on the Rights of Indigenous Peoples' *Te Puni Kōkiri* (Web Page, 22 April 2022) <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>.
[48] 'Māori Targeted Engagement' *Te Puni Kōkiri* (Web Page, 10 May 2022) <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples/maori-targeted-engagement>.

responders to reflect on their experiences of self-determination, equality, culture and accessing lands and resources.[49] The groups were also asked what they would do to realise Maori rights to self-determination, lands, culture and equality if they had control of the resources and ability to make decisive action.[50] The groups were further asked what they believe the actions of the government should be to support the Indigenous peoples rights to exercise self-determination, culture, and equality.[51] The summary features of this engagement process for monitoring the Declaration plan were to consider Indigenous international frameworks; for Indigenous groups to lead the implementations independent of government; for legislated reporting from government to include the impact on Indigenous families; measuring collective, family and environmental wellbeing; and to monitor establishment and resources of the Maori authority and institutions.[52] Willie Jackson, the Minister of Te Puni Kōkiri commented that the next step is drafting an official plan in partnership with Te Puni Kōkiri, the National Iwi Chairs Forum's Pou Tikanga and the Human Rights Commission by the end of 2022, where it will then be consulted on widely with the broader New Zealand society.[53] The draft Declaration plan has already provided a clear pathway to monitor New Zealand's commitment to the Declaration and can produce meaningful outcomes for the Declaration's aspirations.[54] Australia can follow New Zealand's lead to enhance rights-based development for Indigenous peoples.[55]

**Australia and the UNDRIP**

In contrast, Australia has not made similar progress in advancing the Declaration. Initiatives in New Zealand can provide a comparative source of inspiration for thinking about better protecting the rights and cultures of Aboriginal and Torres Strait Islander people in Australia. Historically, Australia has taken the view that accepting the references to self-determination would diminish the political integrity of the state.[56] In 2009, the Rudd Government formally endorsed UNDRIP. Despite these endorsements, minimal work has been put in place to directly address, enact, and enforce UNDRIP in Australia.[57] The Uluru Statement from the heart, produced in 2017, provided a statement from the Indigenous people inviting the government and nation to create a better future through constitutional reform. The three key principles of the statement being Voice, Treaty and Truth. The implementation of this statement would allow

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[49] Ibid.

[50] 'Key Themes from Maori Targeted Engagement' *United Nations Declaration on the Rights of Indigenous Peoples* (Web Page, April 2022) <https://www.tpk.govt.nz/docs/tpk-undrip-keythemesm%C4%81oritargetedengagement-april2022v2.pdf>.

[51] Ibid.

[52] Kiri Rangi Toki, 'What a Difference a "Drip" Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples' (2010) 16 *Auckland University Law Review* 243, 246.

[53] 'Drafting to Commence on Declaration Plan, Targeted Engagement Feedback Released' *Te Puni Kōkiri* (Web Page, 26 April 2022) <https://tpk.govt.nz/en/mo-te-puni-kokiri/our-stories-and-media/drafting-to-commence-on-declaration-plan-targeted->.

[54] Federation of Victorian Traditional Owner Corporations, *UNDRIP and Enshrining Aboriginal Rights* (Discussion Paper 3, March 2021) 14.

[55] Meredith Gibbs, 'The Right to Development and Indigenous Peoples: Lessons from New Zealand' (2005) 33(8) *World Development* 1365, 1375.

[56] Rawiri Taonuii, 'The Rise of Indigenous Peoples: The United Nations Declaration on the Rights of Indigenous Peoples' in Selwyn Katene and Rawiri Taonui (eds), *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (Massey University Press, 2018) 31.

[57] Ibid 6.

for the UNDRIP principles regarding self-determination to be met. Constitutional inclusion of the Uluru Statement would provide Aboriginal and Torres Straight Islanders access to self-determination. However, UNDRIP is not universally welcomed by all Indigenous peoples and scholars. Some Indigenous academics see UNDRIP as a continuation of state-control over Indigenous peoples, as a means of facilitating and legitimising State control.[58] Newcomb stated that UNDRIP, through law and policy, constructs and institutionalises a framework for domination against Indigenous peoples, a mechanism that would not provide self-determination.[59] Therefore, the Uluru Statement of the Heart needs to be the mechanism to adopt the principles of the UNDRIP through terms of the Indigenous peoples. Self-determination allows for Indigenous peoples to exercise autonomy in matters relating to their affairs. The Uluru Statement will allow for this process to occur while implementing the aspirations of the UNDRIP.[60]

New Zealand's implementation of the Declaration has provided an example of the UNDRIP's enactment within government agency. The Commissions that were created to enforce the UNDRIP and provide government with accountability in the Declarations' application provide Australia with an example to undergo similar agencies for Aboriginal and Torres Strait Islander needs. Application of the Uluru Statement into Australian Government will align with UNDRIP aspirations similarly to New Zealand's implementation of the UNDRIP. The Uluru Statement provides a plan of action for implementing rights for Indigenous peoples similarly to the actions of the Declaration Plan in New Zealand. As mentioned above, New Zealand is currently deliberating on the information provided by the Te Puni Kōkiri, the national Iwi Chairs Forum's Pou Tikanga and the Human Rights Commission, for the Declaration Plan. Though we do not have the government response yet, the actions that have been completed can provide Australia guidance on a process to implement a Declaration Plan.

**Recommendations**

5. Implement a Declaration Plan in partnership with Indigenous groups and the Human Rights Commission. Feedback from Indigenous peoples will craft the UNDRIP in a suitable manner for the benefit of Aboriginal and Torres Strait Islander people. This would move away from the paternalist approach the Australian government has previously taken and provide a roadmap to demonstrate the UNDRIP progression across government.
6. Establish a counsel of Indigenous people and Elders, potentially through the Makarrata commission, to hold government accountable for implementing UNDRIP.The Māori have enacted UNDRIP through the Declaration Plan that involved as many Māori contributions and opinions as they could survey. A similar approach for Aboriginal and Torres Strait Islanders in Australia will provide a successful enactment of the UNDRIP and a positive mechanism for the Indigenous peoples' voices to be heard.

[58] Steven Newcomb, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) 20(3) *Griffith Law Review* 578.
[59] Ibid.
[60] Catherine J. Iorns Magallanes, 'Improving the Global Environmental Rule of Law by Upholding Indigenous Rights: Examples from Aotearoa New Zealand' (2018) 7(1) *Global Journal of Comparative Law* 61, 68.

## Matters Relating to Compliance, Legislative Implications, Levels of Government Implementation, Historic and Systemic Considerations, Among Others

The specific disadvantages and legal rights claims of Aboriginal and Torres Strait Islander people and communities are relevant to several terms of reference identified by this inquiry. This is already apparent in the above sections, which primarily addressed term of reference (c) but intersect with terms of reference (a), (i) and (j). The remaining sections of this submission speak to terms of reference d), e), f), i) and j) in tandem. The concerns addressed include disadvantages in the criminal legal system, the family and child law sphere, cultural heritage protection and land systems and management.

## Criminal Legal System - Custodial Sentencing[61]

A cursory glance at statistics reveals the staggeringly disproportionate extent to which Indigenous Australians are subject to custodial sentences; while constituting approximately 3.3% of the total population,[62] Indigenous Australians make up 30% of all Australian prisoners.[63] It is no exaggeration to claim (as many have) that Indigenous Australians are the most incarcerated people on the earth.[64]

Given this disproportionate level of interaction with incarceration, two specific custodial reforms are recommended to help address this: repeal of targeted mandatory sentencing provisions and a statutory requirement for courts to consider an individual's Indigenous status during sentencing.

These achievable reforms would significantly strengthen Australia's commitment to the Declaration and were also made in the 2018 Australian Law Reform Commission Report *Pathways to Justice*.[65] This submission will further expand upon these reforms in relation to the application of UNDRIP in Australia.

### Statutory Requirement to Consider Indigenous Status During Sentencing

Article 2 of the UNDRIP states that:

> *Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity*[66]

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[61] Section authored by Louy Bonnay.
[62] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2018).
[63] Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 9 December 2021).
[64] Suzi Hutchings, 'Aboriginal People in Australia: The Most Imprisoned People on Earth' *Debates Indígenas* (online, 1 April 2021) <https://www.debatesindigenas.org/ENG/ns/97-aboriginal-in-australia.html>.
[65] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* (Report No 133, March 2018) ('*Pathways to Justice*').
[66] *UNDRIP* (n 2) art 2.

It has repeatedly been observed that the high rate of imprisonment of Indigenous people in Australia is partially because of the enduring impact of colonisation and dispossession and the accompanying intergenerational trauma of decades of systemic oppression.[67] Such historical factors result in a higher rate of offending,[68] and when coupled with structural biases such as over policing and the failure to recognise cultural differences in many jurisdictions,[69] these two forces synthesise to significantly increase Indigenous incarceration.

The disproportionate interactions Indigenous Australians have with the prison system are thus arguably a breach of the right to equality expressed in Article 2 of the Declaration because many Australian jurisdictions are not required to consider 'the inter-generational repercussions of uniquely Aboriginal social exclusion'[70] impacting Indigenous offenders when sentencing.

As elaborated upon by the Human Rights Committee, the right to equality can mean that 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination'.[71] Therefore a sentencing provision that dictates courts to account for 'unique systemic and background factors'[72] of Indigenous offenders would mean, as articulated by the Supreme Court of Canada in *R v Ipeelee*, 'sentencing judges are required to pay attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case.'[73] Such a provision of positive discrimination clearly falls under the purview of the aforementioned exception.

Circumstances to be considered for Indigenous offenders should include a historical consideration of Indigenous dispossession, societal exclusion, discrimination, forced removals and the resulting intergenerational trauma. Courts could use this to evaluate the fairness of traditional sentences for Indigenous offenders and respond accordingly, which as the ALRC *Pathways to Justice* report suggests, 'would "promote equality before the law'[74] because it considers historical and ongoing 'circumstances that are applicable to each Aboriginal offender, because of her or his treatment as an Aborigine.'[75] This reform would thus strengthen Australia's compliance with article 2 as it would help rectify 'fundamental misunderstanding and misapplication of the laws'[76] that lead to Indigenous overrepresentation in sentencing.

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[67] Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) ch 5.
[68] Ibid.
[69] Ibid.
[70] Sarah Krasnostein, 'Too much Individualisation – Not Enough Justice: 'Bugmy v the Queen'' (2014) 39(1) *Alternative Law Journal* 12, 13.
[71] Human Rights Committee, General Comment No. 18: Non-discrimination, 73rd sess, UN Doc CCPR/C/GC/18 (10 November 1989) [10].
[72] *Pathways to Justice* (n 65) 204.
[73] *R v Ipeelee* [2012] 1 SCR 433, 479 [75].
[74] *Pathways to Justice* (n 65) 205.
[75] Justice Stephen Rothman AM, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders.' (Paper Delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10.
[76] *R v Ipeelee* (n 73) 471 [63].

It should be emphasised that this is not a radical proposal. The Australian Capital Territory, Queensland and South Australia have similar provisions.[77] In common law, *R v Fernando*[78] was a highly influential case that similarly sought to outline key principles that ought to be considered when sentencing Indigenous offenders.[79] In recent years however there has been a significant narrowing in the application of those principles,[80] with the High Court concluding in *Bugmy v The Queen*[81] that an obligation to consider these principles would be 'antithetical to individualised justice.'[82]

The High Court in making such a consideration optional, arguably failed to consider how the present operations of traditional justice are already unfair for Indigenous Australians.[83] As the *Pathways to Justice* ALRC report argues further, 'failure to take into account the unique systemic circumstances… "thwarts the pursuit of equality and individualised justice".'[84] As Justice Stephen Rothman similarly succinctly articulated, 'To treat Aborigines (sic) differently in Australia by taking account of such factors is an application of equal justice; not a denial of it.'[85]

Thus, whilst presently courts *may* consider various elements of historical factors and systemic biases, the absence of an *explicit statutory requirement* to do so alongside this focus on individualised justice arguably can, as described in *Ipeelee*, ignore 'the distinct history of Aboriginal peoples'[86] and how 'current levels of criminality are intimately tied to the legacy of colonialism.'[87]

In following global examples, the *Pathways to Justice* ALRC report recommended that all Australian jurisdictions introduce sentencing provisions that explicitly oblige the consideration of 'unique systemic and background factors'[88] for Indigenous offenders to enhance Australia's commitment to equality under article 2 of the Declaration. Section 718.2(e) of Canada's *Criminal Code* is a sentencing provision which has sufficiently developed case law that could serve as a direct inspiration for the drafting of this provision.[89]

**Mandatory Sentencing Abolition**

Mandatory sentencing provisions and their current operation arguably infringe upon article 7 of the UNDRIP. This article asserts that:

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[77] *Pathways to Justice* (n 65) 189.
[78] *R v Fernando* (1992) 76 A Crime R 58.
[79] Richard Edney, 'The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8, 8.
[80] Ibid 9-10.
[81] *Bugmy v R* (2013) 302 ALR 192.
[82] Ibid 203.
[83] Krasnostein (n 70) 14.
[84] *Pathways to Justice* (n 65) 205.
[85] Justice Stephen Rothman AM (n 75).
[86] *R v Ipeelee* (n 73) 480 [77].
[87] Ibid.
[88] *Pathways to Justice* (n 65) 204.
[89] For further reading, see ibid, 197-204 on the Canadian legislative provision and its common law development.

1. *Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.*
2. *Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.*[90]

The right to liberty contained here has been further elaborated upon by the Human Rights Committee to include a freedom from arbitrary detention.[91] That is, the requirement to consider the "inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality"[92] to a sentence.

As noted by the dissent in *Nasir v Australia*,[93] there are significant concerns with mandatory sentencing provisions and their compatibility with Australia's international obligations to this right. Mandatory sentencing schemes can violate this right because they are often an 'inappropriate constraint on judicial discretion,' because 'the inability to take into account individual circumstances' gives rise to the 'risk of disproportionate sentences.'[94]

Given various Australian jurisdictions do not have a statutory obligation for an individual's Indigenous status to be a unique circumstance for consideration, mandatory sentencing thus arguably can impose on Indigenous Australians a sentence that 'fails to account for individual circumstances,'[95] specifically the unique history of dispossession and systemic discrimination Indigenous Australians have faced that continues to impact their lives. Mandatory sentences may thus be disproportionate, inappropriate or arbitrary, therefore offending the UNDRIP.

Mandatory sentencing provisions also offend Australia's compliance with the UNDRIP because their operation has a disproportionate and discriminatory impact upon Indigenous Australians.[96] For some Australian jurisdictions, the crimes that have mandatory sentences stipulated are property offences and theft, sometimes termed 'crimes of poverty'.[97] Mandatory sentences for such crimes 'have a discriminatory impact on people of low socio-economic status and particular racial groups, including Aboriginal and Torres Strait Islander People.'[98]

This operation of mandatory sentencing provisions is arguably why the UN's Committee against Torture's 2008 review of Australia's compliance with the *Convention Against*

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[90] *UNDRIP* (n 2) art 7.
[91] Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [11].
[92] Ibid [12].
[93] Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2229/2012*, 116th sess, UN Doc CCPR/C/116/D/2229/2012 (17 November 2016) ('*Nasir v Australia*').
[94] Ibid annex II [3].
[95] Ibid.
[96] *Pathways to Justice* (n 65) 273.
[97] Ibid 277.
[98] Ibid.

*Torture*,[99] found that various mandatory sentencing provisions had a 'disproportionate and discriminatory impact on the Indigenous population'[100] and suggested all such provisions be abolished.[101]

**Recommendations**

Considering the above, and in line with global recommendations, the following measures should be adopted:

7. Statutory Requirement to Consider Indigenous Status During Sentencing
8. Commonwealth, state and territory governments repeal all mandatory sentencing provisions.

It must be emphasised that these proposed reforms are not radical nor unachievable. They are all drawn from previous Law Reform Commission Reports, International rulings and various common law jurisdictions both domestically and internationally. There is clear standing for these reforms and the potential benefits they could bring for Indigenous offenders alongside bringing Australia in line with its obligations under the UNDRIP.

As the commissioners remarked when releasing the Ryal Commission into Indigenous Deaths in Custody, Aboriginal "lives have been controlled, and in many cases still are controlled, by people who share neither their culture nor their perspectives, because they have not shared their history."[102] This fact still holds true today and thus these reforms should not be construed as a complete cure. They are not exhaustive, indeed they arguably should be synthesised with the expansion of non-custodial, alternative sentencing reforms, such as circle sentencing.[103] Such measures would increase Indigenous self-determination in sentencing, which would reduce crime rates as correlations have been observed between 'self-determination and crime rates'[104] in Indigenous communities.

## Criminal Legal System - Indigenous Women and Family Violence[105]

The prevalence of family violence against Indigenous women in Australia is well-documented. Available statistics demonstrate that Indigenous women experience family violence at approximately five-times the rate of non-Indigenous women,[106] and are six-times more likely

[99] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[100] UN Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), [23].
[101] Ibid.
[102] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 340.
[103] For further reading, see *Pathways to Justice* (n 65) 233 on the effectiveness of non-custodial community-based sentences.
[104] Larissa Behrendt, Amanda Porter, and Alison Vivian, 'Indigenous self-determination within the justice context: literature review' (Report, Jumbunna Indigenous House of Learning, 13 April 2017) 23.
[105] Section authored by Laura Barry.
[106] Matthew Willis, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice: Non-disclosure of violence in Australian Indigenous Communities* (No. 405, January 2011) 1; Marica Langton et al, Australia's National Research Organisation for Women's Safety, *Family Violence Policies, Legislation, and Services: Improving Access and Suitability for Aboriginal and Torres Strait Islander Men* (Research Report, Issue 26, December 2020) 14-16.

to be murdered, with over 70-percent of those homicides perpetrated by family members.[107] Despite this, research suggests that 90-percent of violence against Indigenous women is not reported,[108] particularly where the perpetrator is a partner or other family member.[109] This section examines the issue of family violence with a particular focus upon underreporting by Indigenous victims, the link between victimisation and offending, and the benefits of Indigenous healing.

**Relevant UNDRIP Articles**

*Article 21:*

*"States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities."*[110]

*Article 22*

*"1. Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities in the implementation of this Declaration.*

*2. States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."*[111]

**Underreporting**

A commonly identified factor contributing to underreporting is the strong fear of child removal, due to both historical and current experiences.[112] Compounding this fear is the general distrust of police.[113] In particular, many victims fear that reporting might lead to imprisonment of the perpetrator.[114] Indeed, there is a perception that the criminal legal system is too rigid to consider the values of healing and rehabilitation, which Indigenous communities value above criminalisation.[115]

Victims may also fear punitive treatment, as in many instances they are criminalised for self-defence.[116] In other situations, police have used family violence home attendance to act on old

[107] Silke Meyer and Rose-Marie Stambe, 'Indigenous Women's Experiences of Domestic and Family Violence, help-seeking and Recovery in Regional Queensland' (2021) 56 *The Australian Journal of Social Issues* 443, 444.
[108] Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 17.
[109] Willis (n 106) 4; Meyer and Stambe (n 107) 445.
[110] *UNDRIP* (n 2) art 21.
[111] Ibid art 22.
[112] Renee Fiolet et al, 'Indigenous Perspectives on Help-Seeking for Family Violence: Voices from an Australian Community' (2021) 36(21-22) *Journal of Interpersonal Violence* 10128, 10135; Willis (n 106) 6.
[113] Willis (n 106) 5.
[114] Ibid 6.
[115] Harry Blagg et al, Australia's National Research Organisation for Women's Safety, *Innovative Models in Addressing Violence Against Indigenous Women* (Final Report, January 2018) 60; Willis (n 106) 8-9; Meyer and Stambe (n 107) 455.
[116] Willis (n 106) 5.

warrants. For example, police called to a family violence incident at Ms Dhu's home, took this opportunity to arrest her for unpaid fines; she later died in custody.[117]

Many victims fear great community stigma if they report other members of the community,[118] due to a perception that reporting will lead to further incarceration and marginalisation of their people.[119] In some circumstances there is also fear of retribution from the offender's family due to the close-knit nature of the community.[120]

Victims further assert reluctance to report due to the perceived ineffectiveness of the legal system,[121] stemming primarily from an inherent distrust of the system which has historically been used as a tool of oppression.[122] In some communities, the prominence of intergenerational violence has led to internal normalisations of family violence.[123] This in itself is a barrier to reporting, yet it is exacerbated by reports of women whose previous experiences of formal and informal support systems have made them feel stigmatised for reporting as "that's just how it is".[124]

Other victims cite police failure to respond,[125] or failure to keep them informed regarding the progress of their applications.[126] This creates disconnection from the system, causing victims to feel even more powerless and unsupported. There is also, in some circumstances, a lack of community awareness as to the operation of the system.[127]

The ineffectiveness of the system is also impacted by cultural and language barriers. Victims have reported a "lack of cultural understanding and respect"[128] when dealing with the justice system and support services, and a failure to acknowledge the effect of trauma and the confronting nature of the system itself.[129] Moreover, victims suggest that the justice system fails to incorporate Indigenous perspectives, or to provide healing focussed support.[130] Those programs which are Indigenous-specific are usually targeted towards men.[131] The lack of Indigenous support staff within the system furthers these concerns.[132]

**Victimisation and Offending**

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[117] *Inquest into the Death of Julieka Ivanna Dhu* (Perth Coroner's Court, Coroner Fogliani, 28 September 2016); HRLC (n 108) 32; Blagg (n 115) 54.
[118] Meyer and Stambe (n 107) 445; Willis (n 106) 4; Fiolet et al (n 112) 10135.
[119] Meyer and Stambe (n 107) 445; Blagg (n 115) 60.
[120] Meyer and Stambe (n 107) 452.
[121] Willis (n 106) 5.
[122] Ibid 6.
[123] Meyer and Stambe (n 107) 449.
[124] Fiolet et al (n 112) 10134.
[125] Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Unfinished Business: Koori Women and the Justice System* (August 2013) 42.
[126] Willis (n 106) 6.
[127] Ibid 8.
[128] Fiolet et al (n 112) 10134.
[129] Willis (n 106) 6.
[130] Ibid 7; Meyer and Stambe (n 107) 446.
[131] VEOHRC (n 125) 59.
[132] Willis (n 106) 7.

Family violence against Indigenous women must be understood within the wider context of colonisation, dispossession, and transgenerational trauma which affects both perpetrators and victims. These factors must be considered when developing reforms.[133]

It is also critical to understand the link between family violence and wider criminal offending. In an estimated 80-percent of cases, instances of offending by Indigenous women are indirectly linked to abuse.[134] Indeed, many offenders first came into contact with police as children affected by family violence,[135] and continue to experience some form of violence on a daily basis.[136] The cycle of abuse can easily lead to a cycle of offending not only to cope with the abuse, but sometimes just to survive.[137] Accordingly, addressing family violence may also significantly reduce offending and overincarceration, furthermore supporting the adoption of UNDRIP article 7, among others.

**Healing**

Broader development and adequate funding of Indigenous-led healing centres in remote communities will help to address the challenges identified above. Indigenous healing is a powerful method through which to address issues of family violence and offending, as well as the underlying factors which impact upon them.[138] Healing involves recognition of the impacts of dispossession, violence, and trauma, and the empowerment of the community through culture and country.[139]

Indigenous healing programs are wide and varied. However, commonly shared characteristics include care and support, healing and personal development, knowledge and skill training, and community growth.[140] Healing through care and support involves mentoring programs, family support services, counselling to deal with grief and loss, and traditional health clinics.[141]

Personal development is often culturally focussed and involves redevelopment of cultural and spiritual identity, and reconnection to country,[142] as well as referral to additional services, training in self-reflection, and empowering participants to recognise their own abilities.[143]

Training in new knowledge and skills varies between programs, but commonly includes communication and conflict resolution, workplace skills, leadership, parenting, and tradition

[133] Meyer and Stambe (n 107) 445, 456.
[134] HRLC (n 108) 17.
[135] VEOHRC (n 125) 37.
[136] Ibid.
[137] HRLC (n 108) 18.
[138] Meyer and Stambe (n 107) 445.
[139] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (Report No. 1/2005) 57; Blagg (n 115) 8.
[140] Ibid 59; Jane McKendrick et al, Healing Foundation, *Aboriginal and Torres Strait Islander Healing Programs: A Literature Review* (Report, 2013) 58.
[141] McKendrick (n 140) 59, 66, 69; ATSISJC (n 139) 59.
[142] Ibid 59, 67-8.
[143] Ibid 59, 62-3.

and culture.[144] Programs will often train and encourage participants to pass on their learning to support others.[145]

Finally, community growth is fostered through group counselling, trust and respect training, traditional cultural events, and group bonding activities such as fishing.[146] Programs provide a framework to discuss important issues, and commonly include storytelling as a means by which to understand the past.[147]

**Women's Healing Case Managers**

The establishment of Women's Healing Case Managers ("HCM") who are endowed with statutory power to apply for family violence orders ("FVOs")[148] on behalf of victims is a mechanism which can address the above concerns. The intention is to provide legally trained, female, Indigenous case workers to meditate between victims, and the police and courts. It is essential that this reform is developed and facilitated by Indigenous women.[149] Accordingly, the creation and regulation of the HCM must be achieved through both state and federal policy development, advised heavily by existing Healing Centres. However, the power to apply for FVOs can only be conferred via legislation.

In most states, third parties cannot apply for FVOs, [150] except in Victoria and Queensland with written consent.[151] States must, therefore, enact uniform provisions into their family violence legislation specifically conferring the power. A broad list of criteria will need to be inserted into the definition section to prevent process abuse.

**Role**

It is essential that HCMs are Indigenous women in order foster trust and solidarity; research suggests that victims are much more likely to report to fellow Indigenous women whom they trust.[152] This may also overcome cultural and language barriers.[153]

The main role of the HCM is to mediate between victims and the criminal legal system. This predominately involves applying for interim and final FVOs on behalf of victims, to remove direct contact with police where this may be traumatic or confronting.[154] The HCM may also advise and liaise with police in instances of FVO breaches. Importantly, HCMs might

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[144] Ibid 59, 67.
[145] Ibid 62; ATSISCJ (n 139) 57.
[146] McKendrick (n 140) 59, 67 Blagg (n 115) 13.
[147] McKendrick (n 140) 62, 65.
[148] Note that family violence orders (FVOs) are referred to differently in each state. The term "FVO" will be used to refer to the equivalent order in any state.
[149] ATSISJC (n 139) 59.
[150] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48; *Restraining Orders Act 1997* (WA) s 25; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20; *Family Violence Act 2004* (Tas) s 15; *Domestic Violence and Protection Orders Act 2008* (ACT) s 18; *Domestic and Family Violence Act* 2007 (NT) s 28.
[151] *Family Violence Prevention Act 2008* (Vic) s 45(c); *Domestic and Family Violence Protection Act 2012* (Qld) s 25.
[152] Willis (n 106) 8; Fiolet et al (n 112) 10138; ATSISJC (n 139) 59.
[153] Fiolet et al (n 112) 10139.
[154] Ibid 10136; Willis (n 106) 5-6;

encourage that offenders be referred to equivalent men's Healing Centres[155] rather than arrested, where appropriate, in order to promote healing over incarceration.[156]

The HCM also supports victims throughout their court processes and keeps them informed as to any progress. This ensures that the system is transparent, therein fostering trust and confidence in the process.[157]

This program must operate within the broader context of the Healing Centre ensuring that the focus is upon community awareness, rehabilitation, and healing, rather than criminalisation.[158] Accordingly, the HCM oversees the victim's journey through the wider Healing Centre and may refer them to additional support where necessary.[159] Moreover, the HCM should mediate between victims and offenders, including with the offender's equivalent HCM where applicable. This fosters healing on both sides and promotes restoration of relationships over condemnation.[160]

Development of community awareness regarding the operation and benefits of the program is essential to foster whole community healing and trust in the process and encourage reporting.[161] Understanding and awareness will likely reduce community stigmas and shame in reporting.[162]

**Recommendation**

9. Establishment of Women's Healing Case Managers, endowed with statutory power to apply for family violence orders.

This recommendation is intended to achieve the aims of the UNDRIP as it promotes the right of Indigenous women to have access to gender specific and culturally sensitive support services.[163] Similarly, it considers the special needs of Indigenous women, particularly the need for alternate services where mainstream options may be traumatic.[164] Finally, though not a full guarantee against violence, this recommendation attempts to reduce family violence against Indigenous women in accordance with the aims of Article 22.[165]

## Criminal Legal System - Aboriginal Women's Health and Incarceration[166]

Article 21 of the UNDRIP states that Indigenous people have the right, without discrimination, to improvement of their health and sanitation conditions. It further states the need to pay

[155] Blagg (n 115) 7-8.
[156] Department of Planning and Community Development (Vic), *Strong Culture, Strong Peoples, Strong Families: Towards a Safer Future for Indigenous Families and Communities* (Second Edition, 2008) 43.
[157] Langton et al (n 106) 47-53.
[158] Willis (n 106) 8-9; Blagg et al (n 115) 63.
[159] ATSISJC (n 139) 59; Langton et al (n 106) 51.
[160] Willis (n 106) 9.
[161] Ibid 13.
[162] Langton et al (n 106) 51; VEOHRC (n 125) 6; Willis (n 106) 4.
[163] *UNDRIP* (n 2).
[164] Ibid.
[165] Ibid Art 22.
[166] Section authored by Sarah Paulauskas.

particular attention to elders, children, and women when it comes to this right.[167] Further, Article 23 specifies the right to of Indigenous people to be involved in the development and determination of health outcomes, while Article 24 outlines that Indigenous people have the right enjoy the highest attainable standard of physical and mental health.[168] While these Articles set out the standard of Health considerations that should apply to Indigenous women, the reality of vulnerable women, particularly those who are incarcerated, is that they experience poorer health outcomes than non-Indigenous people and men in prison.[169]

Aboriginal and Torres Strait Islander people, making up around 3.3% of the Australian population, make up 28% of the prison population.[170] Aboriginal women are also the fastest growing prison population in the country.[171] This alarming disparity is due to Australia's colonial history and systemic racism experienced by Indigenous people that has resulted in hyper-visibility, over policing, and implicit bias.[172] The effects of the Stolen Generation continue to affect the social reality for Aboriginal women, with untreated trauma among other socio-somatic illnesses being the main reasons for incarceration.[173] More than half of incarcerated Aboriginal mothers in New South Wales were forcibly removed from their family as children,[174] and due to a lack of trauma informed intervention, many times end up in cycles of trauma and incarceration. While there are many standards for Indigenous people and their rights within UNDRIP, current legislative frameworks do not meet these standards. Further consideration is needed to bridge the gap between Aboriginal women and their non-Indigenous counterparts who experience incarceration.

Looking to health and the experiences of Aboriginal women who are incarcerated, it is important to look to wider social issued that have direct impacts on the treatment of these women.

**'Equal treatment' and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)**

Between 2008 and 2018, the rise of Aboriginal women in prison was 55%.[175] This alarming statistic is due to many factors. One important issue is the lack of throughcare for women whilst incarcerated. The 'Prison to Work' report stated that there is currently a lack of transitional support and throughcare, and this disproportionately impacts Aboriginal women.[176] Because

[167] *UNDRIP* (n 2) art 21.
[168] Ibid art 24.
[169] Australian Institute of Health and Welfare, *The health of Australia's Prisoners* 2018. Canberra: Australian Institute of Health and Welfare 2019.
[170] Australian Bureau of Statistics. *Prisoners in Australia,* 2019. Canberra.
[171] Sacha Kendall et al, "Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia" (2019) 29(11) *Qualitative Health Research* 1.
[172] Sacha Kendall et al, "Incarcerated Aboriginal Women's Experiences of Accessing Healthcare and The Limitations of the 'Equal Treatment' Principle" (2020) 19(1) *International Journal for Equity in Health*.
[173] Ibid 3.
[174] Elizabeth A. Sullivan et al, "Aboriginal Mothers in Prison in Australia: A Study of Social, Emotional and Physical Wellbeing" (2019) 43(3) *Australian and New Zealand Journal of Public Health* 7.
[175] Australian Bureau of Statistics (n 170).
[176] Harry Blagg et al, *Building Effective Throughcare Strategies for Indigenous Offenders in Western Australia and the Northern Territory* (Australian Institute of Criminology, 2020) 12.

there is little mind paid to the mental and physical health of women in custody, there is a higher chance of recidivism, and thus the cycle of trauma and incarceration continues. Aboriginal mothers in New South Wales have been found to have high levels of stress generally, poor mental health, and high levels of mental health diagnoses.[177] 'Equal treatment' is not appropriate in providing equitable healthcare when Aboriginal women experience much lower health outcomes.

'Equal treatment' is furthermore an inappropriate and inequitable strategy for incarcerated women, because it is not at all location based. A study has shown that Aboriginal mothers in prison in WA are more likely to speak an Aboriginal language, whereas mothers incarcerated in NSW are more likely to have experienced separation from their families as children.[178] These groups of women need different throughcare for many reasons. Those in WA who may have a closer connection to culture, or be from remote communities going to prison, will generally experience higher levels of discrimination policing,[179] while those who have histories of trauma will need a more mental health focused level of care.

**Aboriginal Health Services**

Aboriginal women have restricted access to both Aboriginal Community Controlled Health Organisations (ACCHOs)[180] and government funded assessments through Medicare.[181] The importance of culturally safe Healthcare is not a disputed need, with one study finding:

*'Addressing [social and emotional wellbeing], discrimination and psychological distress through culturally safe models of care is critical to breaking the cycle of incarceration and improving the health and SEWB of Aboriginal mothers in prison and their families and communities. This needs to be informed by the women themselves and collaboration with Aboriginal community-controlled organisations.'*[182]

In Victoria, where some prisons are privately owned, Aboriginal prisoners do not get access to Aboriginal community-controlled healthcare.[183] Further, all prisoners are denied Medicare. This is completely inconsistent with Article 24 of the UNDRIP which provides that Indigenous people should have access to the highest available level of healthcare.[184] For Indigenous Australians, the highest level of healthcare needs to be culturally informed and needs to extend beyond time spent in prison. Another study stated,

[177] Sullivan et al (n 174) 245.
[178] Ibid.
[179] Ibid.
[180] Kendall et al, (n 172) 3.
[181] Ibid.
[182] Ibid.
[183] Sullivan et al (n 174) 246.
[184] *UNDRIP* (n 2) article 24.

*'More particularly, the service providers that do not manage formal prison throughcare programs indicated that, even if there are services provided in the prison, they are insufficiently aware of them and there is a lack of communication and collaboration.'*[185]

The Australian Law Reform Commission has stated that the best throughcare involves the utilisation of Aboriginal and Torres Strait Islander controlled organisations.[186] It would be especially helpful where individuals have used these organisations prior to entering prison, and need to continuing support through the time spent incarcerated.[187] Further, it is important that interagency collaboration take place to make sure the care that Aboriginal women are receiving is extensive, informed, and comprehensive.[188] The lack of access to these services takes away autonomy from Aboriginal women, usually taking away any notion of self-determination in having a say in their treatment, healthcare options and even in continuing medication they were previously prescribed before entering custody.[189] Long weight times for checks, diagnostic testing, and medication review are all barriers to Aboriginal women's access to healthcare. Upon release, prisoners have a higher rate of hospitalisation than the general public, with even higher rates for Aboriginal prisoners.[190] Should these individuals be able to access targeted healthcare that focuses on culturally safe and informed care, many of these obstacles would be removed.

**Recommendations**

10. The current strategy of 'equal treatment' enshrined in *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)* should be replaced with a new strategic model that considers the vulnerabilities and needs of Aboriginal women, the differences in experience, and their different needs to non-Indigenous women.
11. Aboriginal support and health services should be available to incarcerated Aboriginal women as they are in the community. For many women, the lack of access to these familiar and necessary services results in lower health outcomes, and less access to appropriate care.

Aboriginal women are over-represented in the Australian criminal legal system. The rate of Aboriginal women in prison is rising, and there are many obstacles that create barriers to sufficient healthcare whilst incarcerated. Aboriginal and Torres Strait Islander people have experienced systemic and institutional racism since Australia was colonised, and the effects of this displacement result in psychological, physical, and social outcomes that separate Aboriginal women within the legal system in a pervasive way compared to non-Indigenous women. These disparities need to be accounted for when considering throughcare and general

[185] Blagg et al (n 176) 50.
[186] "The Provision of Throughcare", *ALRC* (Webpage, 2017) <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/5-prison-programs-parole-and-unsupervised-release/the-provision-of-throughcare/>.
[187] Penelope Abbott et al, "Do Programs for Aboriginal and Torres Strait Islander People Leaving Prison Meet Their Health and Social Support Needs?" (2017) 26(1) *Australian Journal of Rural Health* 10.
[188] "The Provision of Throughcare" (n 186).
[189] Kendall et al, (n 172) 7.
[190] Abbott et al (n 187) 8.

health of Aboriginal women. To move toward the standards set out in the UNDRIP, changes need to be made to access to healthcare and throughcare for these women to halt the alarming rise in Aboriginal women who are incarcerated. These recommendations target the problem areas within Indigenous healthcare and need to be addressed swiftly to mitigate the ongoing effects of colonisation by allowing Aboriginal women to assert their rights and experience adequate healthcare.

## Criminal Legal System - Overrepresentation of Aboriginal and Torres Strait Islander Youth[191]

This section draws on certain specific human rights obligations contained in the UNDRIP, the *Universal Declaration of Human Rights* ('UDHR')[192] and the *Convention on the Rights of the Child* ('CRC')[193] to make recommendations that will hold Australia accountable to its international obligations regarding Aboriginal and Torres Strait Islander young people. In particular, this submission focuses on Australia's unconscionable age of criminal responsibility, the disproportionate overrepresentation of Aboriginal and Torres Strait Islander young people in the criminal legal system,[194] and the adverse use of police discretion when dealing with Aboriginal and Torres Strait Islander young people.

### Principles

Australia is party to seven core international human rights treaties,[195] this does not however, include the UNDRIP. Accordingly, Australia can introduce new law and policy without first ensuring its compliance with the minimum human rights standards set out in the UNDRIP. Below are some of the key human rights provisions contained in the UNDRIP, UDHR and CRC that will be addressed in this submission.

Article 2 of the UNDRIP states that,

[191] Section authored by Jasmin L'Green.
[192] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*').
[193] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').
[194] This submission uses the phrasing 'criminal legal system', not 'criminal justice system' as this submission argues the criminal legal system is not 'just' and does not deliver justice for Indigenous youth or Indigenous adults.
[195] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature on 21 December 1965, 2106 UNTS 1 (entered into force 4 January 1969); *CRC* (n 193); *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature on 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

> *"Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."*[196]

Similarly, Article 2 of the UDHR sets out that,

"*Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[197]

Article 8 of the UNDRIP states that,

> *"Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."*[198]

Article 30 of the CRC states that,

> *"In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."*[199]

**The Age of Criminal Responsibility**

The continued overrepresentation of Aboriginal and Torres Strait Islander young people in the criminal legal system should be considered a 'national crisis.'[200] Nationally, Aboriginal and Torres Strait Islander young people are 17 times more likely to be imprisoned than non-Indigenous young people. [201] In the Northern Territory, this number is more than doubled at 43 times more likely.[202] Despite making up only 6 per cent of young people aged between 10 and 17, Aboriginal and Torres Strait Islander young people account for over half (approximately 57 per cent) of youth in detention.[203] This proportion increases to 78 per cent for Aboriginal and Torres Strait Islander young people between the ages of 10 and 13.[204] Distressingly, this

[196] *UNDRIP* (n 2) art 2.
[197] *UDHR* (n 192) art 2.
[198] *UNDRIP* (n 2) art 8.
[199] *CRC* (n 193) art 30.
[200] Australian Child Rights Taskforce, *The Children's Report: Australia's NGO Coalition Report to the United Nations Committee on the Rights of the Child* (Report, 1 November 2018) 13.
[201] Lorena Allam, 'Indigenous Children 17 times more likely to go to jail than non-Indigenous Youth', *The Guardian* (Web Page, 16 July 2020) < https://www.theguardian.com/australia-news/2020/jul/16/nts-indigenous-young-people-43-times-more-likely-to-go-to-jail-than-non-indigenous-youth>
[202] Ibid.
[203] Daniel Hurst, 'More than 30 countries condemn Australia at UN over high rates of child incarceration', *The Guardian* (Web Page, 21 January 2021) < https://www.theguardian.com/australia-news/2021/jan/21/china-attacks-australia-at-un-over-baseless-charges-as-canberra-criticised-for-keeping-children-in-detention>
[204] Ibid.

number continues to increase each year while numerous and ongoing recommendations for reform are not implemented.[205]

These statistics must be understood in the broader context of colonisation, dispossession of Aboriginal land, assimilation, genocide, disruption of kinship systems and connection to country, complete rejection of Aboriginal culture and knowledge systems, societal exclusion, systemic racism, forced poverty and the resulting cycle of intergenerational trauma and disadvantage these factors have collectively produced.[206]

Australia's preparedness to criminalise children under 14 years old is directly inconsistent with international human rights standards.[207] Australia has been condemned by the international community on numerous occasions for its 'internationally unacceptable' practices.[208] At the United Nations Human Rights Council's Universal Periodic Review in January 2021, over 30 countries scrutinised Australia's age of criminal responsibility, linking this directly to the overrepresentation of Aboriginal and Torres Strait Islander young people in prison. The international community has made clear its expectation that Australia raise the age of criminal responsibility from 10 to at least 14 years.

It is evident that Aboriginal and Torres Strait Islander young people are not *'free and equal to all other peoples and individuals'* and are not *'free from any kind of discrimination in the exercise of their rights*.'[209] Australia has an international responsibility to implement and enforce the provisions of the UNDRIP to ensure the fundamental freedoms and human rights of First Nations youth are protected and upheld in practice.

**Mandatory Cultural Training for Police**

Research has consistently illustrated that juvenile 'justice' systems are primarily made up of the most vulnerable young people, those who come from backgrounds of entrenched disadvantage, poorer educational outcomes, drug and alcohol addiction, trauma and abuse and

[205] Casey Temple, Patrick Mercer and Neerim Callope, 'Australia's First Nations Incarceration Epidemic: Origins of Overrepresentation and a Path Forward', *United Nations Association of Australia* (Web Page, 18 March 2021) <https://www.unaa.org.au/2021/03/18/australias-first-nations-incarceration-epidemic-origins-of-overrepresentation-and-a-path-forward/>; Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 31 March 1997); *Pathways to Justice* (n 65).

[206] *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2; Temple, Mercer and Callope (n 205).

[207] United Nations Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice,* 45th sess, UN Doc CRC/C/GC/10 (25 April 2007); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'),* A/RES/40/33 ( 29 November 1985) Rule 19: "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period;" *CRC* (n 193) art 37; *UNDRIP* (n 2) arts 2, 8; *UDHR* (n 192) art 2.

[208] *Children's Rights in Juvenile Justice* (n 207) 11: "…it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable."

[209] *UNDRIP* (n 2) art 2.

unstable living arrangements.[210] Aboriginal and Torres Strait Islander young people experience a number of these disadvantages at a disproportionate rate for reasons outlined above.

It is uncontentious that incarceration has ongoing detrimental effects on young people, including to their physical and psychological development.[211] There is now general consensus that young people should be diverted from the criminal legal system wherever possible to reduce the likelihood of reoffending and promote rehabilitation.[212] For example, more than 80 per cent of young people placed in detention in Australia will return to detention within 12 months.[213] Whereas, around 85 per cent of diverted young people will not reoffend.[214]

There are myriad alternatives to criminalisation of youth, ranging from formal police cautions and warnings to court-ordered mental health or drug treatment.[215] Diversionary options initiated by police are highly variable as police have a large amount of discretion when dealing with young people.[216] Police have been described as the 'gate-keepers' of the criminal legal system, determining who enters and how they enter.[217] Accordingly, police have a pivotal role in reducing the overrepresentation of Indigenous young people in prison and ensuring Australia's compliance with the UNDRIP in practice. Nevertheless, police in every Australian jurisdiction continue to use their discretion adversely against the rights of Aboriginal and Torres Strait Islander young people. Common examples include the arrest of Indigenous youth for offensive language, public intoxication and/or unpaid fines.[218]

The exercise of police discretion when dealing with Indigenous young people must be informed by Australia's ongoing legacy of dispossession and assimilation and the enduring effects this has on Indigenous young people and their perception of the law and law enforcement. Law enforcement officers need to understand the disadvantage suffered by many Indigenous young people in this context and not in isolation. This can be achieved through the implementation of mandatory cultural training.

The current practices of police officers in the exercise of their discretion directly contributes to the overrepresentation of Indigenous young people in prison and undermines a number of

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[210] Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173-189; Devon Indig et al, *2009 NSW Young People in Custody Health Survey* (Full Report, March 2011).
[211] Elizabeth Barnert et al, 'How Does Incarcerating Young People Affect Their Adult Health Outcomes?' (2017) 139(2) *Paediatrics* 1, 7; Laurence Steinberg and Ron Haskins, 'Keeping Adolescents Out of Prison' (Policy Brief, The Future of Children, Fall 2008), 3.
[212] *The Beijing Rules* (n 207)*;* Lesley McAra and Susan McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transition and Crime' (2010) 10(2) *Criminology and Criminal Justice* 179.
[213] Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2018-19* (Report, 1 September 2020) 13.
[214] *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) vol 1, 27.
[215] David O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Back' (2012) 21(1) *Nottingham Law Journal* 86, 91.
[216] *Young Offenders Act 1997* (NSW).
[217] Cunneen, Goldson and Russel (n 210); Anna Corbo Crehan, '"Appropriate" Police Discretion and Indigenous Over-Representation in the Criminal Justice System' (2010) 11(1)-(2) *Australian Journal of Professional and Applied Ethics* 1-13.
[218] Crehan (n 217).

Australia's international human rights obligations, specifically the right of Indigenous people to *"not be subjected to forced assimilation or destruction of their culture"*[219] and the right of an Indigenous child *"not to be denied the right, in community with other members of his or her group, to enjoy his or her own culture…"*[220]

**Recommendations**

To give substance to Australia's international obligations under the UNDRIP, the UDHR and the CRC, this submission strongly recommends that:

12. All Australian jurisdictions raise the age of criminal responsibility from 10 to at least 14 years as recommended by the international community and in line with the global median across 86 countries;
13. Police officers only arrest and detain Aboriginal and Torres Strait Islander young people as a last resort and only for the most serious crimes after all other diversionary measures have been exhausted;
14. Aboriginal and Torres Strait Islander young people on remand for minor offences be allowed to wait for their court hearing and/or sentencing in community under the supervision of an elder to reduce the number of youth in detention; and
15. Mandatory cultural training be enforced as a prerequisite to police training and recruitment across all Australian jurisdictions, with particular attention to the Northern Territory where Aboriginal and Torres Strait Islander incarceration rates are highest. This cultural training should be continuously reviewed, amended and updated from time-to-time and as required in consultation with Indigenous representatives to ensure an appropriate response is implemented to combat adverse and inappropriate use of police discretion against Aboriginal and Torres Strait Islander young people.

## Family and Child Law - The Overrepresentation of Aboriginal and Torres Strait Islander Children in Out of Home Care[221]

While the notions of law and justice are often used interchangeably, the law repeatedly serves to legitimise the inequities experienced by Indigenous peoples. Law's involvement in the suppression and domination of Indigenous culture is prevalent in child protection systems, where a child's connection to family and community, and their sense of identity and culture, is seldomly recognised or respected.

In Australia, law concerning child protection is considered an area of public law legislated by states and territories.[222] This form of law is often regarded as a reactive model of protection, as child protection authorities typically become involved *after* risk of [or actual] harm to a child

[219] *UNDRIP* (n 2) art 8.
[220] *CRC* (n 193) art 30.
[221] Section authored by Rochelle James and Zoe Linnane.
[222] Adelaide Titterton, 'Indigenous Access to Family Law in Australia and Caring for Indigenous Children' (2017) 40(1) *UNSW Law Journal* 146, 146.

is raised.[223] This exacerbates risks for children, particularly Indigenous children as their connection to culture and country is repeatedly jeopardised. The overrepresentation of Indigenous children in the care and protection system is a nationwide crisis.[224] Current child protection systems in Australia mimic post-colonial policies by reinforcing the prejudice, intergenerational trauma, cultural bias, and assimilation that the Stolen Generations introduced. As concerned voices continue to rise at both national and international levels, it is clear that reform in this area is required. While there are analogous concerns across all Australian jurisdictions,[225] this submission will focus on New South Wales.

Ratifying the UNDRIP within Australian Law is an appropriate step towards national understanding and unity. Further, the UNDRIP Articles which directly relate to children, namely Articles 7, 21 and 22, echo Article 30 of the CRC. This consistency is indicative that reform in this context is not merely aspirational, but rather is crucial to ensure Australia fulfils its binding obligations under international law. Also, ratification of existing treaty rights regarding self-determination for Indigenous Peoples in articles 3, 4 and 5 of the UNDRIP is essential to implementing meaningful autonomous governance in child protection for Indigenous communities. Additionally, effective Indigenous Self Determination frameworks can play a pivotal role in reforming harmful child protection systems across the country.

**Relevant UNDRIP Articles**

*Article 3*

*Indigenous 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.*

*Article 4*

*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

*Article 7*

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[223] Ibid.

[224] Aboriginal Legal Service, Submission No. 53 to NSW Parliamentary Committee on Children and Young People, *Inquiry into the children protection and social services system* (15 January 2021) 7.

[225] See, eg, Megan Davis, *Family is Culture*: *Independent Review into Aboriginal Out-Of-Home Care in NSW* (Final Report, October 2019) 252-253; Paul Delfabbro et al, 'The Over-Representation of Young Aboriginal or Torres Strait Islander people in the South Australian Child System: A Longitudinal Analysis' (2010) 32(10) *Children and Youth Services Review* 1418; The Australian Centre for Social Innovation, *Generation by Generation* (Report, June 2016); Commission for Children and Young People, *In Our Own Words* (Report, November 2019); Rochelle Einboden, 'The Problem with Child Protection Isn't the Money, It's the System Itself', *The Conversation* (Web Page, 19 November 2019) <https://theconversation.com/the-problem-with-child-protection-isnt-the-money-its-the-system-itself-127111>.

*1. Indigenous individuals have the rights to life, physical and mental integrity, liberty, and security of person.*

*2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.*

*Article 21*
*1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.*

*2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children, and persons with disabilities.*

*Article 22*
*1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children, and persons with disabilities in the implementation of this Declaration.*

*2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.*

*Article 30*
*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*

Australia's commitment to the protection and enforcement of the rights of the child is evinced through its actions of ratifying the CRC on 17 December 1990. Evidently, as Articles 7, 21 and 22 of the UNDRIP echo Article 30 of the CRC, protecting the UNDRIP principles through legal and institutional reform is a crucial step in ensuring Australia fulfils its binding international obligations.

**Operation of the Child Protection System**

While states and territories each have their own distinct child protection system and legislation, the general philosophies and values underpinning their structures are alike.[226]

A family's involvement with the child protection system will usually be triggered through a report being made to the relevant child protection department.[227] These reports may derive from mandatory reporters or other people involved in the child/family's life.[228] Through a screening process, the child protection department determines whether the report is to be substantiated – based on whether the child is at risk of 'significant harm'.[229] Factors constituting 'significant harm' may include the child's basic psychological or physical needs not being met,[230] or the child being at risk of physical or sexual abuse.[231] Child protection legislation allows for those children subject to substantiated reports to be removed from their families and be placed in Out-Of-Home Care (OOHC) if deemed necessary,[232] however this should be a final resort.

**A System Mimicking the Stolen Generations**

The child protection framework in New South Wales is inextricably linked to Australia's colonial history.[233] Under colonial policies, Indigenous children were forcibly removed from their families, communities, culture, and Country under protection, assimilation, and segregation policies.[234] This is what is now referred to as the Stolen Generations.[235]

While it is claimed that a prohibition on the forceable removal of Indigenous children transpired in 1969,[236] Indigenous children continue to be disproportionately removed and represented in OOHC under the current legal framework–[237] being eight times more likely to enter the system.[238] Evidently, the policies underpinning the contemporary child protection system mimic post-colonisation and further endorse the discrimination, intergenerational trauma, and cultural bias and assimilation introduced by the Stolen Generations.[239]

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[226] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report, June 2015) 5 ('Family Law Council').
[227] Davis (n 225) 57; Family Law Council (n 226) 5.
[228] Davis (n 225) 67; Family Law Council (n 226) 5.
[229] *Children and Young Persons (Care and Protection) Act 1998* s 23(1) ('*Care and Protection Act*').
[230] Ibid s 23(1)(a).
[231] Ibid s 23(1)(c).
[232] See, eg, ibid ss 43-44.
[233] Davis (n 225) 3.
[234] Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 31 March 1997).
[235] Ibid.
[236] Ibid.
[237] Terri Libesman, 'Indigenising Indigenous Child Welfare' (2007) 6(24) *Indigenous Law Bulletin* 16, 16 ('Indigenising Indigenous Child Welfare'). See also 'Rethinking Restoration', *The Australian Centre for Social Innovation* (Web Page, 2022) <https://tacsi.org.au/work/rethinking-restoration/> where alarmingly it has been claimed that more Indigenous children are being taken today than during the Stolen Generations.
[238] Davis (n 225) 43. This number is said to only increase. See Aboriginal Legal Service, *Submission to NSW Parliamentary Committee on Children and Young People's Inquiry into the Children Protection and Social Services System* (Submission, 15 January 2021) 7.
[239] Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21(1) *The International Journal of Children's Rights* 59, 60.

The disproportionate, involuntary removal of Indigenous children from their families is entrenched in the legacy of colonisation and institutional racism.[240] The existence of complex, endemic post-traumatic stress disorder in modern Indigenous communities began as a direct consequence of historic trauma transmission from colonial laws and intergenerational experiences of the Stolen Generations.[241] This trauma manifests itself in multiple risk factors which disproportionately connect to interaction with the child welfare system.[242] Additionally, the current care and protection system in NSW upholds enduring cultural prejudice against parenting models of Indigenous communities.[243] It is intended to respond to harm rather than prevent it from occurring in the first place, which translates to inadequate and culturally insensitive services for Indigenous families.[244]

**Aboriginal and Torres Strait Islander Placement Principle**

The Aboriginal and Torres Strait Islander Placement Principle ('the ATSICPP') was established in response to the trauma experienced by Aboriginal and Torres Strait Islander communities resulting from the Stolen Generations.[245] The ATSICPP incorporates five inter-related elements: prevention, partnership, placement, participation and connection[246] which aim to reduce rates of child removal and enhance and preserve a child's connection to their family and community, along with protecting their sense of identity and culture.[247] Where removal of an Indigenous child is deemed necessary, the ATSICPP's 'placement hierarchy' directs and guides through identifying placement choices in a descending order, with a non-Indigenous placement being a last resort.[248] While the ATSICPP has been enshrined in legislation across all Australian jurisdictions,[249] the issues concerning its effective interpretation, implementation, and compliance are signified in practice.[250] The following case study is an exemplar of not only the ineffectual use of the ATSICPP, but also the wider lack of

[240] Ibid.
[241] Davis (n 225) 21.
[242] Aboriginal Legal Service, Submission No. 53 to NSW Parliamentary Committee on Children and Young People, *Inquiry into the Children Protection and Social Services System* (15 January 2021) 7.
[243] Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 31 March 1997).
[244] Ibid.
[245] The ATSICPP was inspired by the success of the *Indian Child Welfare Act 1978* for Native American Indians in the United States. See Fiona Arney et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle* (Report No 3, 2015) 4.
[246] Arney et al (n 245) 2. See also Paul Grey, 'Beyond Placement: Realising the Promise of the Aboriginal and Torres Strait Islander Child Placement Principle' (2021) 33(1) *Judicial Officers Bulletin* 99.
[247] Arney et al (n 245) 4.
[248] Ibid 2.
[249] See, eg, *Care and Protection Act* (n 8) ss 11-13; *Child Protection Act 1999* (Qld) ss 5c; *Children's Protection Act 1993* (SA) ss 5-6; *Children and Community Services Act 2004* (WA) s 12; *Children, Youth and Families Act 2005* (Vic) s 13; *Care and Protection of Children Act 2007* (NT) s 12; *Children and Young People Act 2008* (ACT) s 513. Notably, the *Children, Youth and Families Act 2005* (Vic) has incorporated an innovative provision (s 176) which requires that the Secretary to the Victorian Department of Human Services must prepare and monitor the implementation of 'a culture plan for each Aboriginal child placed in Out-Of-Home-Care under a guardianship to the Secretary order'. See further Terri Libesman, 'Contemporary Aboriginal and Torres Strait Islander Children's Welfare' in Larissa Behrendt et al (ed) *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2019) 47, 57.
[250] Davis (n 225) 252.

appreciation and misunderstanding of Indigenous culture – critical factors which contribute to the entrenched cycle of intergenerational trauma.

Case **Study**

J was an Aboriginal child in the cohort who was removed at birth. J's mother, A, had been removed as a child herself and FACS had been involved with J's father when he was a child. A's grandmother was part of the Stolen Generations.

There were issues in J's home prior to his birth (and removal), including substance abuse and domestic violence. FACS received the first ROSH report for J nearly two months prior to his birth and removal but did not provide any casework before his removal.

A Safety Assessment was done on the day of J's removal with the outcome 'Unsafe'. The information in the case file raises questions about the accuracy of this assessment, for example, a danger was identified based on the fact that J's mother, A, did not give details of her newborn's 'lunchtime routine'. At the time of the assessment, A was a first-time mother of a one-day-old baby. 'A' had indicated that she planned to feed her baby every three to four hours as she had been advised. The case file also indicates that A had prepared supplies such as bottles and that she had indicated that she would work with Brighter Futures.

Even though there had been generations of trauma in this case, we still see a mother attempting to parent her newborn baby but being prevented from doing so.

When J was removed, he was not placed with his Aboriginal grandmother, who had requested to care for him. He was left in hospital for several days and then placed with a non-Aboriginal foster family for five months, before being placed with his grandmother. In the crucial days and weeks after birth, the stage was set for another generation of trauma.

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**Issues with the Current System**

As depicted in the above case study, the implementation of the ATSICPP remains inadequate.[251] While such concerns have existed for decades,[252] minimal change has transpired. In 2015, figures suggested that the ATSICPP had been fully applied in only 13 per cent of child protection cases involving Indigenous children.[253] As Arney[254] reports, there are several barriers which hinder the effective implementation of the ATSICPP. These barriers include the increasing overrepresentation of Indigenous children in the child protection system, a shortage of available Indigenous foster and kinship carers, inconsistent Indigenous participation and

[251] Davis (n 225) 252. See further case study in 'Saying Sorry Isn't Enough for Indigenous Children', *The University of Sydney* (Web page, 26 May 2016) <https://www.sydney.edu.au/news-opinion/news/2016/05/26/saying-sorry-isn-t-enough-for-indigenous-children.html>. See also *Drake and Drake* [2014] FCCA 2950, [73] (Sexton J) for another example of where the ATSICPP has not been employed.
[252] See, eg, United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention* (Sixtieth Session, 29 May-15 June 2012) 12-13.
[253] Arney et al (n 245) 1.
[254] Ibid 7-8.

contribution in child protection decision-making, and varying degrees of quantification, measurement, and monitoring of the ATSICPP across each jurisdiction.[255]

This lack of implementation can be further attributed to the widespread misunderstanding and non-compliance of the ATSICPP, qualified by the reality that in practice, its existence is either ignored, or it is applied in a narrow or tokenistic manner.[256] Reasons for this concern can be largely accredited to the way this area is legislated. For example, section 13 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), while titled 'Aboriginal and Torres Strait Islander Child and Young Person Placement Principles', only acknowledges the placement and connection elements of the ATSICPP.[257] In essence, this has encouraged the misinterpretation that the ATSICPP is merely a placement hierarchy by overlooking its other crucial principles. Subsequently, through the New South Wales legislation permitting a discretionary application of the ATSICPP – for example, allowing for placement determination to be decided on a 'practicable' basis,[258] opportunities to penalise for non-compliance are eliminated.[259] As demonstrated in the preceding case study, this discretion permitted the department to circumvent the ATSICPP and place J with a non-Indigenous family, despite having an available Indigenous grandmother. Consequently, this discretionary decision legitimised a further generation of trauma for J and his family.

As such, it is clear that the child protection system in New South Wales symbolises a culture of misunderstanding, non-compliance, and lack of accountability – a culture that enables the enforcement of Western ideologies.[260] This in turn compromises the rights of Indigenous peoples and allows for the continuation of intergenerational trauma.[261] To overcome this culture and to better safeguard the right of Indigenous peoples, the ATSICPP needs to be more broadly understood and applied, which will require the implementation of appropriate guidance and leadership.[262]

**Self Determination in the Care and Protection Space**

A lack of structural self-determination has been argued as a fundamental factor in the Indigenous child protection crisis in NSW.[263] AbSec has argued that in the child welfare system, a lack of self-determination manifests itself in the simple permanent transferral of

[255] Arney et al (n 245) 7-8.
[256] Davis (n 225) 252; Senate Community Affairs References Committee, *Out of Home Care* (Report, 2015).
[257] Davis (n 225) 250.
[258] See, eg, *Care and Protection Act* (n 8) s 13(1)(b)-(d).
[259] Davis (n 225) 250.
[260] Libesman (n 231) 16.
[261] See Juanita Sherwood, 'Intergenerational Trauma Isn't Just Another Determinant of Indigenous Peoples' Health' (2015) *Journal of Ethics in Mental Health* 1,1.
[262] Arney et al (n 245) 18; Davies (n 4) 253.
[263] Davis (n 225) 83.

children from marginalised to comparatively more advantaged families, rather than focusing on the value and rights of Indigenous children.[264]

Under articles 3, 4 and 5 of the UNDRIP, Australia has an international obligation to facilitate self-determination for Indigenous Australians. The UNDRIP defines self-determination as a collective, exercisable right for Indigenous Peoples to freely control their political status and cultural, economic, and social destiny.[265] In exercising this right, they have the power to autonomy and self-government in their internal and local matters.[266]

The notion of self-determination in the child protection space is vague in law and policy at the federal and state level.[267] The right to self-determination is not legislated in either commonwealth or state legislation. Section 11 of *the Children and Young Persons (Care and Protection) Act* 1998 (NSW) puts forward the state's position on self-determination. No specific definition is provided in the statute, creating an ambiguous and indeterminate rendering of the right. Consequently, the term in practice is used inconsistently by stakeholders.[268] Self-determination is referred to as a principle by some stakeholders and a right by others. As a result, there is a misunderstanding of what self-determination is and how it should be implemented. The way self-determination is conceptualised in the Act creates weak participatory rights for the state.[269] The state is not required to actively engage in structural recognition of autonomous arrangements in Indigenous communities, nor transfer power to Indigenous communities.[270] In holding all power for child protection measures, the state may invoke their discretionary power to permit Indigenous community consultation and participation in implementing support services and strategies. The vague definition and weak recognition of self-determination in NSW are inconsistent with the right conferred in the UNDRIP.[271]

It has been argued that a child protection system is only effective for Indigenous children when it is consistent with the international human rights obligation to self-determination found in the UNDRIP.[272] Thus, definition, recognition, and structural implementation of the right to self-determination into domestic child protection systems can reform the current failings. This would be achieved by first recognising that Indigenous communities have the right to be free of unjustified government involvement and respond appropriately to their communities' issues.[273] Collaboration between Indigenous communities and the state welfare department must be facilitated to allow Indigenous understandings to permeate all facets of service design,

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[264] Aboriginal Child, Family and Community Care State Secretariat (AbSec), Submission No 13 to Family is Culture*, Independent Review of Aboriginal Children and Young People in OOHC in NSW* (21 December 2017) 5.
[265] Ibid.
[266] Ibid.
[267] Davis (n 225) 78.
[268] Ibid.
[269] Ibid 81.
[270] Ibid.
[271] Libesman (n 231) 17.
[272] Davis (n 225) 80.
[273] Ibid.

delivery and legislation.[274] Also, state welfare departments must facilitate community capacity to create and execute programs and policies that address and ameliorate socioeconomic disadvantage from intergenerational trauma.[275]

**Recommendations**

Based on above, the following recommendations are proposed:

16. The Commonwealth Parliament should consult with Indigenous communities to ascertain the meaning ascribed to self-determination understood by Indigenous peoples in Australia.
17. The Commonwealth Parliament should ratify Articles 7, 21, and 22 of the UNDRIP and work with all states and territories to construct a national, uniform approach to the ATSICPP.[276] In setting a national benchmark, the Commonwealth Parliament will show leadership by coordinating, guiding, and encouraging all Australian jurisdictions to pass uniform legislation. This will eliminate ambiguity within each jurisdiction and will ensure that Australia fulfils its obligations under international law, particularly those that are binding, namely, Article 30 of the CRC, by ratifying pre-existing treaty rights.
18. The Commonwealth Parliament should endorse constitutional reform through a referendum to establish a First Nations Voice to Parliament, in accordance with the terms proposed by the Uluru Statement from the Heart.[277] This would allow for a far greater capacity to hear and work with the perspectives of Indigenous peoples, and would ensure their voices, aspirations, and goals were considered in the making of child protection legislation and policy. Further, this would preserve the distinct sovereignty of Indigenous peoples and promote social justice through eliminating the inequality between those creating and amending laws and those subject to them.
19. The Commonwealth Parliament should ratify Articles 3, 4 and 5 of the UNDRIP and work with all states and territories to implement a national, uniform approach to self-determination, informed by the understanding of the term as established by recommendation sixteen. In setting a national benchmark, the Commonwealth Government will show leadership by coordinating, guiding, and encouraging all Australian jurisdictions to pass uniform legislation. This will eliminate ambiguity between each jurisdiction and ensure that Australia fulfils its obligations to Indigenous self-determination under international law. This process must include consultation with the Indigenous community at every stage.
    19.1 Working under a uniform understanding of self-determination: it is encouraged that the states undertake a devolution of power from the state to

[274] Ibid 85.
[275] Libesman (n 231) 17.
[276] See, eg, the areas of equal opportunity law and discrimination law, where parallel statutes at both the Commonwealth and State levels co-exist. Evidently, it is not uncommon for both Commonwealth and State legislation to exercise legislative power in the same area; Commonwealth legislation does not have to override State law.
[277] See *Uluru Statement from the Heart* (n 37).

Indigenous communities, in the care and protection system, to achieve structural self-determination.

## Protecting Indigenous Cultural and Intellectual Property (ICIP): The Duty to Comply with Articles 11 and 31[278]

This section examines the legal issue of protecting Indigenous Cultural and Intellectual Property (ICIP)[279] in compliance with the UNDRIP. This submission proposes four recommendations that would allow Australia to protect ICIP and to comply with its obligations under the UNDRIP.

### ICIP and the UNDRIP

ICIP refers to 'all the rights that Indigenous people have, and want to have, to protect their traditional arts and culture'.[280] Furthermore, the purpose of protecting ICIP is that it allows for Indigenous people to continue to be 'custodians, practitioners and teachers of culture'.[281] These rights of ICIP can be found in Articles 11 and 31 of the UNDRIP.

*Article 11 of the UNDRIP reads as follows:*[282]

1. *Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
2. *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.*

*Article 31 of the UNDRIP reads as follows:*[283]

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also*

[278] Section authored by Jacob Switzer.
[279] 'But That's our Traditional Knowledge! – Australia's Cultural Heritage Laws and ICIP', *Arts Law Centre of Australia* (Web Page, 7 April 2013) <https://www.artslaw.com.au/article/australias-cultural-heritage-laws/#_edn8>; 'Terms of Reference', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/UNDRIP/Terms_of_Reference>.
[280] Ibid.
[281] Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006' (Policy Paper, 10 May 2006) 11 <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/terry_janke_icip.pdf>.
[282] *UNDRIP* (n 2) art 11.
[283] Ibid art 31.

*have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

2. *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

Articles 11 and 31 both carry obligations for states in how they should handle ICIP. The exact obligations are different according to each article.[284]

Article 11 emphasises the living nature of ICIP, and the right of Indigenous people to practice, maintain, protect and develop their culture. This article also requires states to provide a redress mechanism for instances where ICIP has been used without the free, prior and informed consent (FPIC) of the relevant Indigenous people. [285]

Article 31 also emphasises the rights of Indigenous people and their connection to their culture but makes special emphasis and reference to intellectual property rights. It emphasises that Indigenous people have the right to maintain, develop and protect their intellectual property. Furthermore, states under article 31 are obligated to recognise these rights and to ensure that they are protected.[286]

**Issues of Compliance**

Australia has taken a mixed approach when it comes to the protection of ICIP. In terms of intellectual property, this is handled at the federal level.[287] The states have taken some action on protecting ICIP but approached it from a cultural heritage perspective and have attempted to regulate these protections accordingly.[288] There are merits to both approaches, but compliance issues remain at both levels.

When it comes to the state level there has been progress in some states, as there is some legislation which aims to provide protection for ICIP.[289] However, legislation remains

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[284] Amnesty International, *United Nations Declaration on The Rights of Indigenous Peoples* (Amnesty International Australia) 6, 12 <https://www.amnesty.org.au/wp-content/uploads/2017/01/Declaration-Indigenous-Peoples.pdf>.

[285] Teina Te Hemara, 'The State of Intangible Cultural Heritage in Australia' *National Native Title Council* (Web Page) <https://nntc.com.au/news_latest/the-state-of-intangible-cultural-heritage-in-australia/>; Amnesty International, *United Nations Declaration on The Rights of Indigenous Peoples* (Amnesty International Australia) 6 <https://www.amnesty.org.au/wp-content/uploads/2017/01/Declaration-Indigenous-Peoples.pdf>;
Dean Jarret et al, *The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples* (Guide, November 2020) 22 <https://unglobalcompact.org.au/wp-content/uploads/2020/11/Australian-Business-Guide-to-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-People_FINAL.pdf>.

[286] Australian Human Rights Commission, *Community Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (Paragon Australasia Group, 2010) 50 <https://humanrights.gov.au/sites/default/files/document/publication/declaration_community_guide.pdf>.

[287] 'Guide to Intellectual Property in Australia' *Gilbert+Tobin* (Web Page, 29 July 2021) <https://www.gtlaw.com.au/knowledge/doing-business-australia/guide-intellectual-property-australia>.

[288] Te Hemara (n 285).

[289] Ibid.

inconsistent across all states with some having comprehensive protections while others have none at all.[290]

At the federal level, the current system of IP laws are woefully inadequate for providing adequate protection for ICIP material.[291] The system was not developed with the Indigenous worldview in mind, and so fails to protect these elements in a meaningful way.[292] An example of this is how copyright laws have an expiry date.[293] There is a legitimate basis for this in the Western model as it means eventually that an IP will become free to use for the public long after the creator has enjoyed commercial profits that existed due to the protection offered. In an ICIP context this can have unintended consequences. This feature can dispossess Indigenous people of their culture as their knowledge is only protected for a limited time, which is not compliant with the UNDRIP as it does not indicate acceptance for limitations to cultural protection.[294]

Furthermore, Indigenous people are often unable to use IP protections to protect their cultural elements since the law fails to recognise the material forms that are used by Indigenous people, such as oral traditions and dance.[295] This means that Indigenous people are unable to use IP protections even if they were readily available.

**Recommendations**

20. The federal government establish an Indigenous Body within IP Australia to assess and make determinations on IP applications involving ICIP. This recommendation is based on a previous recommendation contained in a report provided by IP Australia.[296] The UNDRIP requires states to work in conjunction with Indigenous people when it comes to the protection of ICIP.[297] In order to do this, it would follow that the government should ensure that it consults with Indigenous people when it comes to ensuring that their rights surrounding ICIP are protected.
    20.1 One method of ensuring this would be to create a body comprised of Indigenous people whose responsibility is to oversee applications that involved ICIP material. The role of this body would be to assess the application and to come to a determination. This would ensure that Australia is actively working

[290] Ibid.
[291] Australian Human Rights Commission (n 286).
[292] Michael Davis, 'Indigenous People and Intellectual Property Rights' (Research Paper No 20, Parliament of Australia, 1996-1997) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp20#CRITIQUES>.
[293] Jean Kearney, Aurora Intern, and Terri Janke, 'Rights to Culture: Indigenous Cultural and Intellectual Property (ICIP), Copyright and Protocols' *Terri Janke and Company* (Web Page, 29 January 2018) <https://www.terrijanke.com.au/post/2018/01/29/rights-to-culture-indigenous-cultural-and-intellectual-property-icip-copyright-and-protoc>.
[294] *UNDRIP* (n 2) art 31.
[295] Kearney, Aurora Intern and Janke, (n 293).
[296] IP Australia, 'Indigenous Knowledge' (Consultation Paper, IP Australia, February 2021) 5-6 <https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf>.
[297] *UNDRIP* (n 2) arts 11, 31.

with and supporting Indigenous people in protecting their cultural rights while also ensuring that it is complying with its obligations under the UNDRIP.

21. The federal government amend Australian IP legislation to allow for ICIP to be registered to a community rather than an individual. An issue identified in the current IP framework is that it fails to recognise collective ownership.[298] Individual ownership is consistent with how IP functions within the Western framework where the intention is to protect the exclusive rights of an individual to their IP.[299] However, in the case of protecting ICIP from infringement, the intention is not individual protection but rather a desire to protect a group from having their shared IP taken and used without their permission.
    21.1 To achieve this intended protection, the IP legislation must be amended to allow for collective groups to have shared ownership of IP. Reflections can be taken from frameworks already in existence, such as in Victoria.[300]
22. The federal government amend Australian IP legislation to broaden the materials that can be registered. Another gap identified in the current framework is that IP legislation only recognises certain 'materials' which can be registered and thus protected.[301] This means that the current IP framework often does not recognise the forms of ICIP that Indigenous groups wish to have protected.[302] This means Indigenous people are unable to protect important cultural elements such as their oral histories, dances and other knowledges as the law does not recognise these as IP elements capable of registration and protection. This is contrary to the obligations present in article 31 of the UNDRIP which requires states to take active steps to ensure that the cultural elements of Indigenous people are adequately protected.
    22.1 Thus, to ensure that these elements can be protected the federal government must either amend its IP legislation to allow for these broader cultural elements to be protected or to create new legislation that can function to protect these rights and materials that rightfully belong to Indigenous people.
23. The federal government pursue a unified national legislative framework that ensures consistency of legislation surrounding ICIP. Some of the states have begun to make attempts to create legislative frameworks that aim to protect ICIP.[303] These are admiral efforts and should be encouraged, but the federal government should aim to legislate for ICIP on the national level to close the gaps in protection that exist both at the state and national level. This unified legislative framework should contain recommendations 20-22. In this process, it is recommended that the federal government consult the Victorian legislation which could serve as a model for a national framework.[304] The government can attempt to close the gaps in ICIP protections either through amending

[298] Kearney, Aurora Intern and Janke, (n 293).
[299] Ibid.
[300] 'Protecting Aboriginal intangible heritage', *Victorian Government* (Web Page, 6 October 2021) <https://www.firstpeoplesrelations.vic.gov.au/protecting-aboriginal-intangible-heritage>.
[301] Kearney, Aurora Intern and Janke, (n 293).
[302] Ibid.
[303] Te Hemara (n 285).
[304] 'Protecting Aboriginal intangible heritage' (n 300).

the current IP legislation or by creating a new act that exclusively deals with the issue of ICIP.

The UNDRIP requires states to allow Indigenous people to protect their cultural heritage, which includes ICIP.[305] Australia has limited protections at the federal level that comprehensively protect and prevent the abuse of ICIP material.[306] Protections vary at the state level and vary according to jurisdiction.[307] This submission recommends that a federal legislative approach be adopted which recognises collective ownership, Indigenous knowledge and 'material' and allows for active participation of Indigenous people in the protection of their culture. These changes would ensure that Australia is compliant with its obligations under the UNDRIP.

## Land and Water – Native Title[308]

Central to the UNDRIP is land rights for Indigenous peoples. Yet, the United Nations Universal Periodic Review (Compilation on Australia) has described the *Native Title Act 1993* (Cth) ('NTA'), the main source of claims for land rights in Australia, as "a cumbersome tool requiring Indigenous claimants to provide a high standard of proof to demonstrate connection to land."[309] Since the High Court of Australia's landmark native title case in *Mabo v Queensland (No 2)* ('*Mabo*'),[310] land rights under native title claims have been marred in controversy and competing land interests. The NTA reflects this, with a high evidentiary burden for demonstrating a continued connection to land, under s 223, which reinforces the supremacy of colonised Australian law over traditional Indigenous lore. Whilst the NTA faces multiple challenges in reflecting the UNDRIP principles in land rights for Indigenous people, this section focuses on the high evidentiary burden the NTA creates, the obstacle this presents to Indigenous peoples, how this misaligns with the UNDRIP, and accordingly provides recommendations for reform to the NTA.

### Relevant UNDRIP Principles

The UNDRIP features several articles which relate specifically to Indigenous peoples' rights to land. These include:

> *Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*
>
> *Article 26:*

[305] *UNDRIP* (n 2) arts 11, 31.
[306] 'Indigenous Cultural and Intellectual Property (ICIP)' *Arts Law Centre of Australia* (Web Page) <https://www.artslaw.com.au/information-sheet/indigenous-cultural-intellectual-property-icip-aitb/>.
[307] Te Hemara (n 285).
[308] Section authored by Lucas Dowling.
[309] Human Rights Council, '*Compilation on Australia: Report of the Office of the United Nations High Commissioner for Human Rights*' UN Doc A/HRC/WG.6/37/AUS/2 (13 November 2020) 9.
[310] (1992) 175 CLR 1 ('*Mabo*').

1. *Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
2. *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
3. *States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*

*Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

**The Issue of 'Connection'**

Native Title was established at common law through *Mabo*, when the High Court rejected the legal fallacy of *terra nullius* and recognised that the Aboriginal and Torres Strait Islander people hold continuous rights and interests in land which pre-existed British contact.[311] Following the landmark decision in *Mabo*, *the Native Title Act 1993* (Cth) was enacted to provide a national system whereby claims for native title could be assessed, rights be recognised and protected, and the integrity of national land management systems be preserved.[312] Most pertinent to this submission is the definition of Native Title under the NTA, which places the burden of proof on Indigenous claimants. S 223(1) of the NTA defines native title as follows:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia

*Members of the Yorta Yorta Aboriginal Community v Victoria* (*'Yorta Yorta'*) provides a relevant discussion of 'connection', furthering s223(1)(b) outlined above, noting that a continuous connection to land since colonisation of Australia must be demonstrated by the

[311] Ibid.
[312] *Native Title Act 1993* (Cth) preamble.

Indigenous claimants.[313] Correspondingly, *Bodney v Bennell* finds that the connection must be 'substantially maintained' since the time of British contact.[314] Wensing's examination of Australia's adherence to the UNDRIP principles suggests Australia has a level of adherence in legislating a means for Indigenous people to make native title claims on land.[315] However, the issue of proving connection to land in the Australian system evidences that the NTA is not a panacea for Indigenous land rights, particularly in reference to article 27 of the UNDRIP around a 'fair' process of evaluating claims.[316] Evidently, the issue of connection in native title claims arise in two parts; the types of evidence admitted into court and the weight they are assigned, and the requirement of a substantial uninterrupted connection to land.

**Weighing of Evidence**

As emphasised in *Yorta Yorta,* anthropological evidence is given supremacy over Indigenous oral testimony. Through this, the Western legal system reveals its ignorance of the proper weighing of evidence, which should be grounded in Indigenous ways of knowing. In this case, the writing of a pastoralist was assigned greater weight than Indigenous oral testimonies, with the writing of Curr providing a threshold of historical fact which Indigenous evidence needed to meet;[317] despite complications surrounding the reliability of an 'amateur ethnographer'.[318] Though, whilst both s82 of the NTA and the Order 78(ii) of the Federal Court Rules have allowed for greater use of Indigenous customary law, such as dance or song, as evidence for native title claims, there is an inherent bias within judicial officers toward written and historical evidence.[319] This is due to the complexity of understanding and weighing Indigenous knowledges against traditional legal evidence, the latter which may appear to lack historical foundation.[320] Indeed, Justice Michelle Gordon and Simon Young encapsulate this complexity in their respective discussions of *Yarmirr v Northern Territory*,[321] highlighting that anthropological histories may not match the history reflected in Indigenous customary law.[322] This emphasises the issues created by the burden of proof resting on Indigenous people and the interpretation of their evidence by judicial officers.

**Requirement of Substantially Uninterrupted Connection to Land**

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[313] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[314] *Bodney v Bennell* (2008) 167 FCR 84, [179].
[315] Ed Wensing, 'Indigenous Peoples' Human Rights, Self-Determination and Local Governance: Part 1' [2021] (24) *Commonwealth Journal of Local Governance* 1, 1.
[316] Ibid.
[317] Alexander Reilly, 'The Ghost of Truganini: The Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453, 464.
[318] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015) 213.
[319] Kirsten Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title' (2005) 9 *Law Text Culture* 9, 97.
[320] Australian Human Rights Commission, *Options Paper: Reforms to the Native Title Act 1993 (Cth)* (Options Paper, 28 February 2018) 20.
[321] (2001) 208 CLR 1.
[322] Justice Michelle Gordon, 'The Development of Native Title: Opening Our Eyes to Shared History' (2019) 30 *Public Law Review* 314, 325; Simon Young, 'Law and Anthropology: The Unhappy Marriage?' (2014) 3 *Property Law Review* 236, 240.

Australia's colonial history of displacement and violence toward Indigenous people makes it inherently difficult for Indigenous claimants to prove the requirement of substantially uninterrupted connection to land.[323] Correspondingly, the United Nations' Committee on the Elimination of Racial Discrimination recognised the burden of proof requirements of legislation, such as the NTA, as exclusionary to Indigenous groups.[324] The requirement to prove connection to land places an onerous burden on Indigenous peoples and is misaligned with notion of a 'fair, independent, impartial, open and transparent process' as required by article 27 of the UNDRIP. The more a group has been dispossessed the less likely they are to meet this evidentiary burden and obtain a successful determination of native title. Therefore, the NTA is not a panacea for land rights for Indigenous people in Australia. Rather, the NTA, particularly s223(1), sets an exclusionary evidentiary burden for Indigenous people to meet; noting the difficulties colonisation contributes to proving uninterrupted connection to land. To remedy this high evidentiary burden, this submission makes the following recommendations:

**Recommendations**

24. The definition of Native Title in s223 of the NTA be expanded. S223 of the NTA needs to exclude a continued observance of traditions and customs by every generation since sovereignty was claimed, by allowing for the observance to have been interrupted.[325] In practice, this expansion of the definition reduces the burden of proof imposed on Indigenous people, particularly the evidentiary burden which requires each generation to demonstrate an observation of tradition and custom.[326] This expansion of the definition of native title acknowledges the harmful impact of colonisation on Indigenous populations, including the dispossession of land and intergenerational trauma, whilst ensuring these do not undermine and preclude Indigenous people from accessing their right to land as outlined in articles 25, 26, and 27 of the UNDRIP.
25. The introduction of a presumption of connection to land. The introduction of this presumption will alleviate the high standard of proof which bars Indigenous claimants from obtaining native title determinations, due to the adverse effects of colonisation and difficulties in evidence.[327] This will mitigate the disadvantages associated with differing experiences of colonisation. In practice, once Indigenous claimants have provided evidence as to their occupation of an area of claimed land, the onus of proof as to substantial interruption extinguishing their native title should rest on the opposing party; the absence of a rebuttal translates to a presumption of connection.[328] In effect, this reduces the evidentiary burden on Indigenous people and addresses concerns raised

[323] Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (Speech, Native Title User Group, 9 July 2008) [15].
[324] Committee on the Elimination of Racial Discrimination, '*Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia'* UN Doc CERD/C/AUS/CO/18-20 (8 December 2017) 4 [15].
[325] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015) 146.
[326] Ibid 148-150.
[327] Ibid 213.
[328] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: 2009* (Report No 2, 23 December 2009) 83.

by the Committee on the Elimination of Racial Discrimination of the exclusionary requirement for extensive evidence.[329] Ultimately, the presumption allows for greater fairness in the native title system, in line with article 27 of the UNDRIP, as Indigenous parties are presumed to have a connection to land and do not bear the onerous burden of proving this to the court.

## Land and Water – The Rights of Aboriginal and Torres Strait Islander People to Water[330]

Aboriginal and Torres Strait Islander People view the land and water as indivisible entities.[331] Land rights advocacy has been central to political movements, law reform, and social agendas for decades, however, demands for recognition of water rights have often been ignored by policymakers until recent years.[332] State and Commonwealth legislation has restricted the use of water for Indigenous communities across Australia in contradiction to international and customary laws. Further, Indigenous opinions, expertise, knowledge, and skills are often disregarded in relation to water management and resource allocation.[333] However, as natural disasters continue to worsen, including droughts and floods, water rights by Aboriginal and Torres Strait Islander communities have become resoundingly more important.[334] This section explores how the case study of the Murray-Darling Basin ('The Basin') in New South Wales (NSW) can guide law reform, that can be implemented across state, territory, and Commonwealth legislation. This submission recommends that Indigenous Peoples have a mandated opportunity to be more involved in water management strategies and have access to fairer distribution of water entitlements.

### Relevant UNDRIP Principles

International law provides for Indigenous rights to access water, utilise resources appropriately, and be involved in the ongoing negotiations of the appropriate use, management, and allocation of waterways.[335] Article 3 of the UNDRIP provides that Indigenous people have a right to self-determination and to freely pursue their economic, social, and cultural development. Article 25 of UNDRIP provides that Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities

[329] Committee on the Elimination of Racial Discrimination (n 324).
[330] Section authored by Gypsy-Lee Marsh.
[331] Ella Archibald-Binge, 'Indigenous Groups in Murray-Darling Basin Fight to Have Their Voices Heard Over Water Rights', *ABC News* (online, 26 May 2021) <https://www.abc.net.au/news/2021-05-26/indigenous-water-rights-murray-darling-basin-730/100166380>.
[332] Lana D Hartwig, Natalie Osbourne and Sue Jackson, 'Australia Has an Ugly Legacy of Denying Water Rights to Aboriginal People. Not Much Has Changed', *The Conversation* (online, 24 July 2020) <https://theconversation.com/australia-has-an-ugly-legacy-of-denying-water-rights-to-aboriginal-people-not-much-has-changed-141743> ('Australia has an ugly legacy of denying water rights').
[333] *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 explored the requirements of the Minister to consider recommendations and requests and dismissed the application based on the legislation.
[334] Archibald-Binge (n 331).
[335] Lee Godden, Sue Jackson, and Katie O'Bryan, 'Indigenous Water Rights and Water Law Reforms in Australia' (2020) 37(6) *Environmental Planning and Law* 655.

to future generations. Article 27 provides that states should implement a fair, independent, impartial, open, and transparent process to give appropriate recognition to Indigenous laws, traditions, customs, and systems to manage land, and allow active participation by Indigenous people in this process. Lastly, article 32(2) provides that states should consult and cooperate in good faith with Indigenous communities to obtain their informed consent before any work is completed in the waters of Australia that will thus affect their land.

**Case Study: The Murray-Darling Basin Plan**

The Murray-Darling Basin Plan ('The Basin Plan'), substantiated by the *Water Act 2007* (Cth) ('Water Act'), was enacted to restore the health of The Basin's water system to meet the needs of the farmers and local communities of The Basin.[336] However, the plan was initially formulated without the consultation or input of the local Indigenous communities. Aboriginal people in the region have advocated for the inclusion of their communities into water management and economic development of The Basin because of their profound knowledge and strategies.[337] Further, the international right to self-determination is contravened by the states who have been asserting control over water resources and creating complicated regulatory and legislative mechanisms that govern water distribution and the allocation of water entitlements.[338] Across the ten catchments of the Murray-Darling Basin, Aboriginal people hold a mere 0.2% of the available water, whereas Aboriginal people make up 9.3% of the local population.[339]

Despite the work by the National Cultural Flows Research Program (NCFRP) to provide knowledge on the importance of understanding Indigenous values with respect to water, development of water management procedures that align with Aboriginal governance do not exist.[340] Governments are unwilling to introduce reallocation measures to redress these injustices in water allocation to Traditional Owners, including in The Basin.[341] The NTA recognises Aboriginal and Torres Strait Islander people's right to consume and use water without the need for a specific license under the relevant statutory provisions (provided it is for personal and cultural purposes). This consequently does not extend to economic or commercial purposes.[342] This is affirmed by the *Water Management Act 2000* (NSW) ('Water Management Act') which restricts native title holders from constructing dams without approval.[343]

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[336] *Water Act 2007* (Cth) s 3.
[337] Godden, Jackson, and O'Bryan (n 335) 663.
[338] Lana D Hartwig, Sue Jackson and Natalie Osbourne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) *Land Use Policy* ('Trends in Aboriginal Water Ownership') 2.
[339] Hartwig, Osbourne, and Jackson, *Australia has an ugly history of denying water rights* (n 332).
[340] The National Native Title Council, 'Submission to the 2014 Review of The Water Act 2007 on Recognising Indigenous Water Interests in Water Law', *Department of Agriculture, Water, and the Environment* (Web Page, 2014) <https://www.awe.gov.au/sites/default/files/sitecollectiondocuments/water/63-national-native-title-council.pdf> 4-5.
[341] Sue Jackson, Rene Woods and Fred Hooper, 'Empowering First Nations in the governance and management of the Murray-Darling Basin' (2021) Murray-Darling Basin, Australia 2.
[342] Hartwig, Jackson, and Osbourne, *Trends in Aboriginal Water Ownership* (n 338) 7.
[343] *Water Management Act 2000* (NSW) s 55.

In The Basin, The National Water Initiative resulted in public licenses being capable of trading private property rights. Further, the number of these entitlements were affected by the amount of rainfall and storage capabilities.[344] Despite 32% of Australia's land being recognised under native title; Indigenous people hold less than 1% of the nation's water licenses. Further, restrictions on native title rights and interests occur when the land, or water, is subject to other forms of title or leases. In some instances, Indigenous native title is said to be extinguished.[345] Furthermore, even if granted native title rights, holders are unable to negotiate their rights to decide on new water development. Holders are only granted an opportunity to comment prior to the grant of any license to collect water.[346]

There have been some improvements in the conferences between the Government and Indigenous peoples in relation to The Basin. The Aboriginal Partnerships Programs including the Living Murray Indigenous Program attempts to provide opportunities to incorporate First Nations knowledge in environmental water management and respect the Indigenous culture.[347] Despite these programs, Indigenous people have not received a significant increase in water volume under their ownership and control.[348]

Open conferences and co-management are possible and has already been tried and tested. There is currently joint management in the Toorale National Park between Indigenous communities and the governing body, and further, the Barkandji people are negotiating with the government over water management for part of the Darling River.[349] These endeavours have been successful. Similarly, in Victoria, water has slowly been set side or returned to the Traditional Owners of the GunditjMirring and Gurnaikurnai people. Despite these advances, there has been no significant progress in New South Wales. Within NSW, unused water rights have been listed for sale, and have not been made easily accessible or returned to Traditional Owners.[350]

**Recommendations**

26. State and Commonwealth Governments and Government Bodies should be mandated to hold conferences with Aboriginal and Torres Strait Islander communities and obtain approval before any structures or projects are built and conducted on waterways that directly affect these communities. Similarly, it is imperative for the economic and cultural development of Indigenous communities that they are directly involved in the

[344] Rene Woods, Ian Woods, and James A Fitzsimons (2022) Water and land justice for Indigenous communities in the Lowbidgee Floodplain of the Murray–Darling Basin, Australia, *International Journal of Water Resources Development*, 38(1) 65.
[345] Elizabeth Macpherson, 'Beyond Recognition: Lessons from Chile for Allocating Indigenous Water Rights in Australia' (2017) 40(3) *UNSW Law Journal* 1145.
[346] Hartwig, Jackson, and Osbourne, *Trends in Aboriginal Water Ownership* (n 338) 7.
[347] 'Aboriginal Partnership Programs', *Murray-Darling Basin Authority* (Web Page, 23 November 2021) <https://www.mdba.gov.au/about-us/partnerships-engagement/aboriginal-partnerships-programs>.
[348] Jackson, Woods, and Hooper (n 341) 2.
[349] Jackson, Woods, and Hooper (n 341) 4.
[350] Melissa Kennedy, Brendan Kennedy, and Sangeetha Chandrashekeran, 'Terra nullius has been overturned. Now we must reverse aqua nullius and return water rights to First Nations people', *The Conversation* (Online, 30 March 2022) <https://theconversation.com/terra-nullius-has-been-overturned-now-we-must-reverse-aqua-nullius-and-return-water-rights-to-first-nations-people-180037>.

negotiation, design and implementation of strategies utilised to address problems that arise around the Basin, and other waterways in Australia.[351] This is because of the millennia-long connection to the land and water provides a deep understanding of appropriate solutions. The inclusion of Indigenous people in decision-making could take the form of forums, employment of Indigenous staff and water planners, working directly with Indigenous communities and developing partnership programs, among others.[352] This should be embedded within water legislation including the Water Act and Water Management Act.

27. The Native Title Act, Water Management Act, and Water Act should be amended to include a fairer distribution of water licenses to Aboriginal and Torres Strait Islander communities for personal, cultural, and economic use. Similarly, the Native Title Act should be amended to allow for holders to negotiate their rights and have mandated requirements for their opinions to hold weight in negotiating the development of structures, water management and granting of licenses under their native title rights.

## Conclusion

This submission recommends the adoption of the UNDRIP principles federally, to support Commonwealth, state and territory governments in protecting and promoting the rights of Aboriginal and Torres Strait Islander people and communities. We have advanced several recommendations that speak to specific rights under the UNDRIP, and the breadth of legal issues highlighted in this submission demonstrates the need for extensive and systematic law reform. The UNDRIP provides the foundation in international law for such reform. The Centre for Law and Social Justice endorses and promotes the comprehensive framework of reform established in Australia by the Uluru Agenda. The Uluru Statement from the Heart identifies a pathway for fair and necessary legal and structural reform that will advance the rights and opportunities of Indigenous people in Australia. The Centre for Law and Social Justice will gladly assist the Committee if required in its consideration of these important matters.

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[351] Jackson, Woods, and Hooper (n 341) 3.
[352] Module To the National Water Initiative: Policy Guidelines for Water Planning and Management Engaging Indigenous Peoples in Water Planning and Management', *Department of Agriculture, Water, and the Environment* (Web Page, 2017) <https://www.awe.gov.au/sites/default/files/sitecollectiondocuments/water/indigenous-engagement.pdf> 11.

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