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Submission to Senate Standing Committee on Legal and Constitutional Affairs: Application of the United Nations Declaration on the Rights of Indigenous Persons in Australia

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2 June 2022

Senate Standing Committee on Legal and Constitutional Affairs
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Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Senate Select Committee on Legal and Constitutional Affairs

RE: Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

We welcome the opportunity to make a submission in relation to the Senate Select Committee on Legal and Constitutional Affairs on the inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia. This submission is intended to be made public. Assistant Professor Narelle Bedford is a Yuin woman and an academic whose specialisation is Administrative Law, and First Nations People and the Law. Dr Alice Taylor is an academic with a focus on equality and discrimination law and has published on race discrimination.

In making the submissions below, we note that this submission was written on the traditional lands of the Kombumerri people of the Yugambah language group, and to that end, we acknowledge the traditional custodians and pay respects to Elders past, present and emerging.

This submission addresses two Terms of Reference, namely b. the potential to enact UNDRIP in Australia; and c. international experiences of enacting and enforcing the UNDRIP. While our submission may touch on other aspects of the Terms of Reference it is primarily focused on concrete suggestions for implementation of UNDRIP into Australian law and advocates for drawing on international experiences to inform Australia's approach.

SUMMARY

In summary, we consider that there are two key aspects of incorporating UNDRIP¹ into Australian law. First, a commitment to the full implementation of the Uluru Statement from the Heart and its call for a Constitutionally enshrined Voice to Parliament. This commitment recognises the right of self-determination of Indigenous persons as required by UNDRIP. Second, a legislative instrument which commits Australia to the implementation of all of the rights contained in UNDRIP. Such a legislative instrument must include the capacity for concrete change in order to address historical injustice and disadvantage, combat stigma and prejudice and eliminate all forms of violence, racism and discrimination, including systemic and institutional discrimination against Indigenous persons and understand the intersectional disadvantages that Indigenous Elders, young people, women, persons with disabilities and LGBTI+ individuals face.

With respect to the second of these aims, the committee should look to the work in comparable jurisdictions such as Canada and New Zealand to develop the incorporation of UNDRIP into Australian law.

IMPLEMENTING UNDRIP INTO AUSTRALIAN LAW

Australia is both a very old and a very young country. While Aboriginal and Torres Strait Islander peoples represent the oldest living culture in the world,² Australia only achieved full constitutional independence from the United Kingdom in 1986.³ We agree with the statement concerning UNDRIP in an Australian context made by Professor Megan Davis;

While it is true that the Declaration is non-binding and has no effect in domestic law, there are ways in which the Declaration may have some effect in Australia. The most obvious is that politically the Declaration will have strong moral value. Moreover, it will have important educative value for the Indigenous community as well as the broader Australian community, explaining in detail what self-determination means in practice.⁴

Notwithstanding this important point and the role of UNDRIP as an authoritative source for the judiciary and broader Australian community, we support the impetus to take formal measures to implement UNDRIP into domestic law. UNDRIP provides an important addition to the international human rights framework by focusing on and emphasising the collective rights of Indigenous persons. Much of international human rights law is focused on individual rights while UNDRIP is focused on the rights of the collective, specifically through the right to self-determination.

¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/296, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('Declaration').

² Australian Government, 'Australian Indigenous cultural heritage', (online) <<http://australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>>. See also, for example, 'DNA Confirms', Australian Geographic (Online), 23 September 2011, <<http://www.australiangeographic.com.au/news/2011/09/dna-confirms-aboriginal-culture-one-of-earths-oldest/>>.

³ Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, Australia, 2010), 6.

⁴ Megan Davis, 'Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 339, 468.

The principle collective right articulated in UNDRIP is the right to self-determination. That right underpins the call in the Uluru Statement from the Heart,⁵ for a constitutional amendment to enshrine a body representative of First Nations. Although the Uluru Statement from the Heart proposal does not call for a decision-making power, the capacity to be heard is a critical aspect of self-determination. As Synot has highlighted, the dialogue process, National Convention and the Uluru Statement from the Heart represented the right to self-determination as articulated in Art 3 not simply as an abstraction but as a practical manifestation of Indigenous people's needs in their everyday lives.⁶

While the Uluru Statement from the Heart and constitutionally embedded Voice is a key aspect of incorporating the UNDRIP into Australian law, there are other legislative measures that can and should be taken to complement a constitutionally recognised Voice. For an example of such legislative measures, we urge the Committee to look to international experiences in enacting and enforcing the UNDRIP.

INTERNATIONAL EXPERIENCES OF ENACTING AND ENFORCING THE UNDRIP

There has been increased recognition of UNDRIP in the form of constitutional recognition, legislative recognition and judicial pronouncements across the world including in the African Commission, Bangladesh, Belize, the Caribbean Court of Justice and Indonesia.⁷ The UNDRIP has been enshrined in domestic legislation in Bolivia and recently in Canadian federal and provincial law. In our submission we focus on the Canadian experience due to its similarity with the Australian context.

Canada

The Canadian Parliament passed the *United Nations Declaration on the Rights of Indigenous Persons Act* in June 2021 (the 'UNDRIP Act').⁸ Following a lengthy preamble which recognises that the 'rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world', section 4 of the UNDRIP Act articulates two objectives for the legislation. These are to (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and (b) provide a framework for the Government of Canada's implementation of the Declaration. The Act itself is elegant and simple, with only 7 sections before incorporating the UNDRIP in full into the Schedule. Such an approach could be adopted with ease in Australia.

The purpose of the UNDRIP Act is to affirm UNDRIP's application in Canada and to provide a framework for the Government of Canada's implementation of UNDRIP. Critically, the

⁵ Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).

⁶ Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous rights and the Uluru Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320.

⁷ UN Permanent Forum of Indigenous Issues, *Tenth anniversary of the United Nations Declaration on the Rights of Indigenous Peoples: measures taken to implement the Declaration*, UNESC, 16th Sess, UN Doc E/C.19/2017/4 (2017).

⁸ SC 2021, c 14.

UNDRIP Act requires consultation and cooperation with Indigenous peoples to ensure that Canadian laws are consistent with UNDRIP. The UNDRIP Act further provides that the relevant Minister must prepare and implement an action plan to achieve the objectives of UNDRIP. The action plan must be developed in consultation and cooperation with Indigenous peoples and must include measures to address injustices including systemic racism and discrimination and promote mutual respect and understanding. The action plan must include accountability measures which ensure that there is the capacity for oversight and the recourse and remedy with respect to the implementation of the action plan and UNDRIP as a whole. The Minister is currently required to provide the first action plan in June 2023.

While there has been some critique that the commitment of Canada to the implementation of UNDRIP (like in Australia) was limited in the past,⁹ there are early signs that the UNDRIP Act (as well as the provincial equivalents) will be treated as an important legal instrument which could have consequences for the interpretation of common and statutory rights in Canada more generally. In the recent decision of *Thomas and Saik'uz First Nation v Rio Tinto*,¹⁰ the British Columbia Supreme Court raised the possibility that the UNDRIP Act could have far reaching consequences for Canadian law. The case concerned a private nuisance claim which argued that the defendants' activities were interfering with the plaintiff's Indigenous land rights including their Indigenous fishing rights. The UNDRIP Act was passed after the commencement of the cause of action and as such the case did not turn on its application, though both parties addressed the applicability of the UNDRIP Act in their closing submissions. The Court rejected the defendants' argument that the UNDRIP Act was 'a forward-looking' statement of intent and instead emphasised that the Act was one which 'supports a robust interpretation of Aboriginal rights. Ultimately, the Court concluded that the interpretation of the UNDRIP and its effect on existing statutory and common law rights was one for the Canadian Supreme Court. Nevertheless, the case indicates an Act requiring the implementation of UNDRIP in consultation and collaboration with Indigenous peoples can be more than simply an aspirational statement of intent.

British Columbia, Canada

Prior to the federal Act being passed in Canada, the legislature of the Province of British Columbia passed legislation which formally incorporated UNDRIP into that Province's legal system - the *Declaration on the Rights of Indigenous Peoples Act* ('the BC Act').¹¹ Section 2 of the BC Act records three objectives. They are to (a) affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; and (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies. The BC Act does not have a preamble, but it does mandate that the BC Government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration. Similar to the federal Act, the BC Act requires the relevant BC Minister must prepare and implement an action plan to achieve the objectives of UNDRIP.

⁹ Sheryl Lightfoot, 'Using Legislation to Implement the UN Declaration on the Rights of Indigenous Persons' in John Borrows et al (eds) *Braiding Legal Orders: Implementing the United Nations Declarations on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019).

¹⁰ [2022] BCSC 15.

¹¹ SBC 2019, c C-44.

The first BC action plan was released on 30 March 2022 and covers the period 2022-2027.¹² It contains 89 actions to be operationalised over the 5-year period. The actions are grouped under four themes: (1) Self-determination and inherent right of self-government; (2) Title and rights of Indigenous Peoples; (3) Ending Indigenous-specific racism and discrimination and (4) Social, Cultural and Economic Well-Being. The BC action plan requires progress to be summarised in an annual report each year with a comprehensive review at the end of the 5-year period. Importantly, the action plan states that the Provincial government will collaborate with First Nations Peoples to develop appropriate methods to assess progress in implementation and thereby uphold accountability, so that the action plan is not merely an aspirational document.

Aotearoa/New Zealand

In 2019 the Aotearoa/New Zealand government commenced the development of a 'Declaration implementation plan' to set out how the aspirations in UNDRIP would be achieved.¹³ The Aotearoa/NZ Minister for Māori Development appointed a technical advisory group, called the Declaration Working Group (DWG), to support the provision of advice on the form and content of a Declaration plan and an engagement process with Māori. On 1 November 2019 the DWG provided the Minister with their final report, *He Puapua*.¹⁴ In June 2021, the Aotearoa/NZ Cabinet approved a Ministry of Māori Development proposal for a two-step engagement process to further progress the development of a national plan to implement UNDRIP. More recently, in April 2022 the Aotearoa/NZ Cabinet received Māori targeted engagement feedback and agreed the process for drafting a Declaration plan.

CONCLUSION

There are, of course, good things about Australia's constitutional arrangements and we have much to celebrate. However, long shadows are cast by racist provisions in the *Australian Constitution* and the lack of acknowledgement of Australia's Indigenous history and the absence of a structurally embedded Voice to Parliament to give effect to Aboriginal and Torres Strait Islander self-determination. Today, Aboriginal and Torres Strait Islander peoples continue to be incarcerated at alarming rates which have increased in the last four years, and the gap between the social and economic wellbeing of Aboriginal and Torres Strait Islander peoples as compared with non-Indigenous Australians, is concerning.

Implementing UNDRIP into Australian law and in particular focusing on the right to self-determination and the requirement for consultation and cooperation are critical to reconceptualising our relationship with First Nations people on the shared journey towards reconciliation.

¹²https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf.

¹³ Aotearoa/New Zealand's government has appointed a working group to provide advice on implementation of the framework. See Nanaia Mahuta, 'Government Moves on UN Rights Declaration' (Speech, 31 March 2019) <<https://www.beehive.govt.nz/release/government-moves-un-rights-declaration>>.

¹⁴<https://www.tpk.govt.nz/documents/download/documents-1732-A/Proactive%20release%20He%20Puapua.pdf>.

Thank you for the opportunity to contribute this submission.

Yours sincerely

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