



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CCW:JvdPvk180522

18 May 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia

By email: alex.kershaw@lawcouncil.asn.au

Dear Ms Nicoll,

Inquiry into the domestic application of the UNDRIP

Thank you for the opportunity to contribute to the Law Council's submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into the domestic application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). This submission is informed by the Indigenous Issues, Human Rights and Public Law Committees of the Law Society of NSW.

The Law Society, like the Law Council, has long supported the domestic implementation of the UNDRIP. In our view, incorporation of those rights articulated in the UNDRIP in all the ways Indigenous peoples encounter the state should be considered a nation-building exercise, as it provides a principled way to approach resetting relationships between the state and Indigenous peoples.

The Law Society understands that the themes of recognition, reparation and reconciliation are foundational to the application of the UNDRIP, "given that it prescribes both remedial and ongoing measures for achieving indigenous peoples' rights."¹ However, substantive efforts in respect of recognition, reparation and reconciliation have generally only been conducted at state and territory level in Australia in a relatively piecemeal way, such as via state and territory level treaty processes, Aboriginal land rights legislation, a truth commission, and reparations for stolen wages and historical child removal practices.

In this regard we note the view of the Expert Mechanism on the Rights of Indigenous Peoples that, "Current obstacles to the implementation of the Declaration are often related to the absence or denial of processes of recognition, reparation and reconciliation."² We note the Uluru Statement from the Heart, and that its calls for Voice, Treaty and Truth are consistent with the themes of the UNDRIP. We also note the lack of progress made at a national level in relation to all aspects of the Uluru Statement, and most notably in relation to the constitutional enshrinement of the Voice to Parliament.

¹ UN Human Rights Council, *Report of the Expert Mechanism in the Rights of Indigenous Peoples, Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 2 September 2019, A/HRC/EMRIP/2019/3/Rev.1, [2] available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/259/91/PDF/G1925991.pdf?OpenElement> [accessed 16 May 2022]

² *Ibid.* [6]

On the question of whether constitutional amendment should be sought to enshrine specific rights from the UNDRIP, the difficulties faced by any campaign to amend the Constitution are relevant. We note also that from a constitutional perspective, constitutional enshrinement of a Voice to Parliament has been identified as an issue of national concern by Indigenous peoples, and this should be given priority. We continue to support the treaty and truth aspects of the Uluru Statement, and suggest that pursuing these goals at a national level will go some way towards enlivening UNDRIP rights.

In respect of whether the UNDRIP should be implemented via legislation, the Law Society acknowledges that there are complexities in translating some critical norms of the UNDRIP, such as norms around consent and self-determination, into more specific legislative provisions in Australia. These issues require further and more comprehensive consideration.

Given this, the Law Society suggests caution, at this stage, in respect of enacting a separate Act to implement the UNDRIP. Outside of the question of whether constitutional power exists to do so, we also consider it preferable to include UNDRIP rights within consolidated human rights legislation to avoid issues of fragmentation and conflicting interpretations between different pieces of legislation. If it does not appear that general human rights legislation will be forthcoming, it may then be useful to consider separate enforcement of the UNDRIP through legislation. However, we note that meaningful implementation is a complex process, that will require more than simply taking legislative action.

At first instance, we suggest that it would be appropriate and relatively simple to amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include reference to the UNDRIP as an instrument for which the Parliamentary Joint Committee on Human Rights has reporting functions. We suggest also that a public education campaign on the UNDRIP and its beneficial effect on outcomes for Indigenous peoples and for nation-building would also be useful to socialise UNDRIP norms with mainstream Australia.

Finally, we note that many of the rights in the UNDRIP, such as in respect of health, education, property and connection to land and culture, play out substantially within the jurisdiction of states and territories, some of which already have human rights legislation. We will consider undertaking advocacy to the NSW Government on implementation of the UNDRIP in those areas for which it has responsibility, bearing in mind the existing work being undertaken in respect of the National Closing the Gap Agreement.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,



Joanne van der Plaats
President