

**Pacific Indigenous Peoples Preparatory meeting for the
World Conference on Indigenous Peoples
19 - 21 March 2013, Sydney Australia**

**Agenda Item: Giving full effect to the United Nations Declaration on the Rights
of Indigenous Peoples**

**Paper submitted by the Aboriginal and Torres Strait Islander Social Justice
Commissioner**

Introduction

My position as the Aboriginal and Torres Strait Islander Social Justice Commissioner is a statutory appointment to the National Human Rights Institution of Australia – the Australian Human Rights Commission. My role involves monitoring the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander Australians. The Special Rapporteur has referred to this as an excellent model for National Human Rights Institutions. The role is critical to ensuring that the United Nations Declaration on the Rights of Indigenous People (the Declaration) is understood in terms of its ability to overcome Indigenous disadvantage and to develop and action plan for the full realisation of the provisions of the Declaration.¹

The Australian Government indicated its support for the Declaration in April 2009. Since that time there has been limited engagement with Indigenous peoples to secure a strategic commitment by the Government to develop a national framework for the implementation of the Declaration.

In my 2010 Social Justice Report, I outlined my agenda for the five year term. In that report, I committed to being guided by the Declaration in the performance of my statutory functions. I stated that it was my intention to work with the Australian Government and Aboriginal and Torres Strait Islander peoples and their organisations to develop a national implementation strategy for the Declaration; and said that I would monitor and report on Australian Governments' performance using the Declaration as an objective guide.

I released a range of community education materials on the Declaration designed to empower Aboriginal and Torres Strait Islander peoples, communities and organisations to exercise their human rights. These materials were predominantly funded by international non-government organisations and have been well received throughout Australia.

I am of the view that States should be applying a holistic and co-ordinated approach to achieving the ends of the Declaration. For this to be achieved, we must now move beyond the rhetoric of support and calls for implementation, to the development of a detailed plan of action to implement and raise awareness and understanding about the Declaration. Of course this must be done in consultation with Indigenous peoples.

Key components that should be included in a National Strategy include:

- The development of an overarching framework agreement with key priorities for actions, drawn from the main themes of the Declaration;
- A staged plan for the progressive realisation of agreed priorities and targets, guided by the overarching framework;
- Inter-governmental commitment led by the highest levels of the government in the State;
- An integrated monitoring and reporting framework that can be used to report on compliance with various Human Rights Bodies.

I am currently advocating for the Australian Government to enter into a formal dialogue with Aboriginal and Torres Strait Islander peoples to negotiate an implementation framework. I believe it is incumbent upon the Australian Government and all States to ensure the Declaration is effectively incorporated into all initiatives relevant to Indigenous peoples and implemented in its entirety. This process includes the need for a shared understanding of the meaning of the key principles which underpin the Declaration and how they apply in the domestic context.

Appendix 1 contains a suggested framework for a National Strategy to guide discussions on giving effect to the Declaration in the context of the following four principles:-

- Self-Determination;
- Participation in decision-making including free, prior and informed consent and good faith;
- Respect for and Protection of Culture;
- Equality and Non-Discrimination.

In the adoption of the Declaration, the UN General Assembly were:

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples²

I am similarly convinced that the Declaration can also enhance the relationship between Indigenous and business communities.

I note that the UN Global Compact (the Compact) has released for comment the exposure draft of the Business Reference Guide on the Declaration. I am currently in discussions with the Australian branch of the Compact with the aim of building these relationships and it is encouraging that this level of engagement is now occurring in Australia.

I congratulate the UN Global Compact for taking this initiative and encourage all parties to participate in this process as a key element to giving full effect to the Declaration.

Recommendations

As the Social Justice Commissioner, I recommend:

1. That the World Conference on Indigenous Peoples recommends all States to commit to engaging in formal dialogue with Indigenous peoples, and their National Human Rights Institutions, to design and develop a National Strategy to give full effect to the Declaration which includes monitoring and evaluation and annual reporting as to the progress of such implementation.
2. That the World Conference on Indigenous Peoples recommends all States to provide financial assistance to Indigenous peoples and organisations to assist them to fully realise their human rights in accordance with article 39 of the Declaration. In particular to:
 - i) Support Indigenous peoples' effective engagement in the development of a National Strategy;
 - ii) Build capacity at the community level to raise awareness and understanding about the rights contained with the Declaration;
 - iii) Empower Indigenous peoples and their organisations to work with States to implement the National Strategy within their communities.

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007) art 22 and 41

² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007) preambular para 18

Appendix 1

The United Nations Declaration on the Rights of Indigenous Peoples

Giving full effect to the Declaration – a National Strategy

Mick Gooda and Katie Kiss

Introduction

The adoption of the Declaration by the General Assembly of the United Nations in September 2007 was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world. The adoption of the Declaration strengthened and reinforced the international human rights framework.

The Declaration does not contain any new human rights or international standards. Rather it reflects existing legal obligations sourced in international human rights treaties. It simply provides the lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.

It enshrines our right to be different as peoples and affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide while at the same time confirms our right to determine our future development.

Importantly, the Declaration is also seen as an instrument to reset the relationships between Government and Indigenous peoples. This is reinforced in its Preamble, where the General Assembly of the United Nations says that:

...this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith;¹

States should...effectively implement all their obligations...in consultation and co-operation with the peoples concerned;²

It is...a standard of achievement to be pursued in a spirit of partnership and mutual respect.³

The Declaration therefore provides Australia with an opportunity to move beyond the stalemate that is currently frustrating positive development for Aboriginal and Torres Strait Islander peoples and communities.

The challenge facing Australia is what action needs to occur to take advantage of this opportunity and what needs to be done to give full effect to the Declaration.

What is the Declaration?

The Declaration was adopted on 13 September 2007 and the Australian Government provided its support to the Declaration on 3 April 2009.

The Declaration is the most comprehensive and advanced international instrument dealing with Indigenous peoples' rights.⁴ Effectively, it is a tool that can facilitate addressing the contemporary effects of oppression and colonisation.

The Declaration does not create new or special rights for Indigenous peoples. The Declaration contains 46 articles that articulate how existing international human rights principles and standards apply to the situation of Indigenous peoples. It applies them, giving specific consideration to the unique cultural, historical, social and economic circumstances of Indigenous peoples.⁵

The Declaration is a 'standard of achievement to be pursued in a spirit of partnership and mutual respect'⁶ and aims to 'enhance harmonious and cooperative relations between the State and indigenous peoples'.⁷

What is the legal effect of the Declaration?

Declarations do not have the status of a treaty and do not create binding legal obligations on States *per se*. Unlike conventions, declarations cannot be ratified. However declarations are the product of agreement between States and indicate States' consensus on a particular issue. On this basis they have an 'undeniable moral force and provide practical guidance to States in their conduct'.⁸

In the case of this Declaration, it was adopted 'with the approval of an overwhelming majority of Member States' and therefore represents a commitment on the part of Member States to its provisions 'within the framework of the obligations established by the Charter of the United Nations'.⁹

...even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal obligations that are related to the human rights provisions of the Charter of the United Nations, various multilateral human rights treaties and customary international law. The Declaration builds upon the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to connect to a consistent pattern of international and State practice, and hence, to that extent, they reflect customary international law.¹⁰

Does the Australian Government need to give effect to rights in the Declaration?

Yes. The Declaration specifically requires that 'States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.'¹¹

Nineteen of the 46 Articles of the Declaration specifically require States to take action to achieve the rights of Indigenous peoples and provide redress where these rights are violated. This includes an obligation to take specific affirmative measures to give full effect to the Declaration, and actions to promote respect for the provisions of this Declaration.¹²

It would also be a sign of good faith for the Government to follow through with action after it has provided its support for the Declaration. As President Obama said when reversing the United States of America's position on the Declaration:

What matters far more than words – what matters far more than any resolution or declaration – are actions to match those words... That's the standard I expect my administration to be held to.¹³

Why is a National Declaration Strategy necessary?

A National Declaration Strategy is necessary because the adoption of the Declaration will not in and of itself guarantee the realisation of the rights set out within. The Acting UN High Commissioner for Human Rights Kyung-wha Kang and the Special Rapporteur on the rights of indigenous peoples, James Anaya, described it well when they said the adoption of the Declaration:

will not in itself change the everyday lives of the men, women and children whose rights it champions. For this we need the political commitment of states, international cooperation, and the support and good will of the public at large, to create and implement a range of intensely practical programmes, designed and undertaken in consultation with indigenous peoples themselves.¹⁴

The Government, in partnership with Aboriginal and Torres Strait Islander peoples, must take steps to ensure practical outcomes are realised. It is hoped that through open constructive dialogue that ideas and plans realising the rights in the Declaration can be developed.

What could a National Declaration Strategy look like?

There is no 'one' way to give effect to the rights in the Declaration. The International Law Association has said that:

States ought to restructure their domestic law in view of adopting all necessary measures – including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities – in order to make the full realization of indigenous peoples' human rights possible within their territories, consistent with the rules and standards established by the UNDRIP.¹⁵

Some countries have adopted the articles in the Declaration as national law. Others have developed participatory mechanisms or have prioritised education and promotion of the rights in the Declaration.

For example, in 2007 the Pluri-national State of Bolivia passed a law which supports programmes relevant to the implementation of the Declaration.¹⁶ In Norway the legislation for the 'Procedures for Consultations between State Authorities and the

Sami Parliament¹⁷ ensures that new measures, legal provisions and consultations procedures are conducted in accordance with the Sami peoples' right to participate and have a tangible influence in the decision making procedures that directly affect their interests.¹⁸ In Peru, in designing a national plan for the implementation of bilingual education, Indigenous peoples will participate collaboratively with the Minister of Education in the formulation of these educational programs.¹⁹

The Australian Approaches

There are several approaches or opportunities to give effect to the Declaration, including:

- *The 'principled' approach* – This involves the identification of the underpinning principles of the Declaration and then applying these principles to each of the 46 articles.
- *Duties of States* – Ensuring the Australian Government take the action required of them set out in the Declaration. There are at least nineteen articles which impose duties on nation states or governments to undertake particular actions. These range from Article 12 which says that:

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned

to Article 38 which says:

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

- *Referencing the Declaration* – Promoting the referencing of the Declaration at every available opportunity. This could include using the Declaration as a point of reference in the Government's Human Rights Framework and the Parliamentary Joint Committee on Human Rights.

It could also include Indigenous governance structures referencing the Declaration in their constitutions, their values and behaviours, in their advocacy and in their relationships.

- *Auditing compliance* – This could mean auditing existing legislation, policies and programs to ensure compliance with the identified underpinning 'principles' of the Declaration, particularly the principle relating to non-discrimination and equality.

While all of these approaches are reasonable and realistic and we should take every opportunity to action them, a principled approach will provide the basis to giving full effect to the Declaration and using it as the blueprint for advancing the quality of life for Aboriginal and Torres Strait Islander peoples.

The Principled Approach

As stated above, this approach involves first identifying the key principles underpinning the rights in the Declaration and secondly, developing agreed ways in which these principles can give practical guidance on how each of the relevant articles can be operationalized.

The Principles

The Declaration covers all areas of human rights as they relate to Indigenous peoples. This includes fundamental foundational human rights which can be categorised into four key sets of principles:

- self-determination
- participation in decision-making, underpinned by free, prior and informed consent and good faith
- respect for and protection of culture
- equality and non-discrimination.

These four principles provide guidance on how Aboriginal and Torres Strait Islander communities, governments, civil society and the private sector can apply the Declaration to fully realise the human rights of Aboriginal and Torres Strait Islander peoples. These principles will also provide benchmarks against which the effectiveness of the implementation can be measured.

While these principles are understood conceptually within human rights theory, applying them practically at the local level has been a challenge. We believe that this is because:

- governments interpret these core principles purely in the context of international law, through a State sovereignty lens as it relates to their relationships with other world governments. They have not recognised the relationship between this and the domestic application, including community development
- Indigenous peoples have not been able to describe or clarify what these core principles mean practically to their development and how governments should work with them to achieve that.

The Declaration Dialogues

If we are serious about implementing the Declaration, an overarching policy framework based on human rights standards is essential to ensuring a holistic approach that addresses the needs and priorities identified by Aboriginal and Torres Strait Islander peoples and communities.

A national conversation progressed through a series of dialogues is proposed to ensure the principles and rights outlined in the Declaration are fully integrated into the Australian Indigenous policy landscape.

The purpose of these proposed Dialogues will be to:

- raise awareness of the Declaration with all stakeholders, particularly the Aboriginal and Torres Strait community, including how it was developed and adopted, the rights it contains, and how it can be used
- reach a consensus on the need to implement the Declaration
- develop an agreed approach to give full effect to the Declaration between Aboriginal and Torres Strait Islander peoples, governments and other relevant stakeholders
- facilitate discussion between Aboriginal and Torres Strait Islander peoples, governments and other relevant stakeholders regarding the 'principles' underpinning the Declaration and what they mean in a practical context
- develop a National Strategy on the Declaration on the Rights of Indigenous Peoples – adopted at a National Summit.

The Declaration Dialogue Series will provide a mechanism to develop a comprehensive National Strategy. The Declaration Dialogue Series will be informed by a range of consultative mechanisms including:

- a set of focused discussion papers
- a survey of Aboriginal and Torres Strait Islander peoples' views on the Declaration
- high level dialogue meetings with governments and key industry stakeholders
- Aboriginal and Torres Strait Islander community dialogues
- a National Summit.

By encouraging dialogue between Aboriginal and Torres Strait Islander peoples, governments and other stakeholders, we can move beyond the rhetoric of 'support' for the Declaration and work towards achieving its purpose: to improve the lives of Aboriginal and Torres Strait Islander peoples, Australia's Indigenous peoples.

Giving full effect to the Declaration provides us with an opportunity to move beyond the stalemate that is currently frustrating positive development for Aboriginal and Torres Strait Islander peoples and communities. Not only will it provide a positive mechanism for overcoming the disadvantage faced by Aboriginal and Torres Strait Islander peoples, it will place us front and centre in progressively realising this challenge.

Finally, this is not something that will happen overnight. This is a journey that requires a long-term commitment by both governments and Aboriginal and Torres Strait Islander peoples to work together to achieve a common goal: improvement in the lives and well-being of Aboriginal and Torres Strait Islander peoples.

What can I do?

- You can **attend** a dialogue meeting
- You can **write** to us with your views
- You can **talk** about the Declaration with your community and then **tell us** about what they think.

Tell me more

If you would like to read more about the Declaration and the National Strategy have a look at these links.

About the Declaration

[United Nations Declaration on the Rights of Indigenous Peoples](#)

[Community Guide to the UN Declaration on the Rights of Indigenous Peoples](#) - (as the project develops, information about the process will be uploaded here)

About the role of the UN implementing the Declaration

[United Nations Permanent Forum on Indigenous Issues](#)

[Expert Mechanism on the Rights of Indigenous Peoples](#)

About how other countries are implementing the Declaration

[Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples](#)

About the legal effect of the Declaration

J Anaya and S Weissner, [The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment](#)

J Anaya, [Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya \(2008\)](#)

International Law Association, [The Hague Conference \(2010\): Right of Indigenous Peoples Interim Report](#)

International Law Association, [The Sofia Conference \(2012\): Right of Indigenous Peoples Final Report](#)

If you would like to talk to us please contact the Aboriginal and Torres Strait Islander Social Justice Team at the Australian Human Rights Commission: by email at social.justice@humanrights.gov.au, or by phone (02) 9284 9600.

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- ¹ *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, preambular para 18.
- ² *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 19.
- ³ *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 24.
- ⁴ C Charters and R Stavenhagen, 'The UN Declaration on the Rights of Indigenous Peoples: How It Came to be and What it Heralds' in C Charters and R Stavenhagen (eds), *Making the Declaration Work – The United Nations Declaration on the Rights of Indigenous Peoples* (2009), p 10.
- ⁵ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, Report to the Human Rights Council 9th session, UN Doc A/HRC/9/9 (2008), para 40. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx> (viewed 7 September 2012).
- ⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 24.
- ⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 18.
- ⁸ Office of the United Nations High Commissioner for Human Rights, *International Law*, <http://www2.ohchr.org/english/law/> (viewed 7 September 2012).
- ⁹ J Anaya, note 5, para 41.
- ¹⁰ United Nations General Assembly, *Rights of Indigenous peoples*, UN Doc A/66/288 (2011), para 68. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/449/42/PDF/N1144942.pdf?OpenElement> (viewed 1 June 2012).
- ¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, Article 38.
- ¹² *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, Article 42.
- ¹³ B Obama, 'US Supports the UN Declaration on the Rights of Indigenous Peoples' (2010) reproduced in 7(22) *Indigenous Law Bulletin* 1, p 4.
- ¹⁴ Acting UN High Commissioner for Human Rights Kyung-wha Kang and Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 'Joint statement: International Day of the World's Indigenous People' (9 August 2008). At <http://www.un.org/events/indigenous/2008/hcmessage.shtml> (viewed 7 September 2012).
- ¹⁵ Rights of Indigenous Peoples Committee, note 15, p 30.
- ¹⁶ Expert Mechanism on the Rights of Indigenous Peoples, *Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, 5th session, UN Doc A/HRC/EMRIP/2012/4 (2012), p 6. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session5.aspx> (viewed 7 September 2012).
- ¹⁷ Ministry of Government Administration, Reform and Church Affairs, *Procedures for Consultations between State Authorities and The Sami Parliament [Norway]* (2005). At <http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/midtpalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA.html?id=450743> (viewed 7 September 2012).
- ¹⁸ Expert Mechanism on the Rights of Indigenous Peoples, note 21, p 10.
- ¹⁹ Expert Mechanism on the Rights of Indigenous Peoples, note 21, p 8.

Principle 1 – Self-Determination

Self-determination can mean different things to different groups of people. At its core, self-determination 'is concerned with the fundamental right of people to shape their own lives'.¹ In a practical sense, self-determination means that Indigenous peoples have the freedom to live well and humanly, to determine what it means to live humanly, and to live according to our own values and beliefs.²

Key elements: While there can be no pre-determined outcome of what self-determination looks like, some key characteristics are:

- It has both individual and collective elements; it applies universally and equally to all segments of humanity and cannot be viewed in isolation from other human rights.
- It affirms that human beings, individually and as peoples, are equally entitled to be in control of their own destinies.
- It affirms that peoples are entitled to participate equally in the development of the governing institutional order, including the constitution, in which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis.³

Importance of self-determination: The exercise of self-determination for Aboriginal and Torres Strait Islander peoples is central to the achievement of a number of goals and objectives including: establishing our own representative bodies and institutions; self-government; economic independence; recognition of customary law; and involvement in government policy, planning and program implementation.

The following questions may want to be considered in relation to self-determination:

1. What do Aboriginal and Torres Strait Islander peoples mean by 'self-determination'? What does this look like in a practical sense?
2. What changes need to happen in the policy and legislative environment to facilitate Aboriginal and Torres Strait Islander peoples' right of self-determination?
3. What support do Aboriginal and Torres Strait Islander communities and peoples need from Australian governments to facilitate self-determination?
4. What are governments' concerns with the concept of self-determination and what is required to make it work in the Australian context?
5. What support do governments need from Aboriginal and Torres Strait Islander peoples in order to facilitate recognition of the right of self-determination in Australia?

Principle 2 – Participation in Decision-Making, including Free, Prior and Informed Consent, and Good Faith

Indigenous peoples have the right to participate in decision-making in matters which affect their rights, through representatives they chose, as well as to maintain and develop their own decision-making institutions.⁴ In order to ensure effective participation in decisions that affect them, three key elements must be met: the duty to consult; free, prior and informed consent; and good faith.

A duty to consult means that governments have a duty to consult with Indigenous peoples ‘whenever a State decision may affect indigenous peoples in ways not felt by others in society’.⁵

Governments must promote Indigenous peoples’ right to participate in all levels of decision-making.⁶ This means ensuring that consultation processes are framed ‘to make every effort to build consensus on the part of all concerned’⁷ and that contemporary forms of Indigenous peoples’ governance, including collective decision-making structures and practices,⁸ are respected.

Free, prior, and informed consent should underpin the development of all frameworks for engagement with Indigenous peoples as it is fundamental to ensuring effective participation. It requires that: there has been no coercion or manipulation used to gain consent; consent was sought well in advance of commencing an activity or implementing legislation; full and legally accurate information has been provided; meaningful participation is provided in all aspects of assessment, planning, implementation, monitoring and closure of a project; and there is access to advisers, including legal counsel, if required. Consent includes the right to withhold consent and say no to a proposal.⁹

Acting in **good faith** ensures that decision-making processes are fair, cooperative and consistent with cultural practices. This means that all parties – Indigenous and non-indigenous – involved in the decision-making need to be respectful of each other’s needs and priorities, and be prepared to engage with the intent of reaching an agreed outcome.

However, the duty of good faith of itself does not mean that Indigenous people are positioned to engage or negotiate on a footing that is equal. Therefore it must be applied in conjunction with the other two key elements of our right to participate; a duty to consult, and free, prior and informed consent. In all cases, governments should engage in ‘[a] good faith effort towards consensual decision-making’.¹⁰

The following questions may want to be considered in relation to participation:

1. How should the ‘duty to consult’ inform government consultations with Aboriginal and Torres Strait Islander peoples? What will it look like when that obligation is being fulfilled?
2. What does obtaining consent mean? What actions can governments take in their work with Aboriginal and Torres Strait Islander peoples to ensure consent?
3. What is good faith? What does this look like in a consultation or negotiation with Aboriginal and Torres Strait Islander peoples?
4. How can governments facilitate the right to participate?

Principle 3 – Respect for and Protection of Culture

Australia is home to hundreds of nations of Aboriginal and Torres Strait Islander peoples. Each of our nations has its own distinct cultural norms, law, language and identity. While our culture can manifest in many forms, the survival of our culture is passed on to our future generations through our art, dance, song, language and knowledge. In the face of change, culture is a source of strength, resilience, happiness, identity and confidence.

Unfortunately, our culture and our cultural identities have endured significant pressure as a result of colonisation and subsequent policies of dispossession and oppression. To this present day, we continue to manage change that is imposed upon us and our society that threatens the maintenance of our unique culture.

The protection and promotion of our cultural identity is paramount to our social and emotional well-being and it is included in a number of international treaties and Australian domestic legislation.¹¹ However, further work is required to ensure that all aspects of our cultures as outlined in the Declaration are adequately protected under our domestic legislation and policy frameworks. The primary responsibility for protecting and promoting our culture lies with us, Indigenous peoples.

Role of governments: Governments must work with us to design, develop and implement legislation, policies and programs that promote the maintenance, practice, revitalisation, use, development and transmittal of our cultures and languages.¹² While the role of governments in this space is to facilitate the development of structures that support Indigenous peoples to promote and protect their unique and diverse culture and identity, it also includes governments providing effective mechanisms to prevent and provide redress for the destruction of culture.¹³ The Declaration requires that governments provide the resources necessary to ensure that culture is a key priority in policy and community development programs. Governments must ensure that programs provide support for the maintenance and preservation of culture with the strategic inclusion and full participation of Indigenous peoples, including youth.

Cultural competency: Vital to this is that those working within governments and acting on behalf of governments must ensure that they are culturally competent and that their actions are carried out in a culturally secure and safe way. This will require the creation of environments of cultural resilience within Aboriginal and Torres Strait Islander communities and cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.

Governments may want to consider the following questions in relation to respect for and protection of culture:

1. Should the protection and promotion of our cultures be provided through legislative mechanisms? If so, what does this look like?
2. How can governments facilitate the development of structures that support Indigenous peoples to promote and protect their culture and identity?
3. How can governments ensure that culture is a key priority in policy and community development programs?
4. Are government staff culturally competent and are actions carried out in a culturally secure and safe way? How can this be improved?

Principle 4 – Equality and Non-Discrimination

The Australian Government has a legal obligation to promote equality and prohibit discrimination on the basis of race. This obligation arises from its ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)¹⁴ brought into Australian law through the *Racial Discrimination Act 1975* (RDA).¹⁵ The Declaration can be used to guide the Government in implementing its responsibilities under these documents.

Racial discrimination is when a person is treated less favourably than another person in a similar situation because of their race or when a rule or policy that is the same for everyone but has an unfair effect on people of a particular race (indirect discrimination). Racial discrimination also includes racial hatred; doing something in public based on the race which is likely to offend, insult, humiliate or intimidate.

Some forms of racial discrimination are less easy to identify. Institutional or systemic discrimination can be largely invisible. In Australia, systemic discrimination has been perpetuated by legislative and policy frameworks that seek to define what constitutes being Aboriginal or Torres Strait Islander.¹⁶ These legislative frameworks have supported the colonisation process and continue to affect our own constructs of identity, family, community and systems of organisation.

Equality affirms that all human beings are born free and equal, have the same rights and deserve the same treatment and level of respect. Whereas formal equality relies on the notion that all people should be treated identically regardless of difference, substantive equality takes into account 'individual, concrete circumstances', including the effect of past discrimination. It is premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality. The international legal approach to equality is one of substantive rather than formal equality.¹⁷

It is from the concept of substantive equality that 'special measures' emerge. The concept of special measures is generally understood to mean positive measures taken to redress historical disadvantage and confer benefits on a particular racial group. The need for special measures is recognised in Australian discrimination laws, all of which contain an exemption in one form or another.¹⁸

Aboriginal and Torres Strait Islander peoples have been subjected to racial discrimination resulting in disadvantage and inequality since colonisation. In many instances the discriminatory treatment has been enabled by legislation,¹⁹ including the Constitution²⁰ and most recently the Australian Government's Northern Territory Emergency Response.

As a signatory to the ICERD, Australia has a legal obligation to ensure that it protects its citizens from racial discrimination. The Committee on the Elimination of Racial Discrimination (CERD) has provided clear guidance on applying this convention to the rights of Indigenous peoples.²¹

The RDA prohibits racial discrimination of Indigenous peoples under sections 9 and 10 of the Act but allows for 'special measures' to be taken to advance the human rights of certain racial or ethnic groups or individuals under section 8 of the Act. However, relying on the benevolence of Government to protect the rights and

interests of all Australians does not provide adequate protection against discrimination.²²

Aboriginal and Torres Strait Islander peoples are particularly vulnerable to this lack of protection. The Commonwealth Parliament has compromised the RDA on three occasions – each time it has involved Aboriginal and Torres Strait Islander issues.²³ These examples demonstrate how easy it is to create and pass laws which discriminate against Aboriginal and Torres Strait Islander peoples despite the existence of the RDA.

Right to be different: Achieving true equality does not mean that Aboriginal and Torres Strait Islander peoples should be assimilated or integrated into the nation's governance and society. The Declaration recognises that while Indigenous peoples are equal to all other peoples, we also have the right to be different and to be respected in our difference.²⁴ In order to achieve circumstances of equality, the structures of society must be reoriented to account for Aboriginal and Torres Strait Islander people's difference.

In applying the principles of non-discrimination and equality, governments must be committed to removing existing structural and systemic impediments to healthy relationships within our communities and reinforcing protections against race discrimination. Governments can do this by actively involving Aboriginal and Torres Strait Islander peoples at all stages of the design, development, implementation, monitoring and evaluation of policies, programs and legislation.

Australia has taken a number of steps to ensure that policies and legislation designed to address Indigenous disadvantage promote equality and non-discrimination. However, the full participation of Aboriginal and Torres Strait Islander peoples in processes designed to deliver on this goal is critical if we are to be successful. Policies and processes that are underpinned by the principles of self-determination, participation in decision-making, and respect for and protection of culture provide a solid foundation to achieving non-discrimination and equality.

Governments may want to consider the following questions in relation to equality and non-discrimination:

1. How can governments begin to address systemic racism against Aboriginal and Torres Strait Islander peoples in Australia?
2. Under international law, special measures are generally thought to be positive measures rather than punitive measures – is this consistent with the Government's application of special measures?
3. How can governments help protect Indigenous peoples from discriminatory legislation? Is constitutional recognition the answer?
4. How can Aboriginal and Torres Strait Islander peoples' 'right to be different' be operationalized at the legislative and policy level?

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- ¹ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), in 'Introduction', C Fletcher (ed), in *Aboriginal Self-Determination in Australia* (1994), p xi.
- ² E Daes. 'Striving for self-determination for Indigenous peoples', Y Kly, and D Kly (Eds), *In pursuit of the right to self-determination*, Clarity Press, Geneva, 2000, p 58.
- ³ S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', C Charters and R Stavenhaven (eds), *Making the Declaration Work* (2009) pp 184-196.
- ⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex) UN Doc A/RES/61/295 (2007), Article 18. At www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 19 October 2012).
- ⁵ J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement> (viewed 2 December 2010).
- ⁶ Human Rights Council, note 5, Annex para 29.
- ⁷ J Anaya, note 11, para 48.
- ⁸ Human Rights Council, note 5, Annex para 30.
- ⁹ United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), paras 46–49. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement> (viewed 2 December 2012).
- ¹⁰ J Anaya, note 11, para 50.
- ¹¹ See eg, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 15 (2).
- ¹¹ *International Covenant on Civil and Political Rights*, 1966, Article 27, The Declaration on the Rights of Indigenous Peoples, note 4, Articles 3, 4, 5, 8, 9, 11, 12, 13, 14, 15, 31, and 34, *Protection of Movable Cultural Heritage Act* 1986, *Aboriginal and Torres Strait Islander Heritage Protection Act* 1986, *Environment Protection and Biodiversity Conservation Act* 1999, *Native Title Act* 1993 (Cth). See also: the National Indigenous Languages Policy.
- ¹² *Expert Mechanism Advice No. 3 (2012): indigenous peoples' languages and cultures*, and the *UN Declaration on the Rights of Indigenous Peoples*
- ¹³ *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, Articles 8, 11, 12, and 13.
- ¹⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.
- ¹⁵ *Racial Discrimination Act* 1975 (Cth)
- ¹⁶ For example see the Australian Institute of Aboriginal and Torres Strait Islander Studies, *To Remove and Protect, laws that changed Aboriginal Lives*. At www1.aiatsis.gov.au/exhibitions/removeprotect/index.html (viewed 7 December 2012).
- ¹⁷ W McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 178, pp 185-186; G Triggs, 'Australia's Indigenous Peoples and International Law' (1999) 23 *Melbourne University Law Review* 372, pp 379-381; also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31(1986) paras 150 and 158. As cited by the Australian Human Rights Commission, *International Review of Indigenous issues in 2000: Australia* (2000).
- ¹⁸ At the Commonwealth level, see *Racial Discrimination Act* 1975 (Cth) s 8(1); *Sex Discrimination Act* 1984 (Cth) s 7D; *Disability Discrimination Act* 1992 (Cth) s 45; *Age Discrimination Act* 2004 (Cth) s 33.
- ¹⁹ See, for example, Aboriginal Protection Acts which can be found at Australian Institute for Aboriginal and Torres Strait Islander Studies, note 14.
- ²⁰ Section 25 contemplates the exclusion of voters based on race, while section 51(xxiv) allows Parliament to enact racially discriminatory laws.
- ²¹ Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples*, UN Doc A/52/18 (Annex V) (1997), para 4. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument) (viewed 11 October 2011).
- ²² T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *40 years on: What does the 'Yes' vote mean for Indigenous Australians?* (Speech delivered at the Anglicare Tasmania Annual Social Justice Lecture, Hobart, 22 August, 2007). At http://www.humanrights.gov.au/about/media/speeches/social_justice/2007/40_years_on20070822.html (viewed 10 November 2010).

²³ See: the *Native Title Amendment Act 1998* amending the *Native Title Act (Cth) 1993*; and the legislation supporting the Northern Territory Emergency Response (NTER) in 2007. Further, the *Hindmarsh Island Bridge Act 1997* is also arguably inconsistent with s 10 of the RDA because it denies the Ngarrindjeri women the right to enjoy their own culture (Art. 5(e) (vi) ICERD).

²⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, note 6, preambular para 2.

