



Australian  
Human Rights  
Commission

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The Declaration Dialogue Series:  
Paper No.1- Giving Full Effect to the  
Declaration – A National Strategy

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ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series - Discussion Paper 1: Giving Full Effect to the Declaration – A National Strategy

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The Australian Human Rights Commission thanks the following people:

Mick Gooda and Katie Kiss - Authors

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### **Contact details**

For further information about the Australian Human Rights Commission, please visit [www.humanrights.gov.au](http://www.humanrights.gov.au) or email [communications@humanrights.gov.au](mailto:communications@humanrights.gov.au). You can also write to:

Social Justice Team  
Australian Human Rights Commission  
GPO Box 5218  
Sydney NSW 2001

**Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.**

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# 1 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;<sup>1</sup>

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

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

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.

## 2 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.<sup>4</sup> 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.<sup>5</sup>

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

### **3 What is the legal effect of the Declaration?**

Declarations do not have the status of a Treaty. 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.’<sup>8</sup>

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.’<sup>9</sup>

...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.<sup>10</sup>

### **4 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.’<sup>11</sup>

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.<sup>12</sup>

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.*<sup>13</sup>

## **5 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.<sup>14</sup>

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.

## **6 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.<sup>15</sup>

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.<sup>16</sup> In Norway the legislation for the 'Procedures for Consultations between State Authorities and the Sami Parliament'<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

## 7 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.

## 8 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.

## **8.1 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.

## **9 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.

## 10 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.

## 11 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](mailto:social.justice@humanrights.gov.au), or by phone (02) 9284 9600.

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- <sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, preambular para 18.
- <sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 19.
- <sup>3</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 24.
- <sup>4</sup> 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.
- <sup>5</sup> 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 9<sup>th</sup> 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).
- <sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 24.
- <sup>7</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, preambular para 18.
- <sup>8</sup> Office of the United Nations High Commissioner for Human Rights, *International Law*, <http://www2.ohchr.org/english/law/> (viewed 7 September 2012).
- <sup>9</sup> J Anaya, note 5, para 41.
- <sup>10</sup> 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).
- <sup>11</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, Article 38.
- <sup>12</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, note 1, Article 42.
- <sup>13</sup> B Obama, 'US Supports the *UN Declaration on the Rights of Indigenous Peoples*' (2010) reproduced in 7(22) *Indigenous Law Bulletin* 1, p 4.
- <sup>14</sup> 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).
- <sup>15</sup> Rights of Indigenous Peoples Committee, note 15, p 30.
- <sup>16</sup> 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*, 5<sup>th</sup> 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).
- <sup>17</sup> 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/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA.html?id=450743> (viewed 7 September 2012).
- <sup>18</sup> Expert Mechanism on the Rights of Indigenous Peoples, note 21, p 10.
- <sup>19</sup> Expert Mechanism on the Rights of Indigenous Peoples, note 21, p 8.