Expert Mechanism on the Rights of Indigenous Peoples

Free, Prior and Informed Consent

The New South Wales Aboriginal Land Council (**NSWALC**) welcomes the opportunity to provide a submission to the Expert Mechanism on the Rights of Indigenous People (**EMRIP**) *Study on the theme of free, prior and informed consent.*

NSWALC provides this submission in our capacity as the peak organisation representing Aboriginal peoples in the Australian state of New South Wales (**NSW**). As a self-funded statutory corporation under the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**), NSWALC has a legislative objective to improve, protect and foster the best interests of all Aboriginal peoples in NSW.

As a representative body, NSWALC aims to promote the respect, protection and enjoyment of the rights, interests and aspirations of both members of the Aboriginal Land Rights Network and broader Aboriginal communities within the state of NSW. In doing so, NSWALC works directly and in-directly with various Nation, clan and language groups across the state of NSW. In undertaking this work, NSWALC is guided by the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**).

This submission highlights practical examples undertaken by the NSWALC to obtain the free, prior and informed consent of Aboriginal peoples in the Australian state of NSW. NSWALC respectfully highlights these examples as good practice examples where free, prior consent was sought and provided. This submission also provides examples of how governments in Australia have approached the free, prior and informed consent of Aboriginal peoples in the development of laws, policies and programs.

Understanding Free, Prior and Informed Consent

NSWALC endorses the following comments by the Special Rapporteur as accurately reflecting the status of international law on this subject:

> 38. It should be emphasized that the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples, and is firmly rooted in international human rights law. This duty is referenced throughout the Declaration in relation to particular concerns (arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38), and it is affirmed as an overarching principle in article 19, which provides: "States shall consult and cooperate in good faith with the indigenous peoples 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."
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> 40. The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations, including the International Convention on the

Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. Most recently, the Committee on the Elimination of Racial Discrimination, which oversees compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has called upon numerous Governments to carry out consultations with indigenous peoples on matters affecting their rights and interests, specifically in its concluding observations...; and also in its review of specific situations under its early-warning measures and urgent procedures... Similarly, the Human Rights Committee has made reference to the duty to consult in a number of its reports to Governments on their compliance with the International Covenant on Civil and Political Rights... Additionally, the duty to consult arises from the obligations assumed by States under the American Convention on Human Rights, as affirmed by the Inter-American Court of Human Rights.

41. This duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property, as indicated in the referenced statements and decisions, respectively, of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Inter-American Court of Human Rights. More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples affirms in its article 3 that: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This affirmation responds to the aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them.

Failure To Promote, Respect And Protect Human Rights Of Aboriginal Peoples

It is with this understanding of free, prior and informed consent, that NSWALC asserts that to date, Australian governments have not instigated the systemic or structural change needed to ensure the free, prior and informed consent of Aboriginal peoples is secured, both at the institutional level (in the Constitution and laws) or at the practical level (in the development, design and delivery of policies, programs and services). Consequently, participation by Aboriginal and Torres Strait Islander peoples in key areas of decision making is often limited and *ad hoc* in nature.

In addition, Articles 3 and 32 of the UNDRIP recognises the rights of Indigenous peoples to self-determination, as well as rights to control and use their traditional lands and territories. It also stipulates that States must cooperate in good faith with Indigenous peoples through their representative institutions in order to obtain their 'free, prior and informed consent,' particularly in connection with developments over their traditional lands.[1] The UNDRIP emphasises the complex and multifaceted relationships that Indigenous people have with traditional lands and acts as a guide for proper engagement with Indigenous peoples in effectively and holistically responding to this.

As an example, unfortunately in Australia, the federal and state governments have not yet taken comprehensive measures to implement legislative protection of Aboriginal culture and heritage. Currently Aboriginal peoples in NSW do not have recognised rights in legislation to determine what happens with Aboriginal culture and heritage. Legislation is currently reactive and fails to actively

[1] UN Declaration on the Rights of Indigenous Peoples Article 32.2

protect Aboriginal culture and heritage. Significantly, it also falls short of conferring ownership and control of culture and heritage to Aboriginal peoples.[2] This is not in accordance with principles of free, prior and informed consent.

NSWALC contends that government practices in Australia fall well below the existing human rights standards, especially regarding the need to appropriately secure or meet the threshold of free, prior and informed consent. Unfortunately, this failure can also be applied to across the seven core human rights treaties to which Australia is a party and for the standards reflected in the UNDRIP.

A General Lack Of Protection Of Human Rights In Australia

NSWALC is of the view that there exists an 'implementation gap' in Australia between the international human rights obligations voluntarily entered into by the Australian Government and their domestic expression. This exists in constitutional arrangements and through the law, as well as in policy and service delivery processes more generally. This lack of protection of human rights impacts on Aboriginal and Torres Strait Islander peoples in several ways in Australia:

- **Human rights considerations are not at the forefront when policies and programs that affect Aboriginal and Torres Strait Islander peoples are developed.** The outcome has often been policy that is ill-considered or unsuitable to the specific cultural circumstances and needs of Aboriginal peoples, and which has been formulated without the participation of Aboriginal and Torres Strait Islander peoples. This approach is also at odds with Article 19 of the UNDRIP which states "shall consult and cooperate in good faith with the indigenous peoples 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".

  As an example, the Australian Government's Closing the Gap policy framework, where the Australian Government committed to specific targets for reducing inequalities in Aboriginal and Torres Strait Islander life expectancy, mortality, education, school attendance and employment over a 10 year period. In 2018, the official Government evaluation of the policy framework reported that only three of the seven national targets were on track and goals to close the gap on school attendance, halve the gap in unemployment rates and school literacy and numeracy results, were also set to expire having never been met.

  The Australian Government recently announced a refresh of the Closing the Gap policy framework. NSWALC is of the view that any refresh of this policy framework must position Aboriginal community control front and centre of the design and delivery. Principles of free, prior and informed consent must be embedded in the Australian Government's Closing the Gap refresh.

  NSWALC strongly believes that genuine respect and protection of the human rights of Aboriginal peoples requires the Australian Government to engage in meaningful and genuine dialogue with Aboriginal peoples to develop an appropriate policy framework 'from the ground up'. Such an approach would be consistent with the rights of Aboriginal peoples as expressed in Article 19 of the UNDRIP.

[2] NSWALC Submission to the NSW Government: Reforming Aboriginal Culture and Heritage laws in NSW p. 36.

- **There is limited recourse where government policy itself results in breaches of Aboriginal peoples' human rights.** Aboriginal peoples are particularly vulnerable to discrimination that is instigated directly through legislation. Where a policy does not observe human rights, the lack of general protection of human rights in the Australian legal system leaves Aboriginal peoples without recourse or remedy through the court system. Legal proceedings tend to focus on whether laws have been validly made, within the (very broad) powers of the Constitution, rather than whether they involve breaches of human rights. Australia has no Charter of Rights or other human rights legislation that enables Courts to issue statements of compatibility (as exist in many other countries). This leads to very limited scrutiny of the human rights implications of legislation. This approach is again, at odds with Article 19 of the UNDRIP.

  As an example, 'Income Management' (also sometimes referred to as 'welfare quarantining') is a policy approach that advocates for restrictions on how social welfare recipients spend their welfare benefit. Typically, one portion of the benefit is received as a regular cash payment, and the remaining amount is set aside for a cashless welfare card (also referred to in Australia as a 'Basics Card' or 'Healthy Welfare Card'). This can be used for approved purposes such as buying groceries, but not for alcohol, tobacco, drugs, pornography or gambling.

  With good reason, many Aboriginal people have described Income Management as discriminatory. This has been corroborated by the Parliamentary Joint Committee on Human Rights (**PJCHR**), which raised several human rights compatibility issues in a 2013 report[3], including whether Income Management is consistent with:

    - The right to be free from discrimination on the grounds of race or ethnic origin;
    - The right to be free from discrimination on the grounds of sex (note that a discussion on gender issues will follow);
    - The right to equal protection of the law;
    - The rights to social security and an adequate standard of living; and
    - The right to privacy.

  Further, the lack of consultation with affected Aboriginal communities about the Income Management schemes imposed on them was also identified by the PJCHR[4] as constituting a breach of Indigenous peoples' right to self-determination under international human rights law, including the UNDRIP, of which Australia is a signatory.

  NSWALC is also concerned that where parliamentary scrutiny identifies human rights concerns about legislation, this is often overlooked or not addressed. As an example, previously concerns were expressed about actions of the Queensland Government to declare a series of river systems and surrounding land as 'Wild Rivers' under heritage protection legislation, with the effect of limiting development opportunities in these regions for local traditional Aboriginal owners. These steps were taken without adequate consultation and without obtaining the free, prior and

[3] Cited in Bielefeld 2016, p. 860.
[4] Cited in Bielefeld, S. 2014, 'Compulsory Income Management and Indigenous Peoples: Exploring Counter Narratives amidst colonial constructions of "vulnerability"', *Sydney Law Review*, Vol. 36, p. 714.

informed consent of local Aboriginal communities with traditional rights over that land. A subsequent federal parliamentary committee[5] into the matter noted concerns about the lack of consent and concluded that:

> 2.83 In relation to Article 19 of the UN DRIP, the committee notes only that the principle of 'free, prior and informed consent' is not binding in Australian law, nor have the federal, state and territory governments overwhelming embraced the principle. Criticisms of the Queensland Act based on this international principle of law are therefore not well founded.

The assertion that free, prior and informed consent is 'not binding in Australian law' demonstrates a fundamentally inaccurate understanding of free, prior and informed consent; whether conceptualised as either a procedural process or a 'principle'. Such an understanding is also at odds with the inter-American Commission on Human Rights that has stated the "requirement of consent must be interpreted as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights...." This is unfortunately, one of the many ways the Australian State has failed in its duty to protect, respect and promote the ends of the UNDRIP.

NSWALC also draws attention to two further situations that also clearly demonstrate both the failure to secure the free, prior and informed consent but also the dire consequences that can occur, when free, prior and informed consent is disregarded by States. Firstly, NSWALC draws attention to the indefinite detention of people with cognitive and psychiatric impairment in Australia. NSWALC acknowledges the work of the then, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda who has made the following observations:

> The violation of rights starts pre-contact with the criminal justice system, when Aboriginal and Torres Strait Islander people with cognitive impairments and their families and communities are not provided with appropriate support, or even diagnosis.
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> The violation continues during engagement with police and the courts, where cognitive impairments of Aboriginal and Torres Strait Islander people are not recognised or understood. I note that Article 13 of the UN Convention on the Rights of Persons with Disabilities provides for equal access to justice for people with disabilities.
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> The violation continues when Aboriginal and Torres Strait Islander people with cognitive impairments are imprisoned without trial, let alone conviction. And then in several cases this detention becomes long-term and even indefinite.
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> Indefinite detention is in breach of Article 9 of the International Convention on Civil and Political Rights (ICCPR) which prohibits arbitrary detention. Article 9(3) specifically states that anyone arrested *"shall be entitled to trial within a reasonable time or to release."* And Article 14(1)(b) of

[5] Senate Legal and Constitutional Legislation Committee, *Inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No.2]*, Australian Parliament, Canberra, 2010, online at: http://www.aph.gov.au/senate/committee/legcon_ctte/wildrivers/report/report.pdf.

the Convention on the Rights of Persons with Disabilities (ICRPD) states that *'the existence of a disability shall in no case justify a deprivation of liberty'.*

The violation continues still, in the accommodation provided in several Australian jurisdictions which house prisoners with cognitive disabilities in prisons. Accommodating unconvicted prisoners with the general prison population is in breach of Article 10 of the ICCPR.

Article 10(3) of the ICCPR requires that prison systems be aimed at reformation and rehabilitation; but people with cognitive disabilities in these Australian jurisdictions appear to be given little to no targeted support.

Article 14(2) of the Convention on the Rights of Persons with Disabilities provides that

'States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.'

In addition to the rights in the ICCPR, and the ICRPD, the Convention on the Elimination of all forms of Racial Discrimination is engaged when Aboriginal and Torres Strait Islander people are being disproportionately affected by these laws[6].

Secondly, NSWALC draws attention to the occurrence of the forced sterilisation of persons with disabilities and in particular women and girls. In this situation, NSWALC references the 2013 Concluding Observations of the Committee on the Rights of Persons with Disabilities, who expressed "deep concern" at the ongoing practice of forced sterilization, including "the failure of Australia to implement the recommendations from the Committee on the Rights of the Child (CRC/C/15/Add.268; CRC/C/AUS/CO/4), the Human Rights Council (A/HRC/17/10), and the Report of the UN Special Rapporteur on Torture (A/HRC/22/53), which address concerns regarding sterilization of children and adults with disabilities."7

The Committee also subsequently urged the Australian Government to "adopt national uniform legislation prohibiting the use of sterilization of boys and girls with disabilities, and of adults with disability in the absence of their prior, fully informed and free consent"8.

NSWALC highlights these egregious breaches to demonstrate the severe consequences that occur when free, prior and informed consent is not secured.

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[6] Australian Human Rights Commission(2012) *Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach* Retrieved from: https://www.humanrights.gov.au/news/speeches/mental-illness-and-cognitive-disability-aboriginal-and-torres-strait-islander [accessed 27-feb-2018]

[7] [Australia][CRPD/C/AUS/CO/1]

[8] CRPD/C/AUS/CO/1

NSWALC as a Good Practice Example
In 1983, the ALRA was enacted. The ALRA is the primary piece of legislation within NSW that allows Aboriginal peoples, via their Local Aboriginal Land Councils (**LALCs**) to own, use, control and manage lands, territories and resources. The ALRA is a compensatory legislative regime which recognises that land is of spiritual, social, cultural and economic importance to Aboriginal peoples. The land claim process (supporting the return of land to Aboriginal Land Councils generally in freehold title) is the cornerstone and primary mechanism through which Aboriginal peoples can realise economic and social justice outcomes in NSW.

In 2015, the ALRA was amended to provide for the strategic negotiation of land with government (Aboriginal Land Agreements - **ALAs**). ALAs allow for the strategic settlement of multiple land claims, negotiation of government land and for flexibility in providing the social, cultural and economic outcomes intended by the ALRA. ALAs may also provide for the co-management of land, if deemed appropriate by relevant LALCs. It is also important to note that ALAs are in addition to the existing Aboriginal land claims process under the ALRA.

Put simply, ALAs are a new mechanism based on genuine and meaningful negotiations that have the potential to allow for the settlement of multiple Aboriginal land claims. Throughout the ALA procedural process, the free, prior and informed consent of Aboriginal peoples is ongoing, not coerced and revokable at any time, without penalty. This approach is consistent with Article 19 of the UNDRIP.

As a second demonstration of good practice with regards to free, prior and informed consent, NSWALC highlights our policy development cycle that has elements of free, prior and informed consent embedded throughout. Under the ALRA, Section 113 provides NSWALC with the authority to prepare and implement policies that relate to business matters such as land dealings, investment and provision of training to members of staff and board members of LALCs. This section also requires that policies are publicly available and reviewed every five years, ensuring policies are relevant and reflect current best practice.

Additionally, Section 114 of the ALRA requires that before NSWALC adopts a policy, it must refer the policy to each LALC for comment and consider any submissions made by any LALC within 30 days of the referral of the policy. It is only then that the Minister can provide approval of the final policy. Section 114 ensures that the free, prior and informed consent of the 120 autonomous LALCs is obtained.

Whilst this is the formal process outlined under the ALRA, informally, NSWALC also welcomes feedback and engagement from LALCS throughout the policy development cycle and seeks to foster these relationships where and when appropriate. It is apparent that as the intended audience for NSWALC policies, LALCs and more broadly Aboriginal peoples in NSW have vested interests in ensuring that policies are responsive to their day to day operating environment and future aspirations. Throughout the policy development process, NSWALC seeks to elicit the views and opinions within the LALC network and also set a standard of engagement that recognises the status of Aboriginal peoples as rights holders and not merely 'stakeholders'. The ALRA provisions for consultation with the 120 LALCS ensure that self-governance principles are not only adhered to but

implemented in tangible ways with real opportunities to guide the direction of the Aboriginal land rights network.

It is NSWALC contention that the requirements for consultation and information sharing within the development of policy ensure that the free, prior and informed consent of the Aboriginal land rights network is respected and facilitated throughout the policy development cycle. NSWALC also contends that the practical application of the ALRA is also in line with Article 3 of the UNDRIP which identifies the right of Indigenous peoples to self-determination. The Aboriginal land rights network is guided by the expertise of an all Aboriginal board that is democratically elected and this is self-determination in action.

Conclusion

There is a clear need for governments in Australia to move from rhetoric to action, so that the human rights of Aboriginal peoples are respected, protected and promoted as well as embedded across the institutional and policy frameworks that are applied on a day to day basis in Australia. NSWALC refers to the preamble of the UNDRIP when we state that we are:

'Convinced that the recognition of the rights of indigenous peoples... 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'

and when we encourage:

'***States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned'.***

References

UN-REDD Programme. Guidelines on Free, Prior and Informed Consent. Accessed February 26, 2018, http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.

UN Doc: A/HRC/12/34, 15 July 2009. Section 2 of the report analyses the 'duty of States to consult with indigenous peoples on matters affecting them'.

Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, at para. 333