

## **AUSTRALIA'S COMMITMENT TO 'ADVANCE THE HUMAN RIGHTS OF INDIGENOUS PEOPLES AROUND THE GLOBE' ON THE UNITED NATIONS HUMAN RIGHTS COUNCIL**

### ABSTRACT

In 2018, Australia took up its first three-year term as a Member State of the United Nations Human Rights Council ('UNHRC'). In its bid for election, Australia made a number of voluntary commitments in relation to its human rights performance as a member. In this article, we consider the six elements of Australia's pledge relating to Indigenous rights at domestic and international levels. Although it is too early to assess Australia's overall performance on the UNHRC, an assessment of current human rights practice in relation to these six areas provides a helpful snapshot of contemporary Indigenous affairs and rights realisation in Australia. After considering Australia's performance within this framework, we advance recommendations for the constructive development of Australian law and policy in the future and in particular, advocate for the adoption of the *Uluru Statement from the Heart* ('*Uluru Statement*'). We also identify ways in which Australia can advance the rights of Indigenous peoples around the world.

### I INTRODUCTION

**T**he UNHRC is the key intergovernmental body responsible for promoting and encouraging respect for human rights and fundamental freedoms for all.<sup>1</sup> The UNHRC consists of 47 elected Member States serving three-year membership terms on a rotating basis. When States put themselves forward for election, they are evaluated not only on their record of human rights promotion and protection, but also

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<sup>1</sup> United Nations Human Rights Council, GA Res 60/251, UN GAOR, 60<sup>th</sup> sess, 72<sup>nd</sup> plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006, adopted 15 March 2006) para 2.

any voluntary pledges they advance as candidates for membership. These pledges should consist of specific, measurable and verifiable commitments.<sup>2</sup>

As the key international human rights body, the UNHRC has an important role to play in promoting the rights of Indigenous peoples who are widely recognised to be amongst the most vulnerable and at-risk communities in the world today.<sup>3</sup> This is a matter of concern for the United Nations ('UN') which, in response, has adopted the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'),<sup>4</sup> appointed a UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People (now the 'UN Special Rapporteur on the Rights of Indigenous Peoples'), and established a UN Permanent Forum on Indigenous Issues.<sup>5</sup> In Australia, Indigenous peoples experience significant disadvantages compared to their non-Indigenous counterparts.<sup>6</sup> The stark gaps in health, life expectancy, and education outcomes for Indigenous peoples led the Council of Australian Governments ('COAG') in 2008 to adopt targets to improve these outcomes, via the Closing the Gap ('CTG') initiative.<sup>7</sup> At the international level, Australia also made a pledge to advance the human rights of all Indigenous peoples,<sup>8</sup> and was subsequently elected

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<sup>2</sup> Ibid paras 7–8; United Nations Office of the High Commissioner for Human Rights, 'Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council' (Paper, 2006) 1.

<sup>3</sup> Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Routledge, 2011) 1.

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').

<sup>5</sup> Morgan (n 3).

<sup>6</sup> For example, compared to non-Indigenous Australians, Indigenous peoples in Australia are expected to live approximately eight years less, receive inadequate education and employment, and despite comprising less than 3% of the population, account for 28% of Australia's prison population. See Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Life Expectancy Lowest in Remote and Very Remote Areas* (Catalogue No 3302.0.55.003, 29 November 2018); Department of the Prime Minister and Cabinet, *Closing the Gap 2019* (Annual Report, 2019) 10 ('*Closing the Gap*'); Australian Bureau of Statistics, 'Prisoners in Australia, 2019' (Catalogue No 4517.0, 30 June 2018).

<sup>7</sup> National Indigenous Australians Agency, 'About Closing the Gap', *Closing the Gap* (Web Page) <<https://closingthegap.niaa.gov.au/about-closing-gap>>.

<sup>8</sup> In this article we use the term 'Indigenous peoples' as it is the commonly used term in international law to describe First Nations peoples, and we use title case. Where we quote from government and other documents, lower case may be used for 'indigenous' and Indigenous peoples may be referred to as 'Indigenous Australians' — we avoid use of 'Indigenous Australians' as Indigenous groups have their own groups and identifiers pre-dating settler-colonial Australia. When referring to Indigenous peoples within Australia, and drawing on other sources, we also refer to Aboriginal and Torres Strait Islanders which we recognise is a preferred term for referring to Australia's First Peoples: Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Peoples Engagement Toolkit* (Engagement Toolkit Paper, 2012) 6.

to the UNHRC for the 2018–20 term.<sup>9</sup> Australia's bid to join the UNHRC centred around its 'proud and long history of promoting and protecting human rights' and its status as 'arguably the most successful, the most diverse, multi-cultural society on earth'.<sup>10</sup> Alongside its commitment to promote the rights of Indigenous peoples, Australia also made commitments across four other 'pillars': (i) advancing the rights of women and girls; (ii) promoting good governance and stronger democratic institutions everywhere; (iii) promoting and protecting freedom of expression; and (iv) promoting strong national human rights institutions and capacity-building.<sup>11</sup>

This article focuses on the six specific commitments Australia made in relation to Indigenous rights in its UNHRC bid, namely to:

1. Support the *UNDRIP*;
2. Actively engage with multilateral processes affecting Indigenous peoples, including through discussions at the Permanent Forum on Indigenous Issues, and strengthen the Expert Mechanism on the Rights of Indigenous Peoples;
3. Continue efforts to increase the participation of Indigenous peoples in all relevant processes and mechanisms of the UN human rights system;
4. Advance the economic rights of Indigenous peoples;
5. Tackle Indigenous disadvantage in partnership with Aboriginal and Torres Strait Islander peoples to improve health, education, and employment outcomes; and
6. Pursue a referendum to recognise Aboriginal and Torres Strait Islander peoples under the *Constitution*.<sup>12</sup>

The article is structured according to these six elements of Australia's pledge, using them as a framework to examine Australia's performance on Indigenous rights at domestic and international levels. Although it is too early to assess Australia's overall performance on the UNHRC, an assessment of current practice in relation to the six areas of Australia's voluntary commitment provides a helpful snapshot and finds that in many areas, Australia falls short of giving effect to Indigenous rights. After considering performance in relation to its UNHRC commitments, we advance recommendations. The unifying themes of these recommendations are two-fold, first

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<sup>9</sup> Permanent Mission of Australia to the United Nations, *Note Verbale Dated 14 July 2017 from the Permanent Mission of Australia to the United Nations Addressed to the President of the General Assembly*, UN GAOR, 72<sup>nd</sup> sess, Provisional Agenda Item 115(d), UN Doc A/72/212 (24 July 2017) [18] ('*Australian UNHRC Pledge*').

<sup>10</sup> Julie Bishop, 'Human Rights Council Campaign Launch' (Speech, Human Rights Council, 18 May 2017) <<https://www.foreignminister.gov.au/minister/julie-bishop/speech/human-rights-council-campaign-launch>>.

<sup>11</sup> See *Australian UNHRC Pledge* (n 9).

<sup>12</sup> *Ibid* [18].

they support the constructive development of Australian law and policy in the future, in line with Australia's broader obligations under international law. For example, a key recommendation is for the adoption of the *Uluru Statement*. Second, the recommendations identify ways in which Australia's commitment to Indigenous rights can support the rights of Indigenous peoples around the world, including through bolstering Indigenous rights at the UNHRC.

## II SUPPORTING THE UNITED NATIONS DECLARATION ON THE RIGHT OF INDIGENOUS PEOPLES

'Support the Declaration on the Rights of Indigenous Peoples in both word and deed, including the promotion of the Declaration's principles through national engagement, and internationally through its aid programme.'<sup>13</sup>

One of the most important instruments for Indigenous rights at the international level is the *UNDRIP*, the product of over two decades of discussions at the UN. The resulting instrument sets out international standards which States can strive towards in an effort to truly recognise Indigenous peoples' rights to self-determination, participation in decision-making, respect for and promotion of culture, and equality and non-discrimination.<sup>14</sup> Ongoing support for the *UNDRIP* by the UNHRC and its constituent members remains critical to realising its potential, for although Indigenous rights and the *UNDRIP* are generally accepted and recognised by States — especially by the legislature and judiciary — in many countries the practical implementation and effective realisation of the rights of Indigenous peoples remain unsatisfactory.<sup>15</sup>

For Australia, Eddie Synot has argued that the significance of the *UNDRIP* is its commitment to self-determination:

Regardless of the Australian Government's continuing reluctance to embrace international standards of human rights, those standards still are potent mechanisms for Indigenous peoples to speak from and be heard. *UNDRIP* especially provides recognition of the foundation of self-determination being key to all Indigenous rights and that Indigenous claims exist beyond the narrow understanding of Indigeneity aimed at the alleviation of socio-economic disadvantage. Perhaps most importantly, *UNDRIP* provides a principled road map to effect self-determination beyond abstraction.<sup>16</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> *UNDRIP* (n 4); Mick Gooda and Katie Kiss, 'Ensuring the Ongoing Survival of the Oldest Living Culture in the World' (Declaration Dialogue Series Paper No 4, Australian Human Rights Commission, July 2013) 4.

<sup>15</sup> Federico Lenzerini, 'Implementation of the *UNDRIP* around the World: Achievements and Future Perspectives' (2019) 23(1–2) *The International Journal of Human Rights* 51.

<sup>16</sup> Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320, 324.

He notes that the *Uluru Statement* is a self-determining document that sets the practical and meaningful groundwork of how to implement, protect and enforce self-determination through the three key pillars of Voice, Treaty and Truth. It represents a significant opportunity for Australia to meet its *UNDRIP* commitment to self-determination — an opportunity that has to date, been missed, as discussed in Section VII. Synot remains hopeful that UN instruments and institutions, including the UNHRC and the *UNDRIP*, will continue to play ‘important roles in amplifying Indigenous voices and increasing the ability of others and the Australian community to hear them’.<sup>17</sup>

As authors from both Indigenous and non-Indigenous backgrounds, we acknowledge that the *UNDRIP* has not received universal welcome by Indigenous peoples and scholars. Irene Watson argues that the *UNDRIP* positions Indigenous peoples within the boundaries of States — States which continue to determine all aspects of Aboriginal life.<sup>18</sup> She also criticises the *UNDRIP*’s failure to centre Indigenous knowledges.<sup>19</sup> Steven Newcomb situates the *UNDRIP* within the colonial framework of States, which define Indigenous peoples as ‘less-than-human’ and construct and institutionalise a framework of domination against Indigenous peoples through law and policy.<sup>20</sup> He sees the *UNDRIP* as not only failing to address the issue of domination over Indigenous peoples but rather, a mechanism by States to maintain the status quo. These criticisms fit within a broader critique of international law as a neo-colonising force.<sup>21</sup> Acknowledging these valid criticisms, we seek to progress Indigenous rights through the existing framework but also expand the framework to incorporate more Indigenous knowledges by drawing on Indigenous initiatives and critiques that either seek to improve Indigenous rights in Australia, or internationally.

Australia was one of only four States to vote against the *UNDRIP* at the time of its adoption by the UN General Assembly (‘UNGA’) in 2007.<sup>22</sup> Although endorsement came in 2009, it has not yet translated into domestic implementation of the *UNDRIP* obligations. Successive Commonwealth governments have been subjected to

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<sup>17</sup> Ibid 325.

<sup>18</sup> Irene Watson, ‘Aboriginal(ising) International Law and Other Centres of Power’ (2011) 20(3) *Griffith Law Review* 619, 638.

<sup>19</sup> Ibid 637.

<sup>20</sup> Steven T Newcomb, ‘The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination’ (2011) 20(3) *Griffith Law Review* 578.

<sup>21</sup> See, eg, Makau Mutua, ‘What Is TWAIL?’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

<sup>22</sup> The other three States were Canada, New Zealand and the United States (together referred to as CANZUS). The cohort collectively used their significant foreign policy budgets to negotiate the language used within the *UNDRIP*: see Megan Davis, ‘To Bind or Not to Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On’ (2012) 19 *Australian International Law Journal* 17, 42.

criticism and demands for adherence to the Declaration's principles.<sup>23</sup> Indeed, many policies since 2007 have been criticised for going *against* the right of Indigenous peoples to self-determination by adopting paternalistic strategies that erode the capacity of Indigenous peoples to protect the land or pursue social, economic or cultural development.<sup>24</sup> The implementation of the Northern Territory Emergency Response ('Intervention') directly conflicted with the *UNDRIP*'s principles of self-determination and consultation.<sup>25</sup> In 2010, the UN Committee on the Elimination of Racial Discrimination noted 'the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies ... (arts. 1, 2 and 5)'.<sup>26</sup>

Australia falls short of its *UNDRIP* obligations in a number of areas. For example, Australia has not implemented the recommendations of the Special Rapporteur on the Rights of Indigenous People, a key UN mechanism for Indigenous peoples. Special Rapporteur Victoria Tauli-Corpuz's report on Australia in 2017<sup>27</sup> urged the government to address a number of issues including: Indigenous incarceration rates, child removal and compensation for victims of the Stolen Generation, and specifically criticised the Indigenous Advancement Strategy ('IAS') funding model, and the

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<sup>23</sup> Australian Human Rights Commission, *Australia's Universal Periodic Review* (Report, 19 December 2014) 8; Australian Human Rights Commission, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (15 April 2015) 6; Australian NGO Coalition, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (March 2015) 6; United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN GAOR, 36<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [34]–[36], [107] ('*Report of the Special Rapporteur*').

<sup>24</sup> See, eg, the discussion of Stronger Futures and the Northern Territory Intervention in *Report of the Special Rapporteur* (n 23) [60]–[61]; National Congress of Australia's First Peoples, *Briefing for the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpuz* (Briefing Paper, March 2017) ('*Briefing for UN Special Rapporteur*').

<sup>25</sup> *UNDRIP* (n 4). The *UNDRIP* provides for self-determination: at art 3. The *UNDRIP* also provides that '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': at art 19. See also Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Washington International Law Journal* 247.

<sup>26</sup> Committee on the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77<sup>th</sup> sess, UN Doc CERD/C/AUS/CO/15–17 (13 September 2010, adopted 24 August 2010) para 16.

<sup>27</sup> See generally *Report of the Special Rapporteur* (n 23).

CTG initiative.<sup>28</sup> Former Indigenous Affairs Minister Nigel Scullion responded to the Special Rapporteur's recommendations defensively, stating that the 'government is absolutely committed to working with Indigenous Australians to deliver better outcomes' and referred to improvements to education and procurement.<sup>29</sup> However, there is no evidence of a substantive government response to the Special Rapporteur's report.

Australia has responded to recommendations to fully implement the *UNDRIP* with the argument that *supporting* the promotion of the Declaration, current domestic policies, and involvement in Indigenous affairs at an international level constitute sufficient action.<sup>30</sup> During its 2015 review by the UNHRC through the peer review mechanism, the Universal Periodic Review ('UPR'), the Commonwealth government therefore accepted the majority of Indigenous-related recommendations made by other States 'on the basis of existing law, policy and action'.<sup>31</sup> It is debatable whether this means the government intended to take further action, or whether this meant 'business as usual' with no specific action intended.<sup>32</sup>

Nonetheless, although proactive implementation of the *UNDRIP* has been lacking, many legislative and policy initiatives within Australia are at least aligned with the *UNDRIP*'s principles and provisions.<sup>33</sup> Several of these initiatives, and responses by the government to the UNHRC, refer to the IAS as the roadmap to realise Indigenous rights within Australia and further the implementation of the *UNDRIP*.<sup>34</sup>

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<sup>28</sup> Ibid [37]–[41], [46]–[47]; *Racial Discrimination Act 1975* (Cth).

<sup>29</sup> Calla Wahlquist, 'Australia's Rate of Indigenous Child Removal "Unique", UN Investigator Says', *The Guardian* (online, 4 April 2017) <<https://www.theguardian.com/australia-news/2017/apr/04/australia-rate-indigenous-child-removal-unique-un-investigator>>.

<sup>30</sup> Attorney-General's Department, 'Australia's Second Universal Periodic Review', Submission to the Universal Periodic Review Working Group (18 September 2015) 6 ('Attorney-General's Submission for Second UPR'); Attorney-General's Department, 'Australia's Formal Response to the UPR Recommendations', Submission to the Universal Periodic Review Working Group (8 June 2011) 2.

<sup>31</sup> Attorney-General's Submission for Second UPR (n 30) 6; Universal Periodic Review Working Group, *Report of the Working Group on the Universal Periodic Review: Australia*, 31<sup>st</sup> sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016) [23] ('UPR Report Australia').

<sup>32</sup> See also Fiona McGaughey, 'The Role and Influence of Non-Governmental Organisations in the Universal Periodic Review: International Context and Australian Case Study' (2017) 17(3) *Human Rights Law Review* 421, 448.

<sup>33</sup> See, eg, 'Commonwealth Rights and Interests in Indigenous Grant Funded Property: Policy Statement', *Department of Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/indigenous-affairs/commonwealth-caveated-property/policy-statement>>; 'Culture and Capability', *National Indigenous Australians Agency* (Web Page) <<https://www.niaa.gov.au/indigenous-affairs/culture-and-capability>>.

<sup>34</sup> See, eg, 'Community Safety', *National Indigenous Australians Agency* (Web Page) <<https://www.pmc.gov.au/Indigenous-affairs/community-safety>>; Nigel Scullion, 'Celebrating the 10th Anniversary of the United Nations Declaration on the Rights

The IAS determines the way that the Australian government funds programs for Indigenous peoples. The introduction of the IAS in 2014 saw the Department of Prime Minister and Cabinet consolidate 27 programs into five application streams, including education, employment, and economic development.<sup>35</sup> Since its inception, the IAS has been criticised as 'deeply flawed' for its failure to adequately consult with Indigenous communities and its incoherent, rapid roll-out which lacked transparency.<sup>36</sup> The further \$5.2 billion in funding announced in the 2019–20 budget, and government praise of the strategy, falsely inflated the positive effects of the IAS,<sup>37</sup> when in fact the expeditious change in funding arrangements had a notably negative impact on community organisations.<sup>38</sup> While it is responsible for delivering financial support to many organisations, the IAS has been criticised for decreasing the number of Indigenous organisations by forcing them to compete in an arduous bidding process against much better resourced and well-funded companies.<sup>39</sup> Several large non-Indigenous corporations have been the greatest beneficiaries of the IAS funding, whose efforts in the name of 'reconciliation' have been prioritised over Indigenous self-determination.<sup>40</sup> Reports of funds under the IAS being given to lobby groups have been met with disapproval in Indigenous communities, with some suggesting that it is easier to attract funds to *help* Indigenous communities than to facilitate their self-determination and decision-making.<sup>41</sup> In this way, the IAS fosters colonial

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of Indigenous Peoples' (Media Release, Department of Prime Minister and Cabinet, 13 September 2017) ('Celebrating the 10<sup>th</sup> Anniversary'); *UPR Report Australia* (n 31).

<sup>35</sup> 'Indigenous Advancement Strategy', *National Indigenous Australians Agency* (Web Page) <<https://www.indigenous.gov.au/indigenous-advancement-strategy>>; Australian National Audit Office, *Indigenous Advancement Strategy* (Report No 25, 3 February 2017) 7.

<sup>36</sup> Elizabeth Strakosch, 'The Technical is Political: Settler Colonialism and the Australian Indigenous Policy System' (2018) 54(1) *Australian Journal of Political Science* 114, 121; Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Indigenous Advancement Strategy Tendering Processes* (Report, March 2016) 77; Megan Davis, 'Gesture Politics' *The Monthly* (online, December 2015) <<https://www.themonthly.com.au/issue/2015/december/1448888400/megan-davis/gesture-politics>>.

<sup>37</sup> *Ibid*; *Report of the Special Rapporteur* (n 23) [37]–[41]; Celebrating the 10<sup>th</sup> Anniversary (n 34).

<sup>38</sup> Senate Finance and Public Administration References Committee (n 36) 45.

<sup>39</sup> *Briefing for UN Special Rapporteur* (n 24); 'Indigenous Advancement Strategy', *Australian National Audit Office* (Web Page, 3 February 2017) <<https://www.anao.gov.au/work/performance-audit/Indigenous-advancement-strategy>>.

<sup>40</sup> Davis, 'Gesture Politics' (n 36).

<sup>41</sup> For example, approval for funding has been given to fishing lobby groups to attain legal advice on how they will be affected by Indigenous land claims. See Jano Gibson, 'Indigenous Advancement Funds Given to Lobby Groups Impacted by Aboriginal Land Claims', *ABC News* (online, 31 October 2018) <<https://www.abc.net.au/news/2018-10-31/Indigenous-advancement-strategy-funds-given-to-lobby-groups-nt/10451664>>; Michele Madigan, 'The Government's Retrogressive Indigenous Advancement Strategy' (2015) 25(12) *Eureka Street* 23.

rhetoric,<sup>42</sup> a poorly constructed system deemed necessary to improve Indigenous incapacity and inferiority, rather than a system implemented to progress Indigenous empowerment.

Australia's UNHRC pledge could have been shaped to refocus Indigenous policy objectives in line with international standards. Instead, few of the voluntary commitments Australia advanced went beyond the intention to maintain policies and programs already underway. Nevertheless, in this article we focus on potential avenues to substantive reform, rather than on a critique of Australia's reluctance to make more ambitious commitments to the UNHRC.

### III ENGAGING WITH MULTILATERAL PROCESSES AFFECTING INDIGENOUS PEOPLES

'Actively engage with multilateral processes affecting Indigenous peoples, including through discussions at the Permanent Forum on Indigenous Issues, and strengthen the Expert Mechanism on the Rights of Indigenous Peoples.'<sup>43</sup>

This pledge relates to Australia's engagement with multilateral processes affecting Indigenous peoples, an effort that has remained relatively constant in recent years. The key international-facing policy for the government's approach to Indigenous peoples is the 2015–19 Department of Foreign Affairs and Trade ('DFAT') Indigenous Peoples Strategy, which provided guidance for Australia's international policies and interaction with international partners.<sup>44</sup> Outlining Australia's commitment to issues facing Indigenous peoples internationally, the Strategy emphasised Australia's role as a 'longstanding advocate for the full and effective participation of indigenous peoples' in the UNGA, the UNHRC, the UN Permanent Forum on Indigenous Issues ('UNPFII') and the Expert Mechanism on the Rights of Indigenous Peoples ('EMRIP').<sup>45</sup> The government's commitment to these mechanisms is evidenced by their support for the attendance of Australian delegates at the UNPFII and EMRIP.<sup>46</sup> Further, Australia was involved in the 2016 amendments to the EMRIP mandate, which were designed to strengthen the body and to allow for better evaluation of

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<sup>42</sup> See generally Strakosch (n 36).

<sup>43</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>44</sup> Department of Foreign Affairs and Trade, *DFAT Indigenous Peoples Strategy 2015–2019: A Framework for Action* (Report, June 2015) 7 ('*DFAT Indigenous Strategy*').

<sup>45</sup> *Ibid.*

<sup>46</sup> There is no specific record of the attendance at the annual events, however some UN records, media releases and news articles note attendance of Australian participants at the UNPFII and the EMRIP. See, eg, *ibid.*; Peter de Krujiff, 'Young Leader Inspired after UN Visit', *The West Australian* (Perth, 30 May 2018); Permanent Forum on Indigenous Issues, *Attendance at the Seventeenth Session of the Permanent Forum on Indigenous Issues*, UN ECSOR, 16<sup>th</sup> sess, UN Doc E/C.19/2018/INF/1 (4 May 2018).

the impact of UNDRIP.<sup>47</sup> This pillar of the UNHRC pledge replicates the aforementioned Indigenous Peoples Strategy which expressed a commitment to 'remain active' in multilateral fora addressing Indigenous issues.<sup>48</sup> However, it is difficult to assess the success of the Strategy, as the findings from its 2017 mid-term review are not publicly available.<sup>49</sup> The Strategy has also expired and is yet to be reformulated for the period commencing 2020.

As an advocate for Indigenous rights, we would expect Australia's commitment to Indigenous rights in international fora to be evident. For example, Australia's UPR recommendations at the UNHRC to other States regarding Indigenous peoples is a key opportunity and could indicate a level of commitment to the issue. Yet at this point in Australia's UNHRC term, the government has not yet made any recommendations categorised as relating to 'Indigenous peoples' in the UPR-Info database of recommendations. There have been a total of 15 recommendations on 'Indigenous peoples' made historically, out of a total of 1,389 recommendations made by Australia to date.<sup>50</sup> This means that recommendations relating to Indigenous peoples constituted approximately 0.1 per cent of all recommendations made by Australia to other States. This is consistent with the records of other settler colonial States with Indigenous populations, including the United States (18 out of 1362 recommendations), New Zealand (nine out of 550) and Canada (28 out of 1,943), but pales in comparison to other member States' approaches, for example, Bolivia's 62 out of a total of 350 recommendations.<sup>51</sup> An example of incongruence between DFAT's strategy and substantive action is the fact that Australia's recommendations during its UNHRC term relating to other issues dramatically outnumber Indigenous-related recommendations, with 208 relating to abolition of the death penalty and 565 relating to international instruments.<sup>52</sup> Death penalty abolitionist advocacy relates to the 'good governance' pillar of Australia's UNHRC's pledges.

Prior to the commencement of Australia's UNHRC term, at the 2017 UNPFII, representatives from Indigenous organisations in Australia expressed their frustration at the actions of the government, such as the failure to develop a national

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<sup>47</sup> Australian Government, 'Questionnaire: Reform of the Mandate of the Expert Mechanism on the Rights of Indigenous Peoples', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/MandateReview/States/Australia.pdf>>; *Expert Mechanism on the Rights of Indigenous Peoples*, HRC Res 33/25, UN GAOR, 33<sup>rd</sup> sess, 41<sup>st</sup> mtg, Agenda Item 5, UN Doc A/HRC/RES/33/25 (5 October 2016, adopted 30 September 2016).

<sup>48</sup> *DFAT Indigenous Strategy* (n 44) 6.

<sup>49</sup> *Ibid* 4.

<sup>50</sup> UPR Info, *Database of Recommendations* (Web Page) <<https://www.upr-info.org/database/>>.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

policy framework for implementation of the *UNDRIP*<sup>53</sup> and the failure to address the shocking rates of Indigenous incarceration.<sup>54</sup> Also at the 2017 UNPFII, the Australian Human Rights Commission advocated for the inclusion of the *UNDRIP* in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and emphasised the former Special Rapporteur on the Rights of Indigenous Peoples' comments on the inadequacy of Australian governmental (federal, state and territory) responses to the efforts of Indigenous rights defenders.<sup>55</sup> The UNPFII provides a forum for governments to listen and learn from Indigenous peoples, however, the dialogue there is negatively affected by the division of UN Member States and Indigenous peoples' representatives into separate sessions.<sup>56</sup> Statements made by the Commonwealth government at the UNPFII acknowledge some challenges but avoid delving into the inadequacies of current policies. In 2018, Indigenous organisations appealed to the UNPFII to request that Australia undertake an audit of land rights legislation against the *UNDRIP* and to urge for comprehensive implementation of the *UNDRIP* to address the 'human rights crisis' facing Indigenous peoples.<sup>57</sup>

Turning to the second international Indigenous forum, a somewhat similar pattern emerges. The EMRIP is the advisory body to the UNHRC engaged to prepare studies on issues affecting Indigenous peoples.<sup>58</sup> Commonwealth government statements generally acknowledge the role of the EMRIP and the potential for the mechanism

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<sup>53</sup> Anthony Watson, 'Intervention by Mr Anthony Watson Chairman of the Kimberley Land Council, Australia', (Speech, Permanent Forum on Indigenous Issues, 16<sup>th</sup> sess, Agenda Item 4, 26 April 2017) <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHceca/647a36c1.dir/PF17watsonItem42604.pdf>>.

<sup>54</sup> Cathryn Eatock, 'Intervention Delivered by Cathryn Eatock on Behalf of the Indigenous Peoples Organisation of Australia and the Aboriginal Rights Coalition' (Speech, Permanent Forum on Indigenous Issues, 16<sup>th</sup> sess, Agenda Item 10, 1 May 2017) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHf93b/66bf1b46.dir/PF17Eatock100501.pdf>>.

<sup>55</sup> Permanent Forum on Indigenous Issues, *Compilation of Information from National Human Rights Institutions*, UN ESCOR, 16<sup>th</sup> sess, Provisional Agenda Item 4, UN Doc E/C.19/2017/9 (27 January 2017) 4.

<sup>56</sup> Eatock (n 54).

<sup>57</sup> Anne Dennis, 'Intervention by the New South Wales Aboriginal Land Council, Delivered by Councillor for the North West Region, and Member of the Gamilaraay People, Councillor Anne Dennis' (Speech, Permanent Forum on Indigenous Issues, 16<sup>th</sup> sess, Agenda Item 10, 2 May 2017) 2, 5 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH010c/9fe70325.dir/PF18DENNIS100418.pdf>>; Terry Mason, 'Intervention Delivered By Terry Mason On Behalf Of The Indigenous Peoples Organisation Of Australia' (Speech, Permanent Forum on Indigenous Issues, 17<sup>th</sup> sess, Agenda Item 8, 17 April 2018) 2 <[https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHec05/51244138/6da18e33.dir/PF18Mason080417\\_.pdf](https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHec05/51244138/6da18e33.dir/PF18Mason080417_.pdf)>.

<sup>58</sup> 'Expert Mechanism on the Rights of Indigenous Peoples', *United Nations Human Rights Office of the High Commissioner* (Web Page) <<https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>>.

to 'work together' with Indigenous peoples to achieve the goals of the *UNDRIP*.<sup>59</sup> However, submissions by Indigenous bodies, such as the Indigenous Peoples Organisation and the New South Wales Aboriginal Land Council accuse the government of 'clever window-dressing',<sup>60</sup> and urge for the development of national action plans and support for Aboriginal community-controlled approaches and frameworks.<sup>61</sup> These organisations call for an EMRIP country visit to Australia to provide advice on these issues,<sup>62</sup> and the appointment in 2019 of Cobble Cobble woman and academic expert Professor Megan Davis to the EMRIP presents opportune timing for such a visit.<sup>63</sup>

#### IV PLEDGE TO INCREASE INTERNATIONAL INDIGENOUS PARTICIPATION

'Continue efforts to increase the participation of Indigenous peoples in all relevant processes and mechanisms of the United Nations human rights system. Australia will continue to contribute to the United Nations Voluntary Fund for Indigenous Peoples to support the participation of Indigenous peoples in relevant meetings.'<sup>64</sup>

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<sup>59</sup> Australian Mission to the United Nations, 'Australian Statement' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 10<sup>th</sup> sess, Agenda Item 5, 11 July 2016) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0181/7d4d6e61.dir/EM17Australia50711.pdf>>; Australian Mission to the United Nations, 'Australian Statement' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11<sup>th</sup> sess, Agenda Item 3, 10 July 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH016a/4f3f7a20.dir/EM18AUSTRALIA.30710.pdf>>.

<sup>60</sup> James Christian, 'Intervention by the New South Wales Aboriginal Land Council' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11<sup>th</sup> sess, Agenda Item 4, 9–13 July 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0703/c931820b.dir/EM18CHRISTIAN40709.pdf>>.

<sup>61</sup> Anne Dennis, 'Intervention by the New South Wales Aboriginal Land Council, delivered by the Deputy Chairperson, Councillor Anne Dennis' (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11<sup>th</sup> sess, Agenda Item 10, 9–13 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0193/61849c0f.dir/EM18DENNIS100712.pdf>>.

<sup>62</sup> Jack Collard (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11<sup>th</sup> sess, Agenda Item 7, 11 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0134/d867ebf3.dir/EM18COLLARD70711.pdf>>; Noongar Child Protection Council (Speech, Expert Mechanism on the Rights of Indigenous Peoples, 11<sup>th</sup> sess, Agenda Item 7, 10 July 2018) 2 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHdacc/24cda83e.dir/EM18HOFFMAN30710.pdf>>.

<sup>63</sup> Letter from President of the Human Rights Council to Permanent Representatives to the United Nations Office at Geneva, 11 February 2019 <[https://www.ohchr.org/Documents/HRBodies/SP/CallApplications/HRC40/20190211\\_President\\_List\\_HRC40\\_appointments.pdf](https://www.ohchr.org/Documents/HRBodies/SP/CallApplications/HRC40/20190211_President_List_HRC40_appointments.pdf)>.

<sup>64</sup> *Australian UNHRC Pledge* (n 9) [18].

Almost eight years after the adoption of the *UNDRIP* at the World Conference on Indigenous Peoples,<sup>65</sup> the Member States of the UN requested that the President of the UNGA consult with Indigenous peoples and the UN mechanisms for Indigenous peoples (including the UNPFII, the EMRIP and the Special Rapporteur on the Rights of Indigenous Peoples), in respect of the actions required to enable participation of Indigenous peoples at meetings of relevant UN bodies.<sup>66</sup> The advisers appointed by the President of the UNGA undertook a consultation process resulting in the 2017 UNGA resolution, *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them* ('Resolution').<sup>67</sup>

Australia is the fifth largest contributor to the Voluntary Fund for Indigenous Peoples, showing clear commitment to that aspect of the pledge.<sup>68</sup> However, there are also many Indigenous people from Australia who have attended UN events throughout Australia's UNHRC term (and historically) without government assistance and instead through support and sponsorship from non-governmental organisations.<sup>69</sup> Jackie Huggins, the Co-Chair of the National Congress of Australia's First Peoples, needed to fundraise in order to attend the UNPFII in 2018, despite the National Congress being referenced in the Australian UNHRC bid.<sup>70</sup> The Indigenous Peoples Organisation Network, a key organisation supporting access to the UN, was mentioned in Australia's UNHRC voluntary pledge,<sup>71</sup> but has not received any government funding since 2014 and independently funds a cohort to attend the UNPFII.<sup>72</sup>

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<sup>65</sup> *UNDRIP* (n 4).

<sup>66</sup> *Rights of Indigenous Peoples*, GA Res 70/232, UN GAOR, 3<sup>rd</sup> Comm, 70<sup>th</sup> sess, Agenda Item 69(a), UN Doc A/Res/70/232 (16 February 2016, adopted 23 December 2015) para 19.

<sup>67</sup> *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them*, GA Res 71/321, UN GAOR, 71<sup>st</sup> sess, Agenda Item 65, UN Doc A/RES/71/321 (21 September 2017, adopted 8 September 2017).

<sup>68</sup> 'United Nations', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/international-relations/international-organisations/un/Pages/united-nations-un>>; 'UN Voluntary Fund for Indigenous Peoples: Last Session', *United Nations Human Rights Office of the High Commissioner* (Web Page, 2019) <<https://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/IPeopleFundLastsession.aspx>>.

<sup>69</sup> Tammy Solonec, 'UN Mechanisms for Indigenous Peoples: A Personal Account of Participation in 2010' (2010) 7(19) *Indigenous Law Bulletin* 8.

<sup>70</sup> Jackie Huggins, 'Australia's First People to the UN: Govt Statements Are "Hypocritical in the Extreme"' *The Mandarin* (online, 24 April 2018) <<https://www.themandarin.com.au/91664-australias-first-people-to-the-un-govt-statements-are-hypocritical-in-the-extreme>>; *Australian UNHRC Pledge* (n 9) [18].

<sup>71</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>72</sup> See Tammy Solonec (n 69).

In general, participation of civil society remains a challenge in the UN human rights system,<sup>73</sup> reflecting the dominance of state-centrism.<sup>74</sup> However, Indigenous peoples can face particular barriers in participation both in domestic consultation regarding UN human rights obligations and in participation in international fora.<sup>75</sup> The reality is that States hold the cards when it comes to Indigenous participation in the UN, and whilst the UNPFII is a significant annual event, its success has been undermined by its limited mandate.<sup>76</sup> Despite being higher in the UN hierarchy than the Working Group on Indigenous Populations ('WGIP'), the UNPFII has been criticised by Indigenous attendees from Australia due to the convoluted time frames, inaccessibility, significant costs associated with attending the event annually in New York, and its lack of innovation and failure to address issues seriously — in comparison to WGIP which they see as less problematic.<sup>77</sup> The two week sessions discuss only three of the six mandated areas annually and individuals are unable to successfully protest injustices by Member States due to the constrained schedule and resulting recommendations being reviewed and amended by the UN Economic and Social Council, further obstructing the mechanism from delivering substantive change.<sup>78</sup>

## V PLEDGE TO ADVANCE ECONOMIC RIGHTS OF INDIGENOUS PEOPLES

'Advance the economic rights of Indigenous peoples and harness the knowledge and expertise of Indigenous Australians in the design and delivery of its aid programme. We recognise that Indigenous businesses can provide expert, culturally appropriate, 'peer-to-peer' assistance to other Indigenous communities in developing countries.'<sup>79</sup>

The aforementioned DFAT Indigenous Peoples Strategy pledges to implement and deliver international programs that improve outcomes for Indigenous peoples through consultation, a 'community of practice on Indigenous issues', and DFAT funded opportunities and grants with the aim of projecting a 'positive image of

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<sup>73</sup> Fiona McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organisations Engaging with United Nations Human Rights Mechanisms' (2018) 36(2) *Netherlands Quarterly of Human Rights* 111, 129–30.

<sup>74</sup> See, eg, Linda Camp Keith, 'Human Rights Instruments' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, November 2010) 353, 355.

<sup>75</sup> See McGaughey (n 73).

<sup>76</sup> Megan Davis, 'Outwitted and Outplayed: Indigenous Internationalism and the United Nations' (2005) 6(11) *Indigenous Law Bulletin* 4, 5 ('Outwitted and Outplayed').

<sup>77</sup> Ibid; Isabelle Schule-Tenckhoff and Adil Hasan Khan, 'The Permanent Quest for a Mandate Assessing the UN Permanent Forum on Indigenous Issues' (2011) 20(3) *Griffith Law Review* 673, 674.

<sup>78</sup> Davis, 'Outwitted and Outplayed' (n 76) 5; Solonec (n 69); Aimee Ferguson, 'Reflections on the 2012 UN Permanent Forum on Indigenous Issues' (2012) 8(3) *Indigenous Law Bulletin* 24, 24.

<sup>79</sup> *Australian UNHRC Pledge* (n 9) [18].

Australia'.<sup>80</sup> Further to this, in 2017, DFAT published a Charter to promote the economic interests of Australian Indigenous businesses to the overseas market and provide further information to Indigenous businesses interested in pursuing opportunities abroad ('Indigenous Business Charter').<sup>81</sup> The Indigenous Business Charter specifically aims to encourage trade, investment, and promotion of Australia as an outstanding place to visit.<sup>82</sup>

The aspect of the Commonwealth government's UNHRC pledge relating to advancing the economic rights of Indigenous peoples reflects these policies and their aims.<sup>83</sup> It is evident from DFAT materials that this pillar has received considerable time and governmental input.<sup>84</sup> The Indigenous Peoples Strategy, the Indigenous Business Charter, and the wider framework within the *2017 Foreign Policy White Paper* reflect the prevalence of 'aid for trade' in international aid programs in recent decades. The use of aid as a means to address constraints to trade such as 'cumbersome regulations and poor infrastructure' reflects the neo-liberal policy agendas of recent government as a result of Australian business interests, structural power and the institutional context in which aid policy is developed.<sup>85</sup> Such an approach relies on the 'trickle-down' effect of private sector business and infrastructure aid investment to resolve poverty in developing countries and contrasts heavily with a social justice agenda, which would instead focus on targeted approaches.<sup>86</sup>

Parallels can be drawn between the growth of aid policy facilitating institutional and political development in developing countries, and the domestic policy frameworks addressing Indigenous inequality.<sup>87</sup> The dominant approach to development has been criticised as materialistic, linear and ethnocentric,<sup>88</sup> and is often used as a political strategy to further the objectives of governmental interests as opposed to delivering programs to address the issues of inequality itself. One of the most recent developments during the UNHRC term is DFAT's release of the 'Private Sector Engagement in Australia's Aid Program: Operational Framework', with action plans including

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<sup>80</sup> *DFAT Indigenous Strategy* (n 44) 8.

<sup>81</sup> Department of Foreign Affairs and Trade, *Promoting the Economic Interests of Indigenous Australian Businesses Overseas* (Charter, 13 December 2017) 1, 10 ('*Indigenous Business Charter*').

<sup>82</sup> *Ibid* 2.

<sup>83</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>84</sup> For example, the provision of grants annually and projects are frequently updated on the Grant Connect website. See, eg, 'Current Grant Opportunity List', *Grant Connect* (Web Page) <<https://www.grants.gov.au/Go/List>>.

<sup>85</sup> Andrew Rosser, 'Neo-Liberalism and the Politics of Australian Aid Policy-Making' (2008) 62(3) *Australian Journal of International Affairs* 372, 372.

<sup>86</sup> *Ibid* 377.

<sup>87</sup> Jack Corbett and Sinclair Dinnen, 'Examining Recent Shifts in Australia's Foreign Aid Policy: New Paradigm or More Incremental Change?' (2016) 70(1) *Australian Journal of International Affairs* 87, 89.

<sup>88</sup> See *ibid*.

promoting collaboration with Indigenous businesses.<sup>89</sup> However, the aid investment priorities of DFAT are the key determinants of Indigenous involvement in the aid program. As such, Indigenous businesses offering peer-to-peer assistance through the private sector Business Partnerships Platform will still be funded in line with economic incentives.<sup>90</sup> That being said, the Indigenous Investment Priorities have been developed with assistance from Indigenous Business Australia, a government organisation devoted to promoting economic independence for Indigenous peoples.<sup>91</sup>

Whilst financial investment and trade in partnership with Indigenous businesses has been shown to be beneficial for some Indigenous businesses in Australia,<sup>92</sup> the underlying policy objectives centred on economic growth echo the heavily criticised efforts of 'practical reconciliation' which has been seen within the CTG strategy, as will be discussed in VI.<sup>93</sup> The use of both international aid and domestic Indigenous affairs policies to capitalise on potential for economic growth in line with government interests detracts from the core issue of inequalities which may be better addressed through a social justice approach.<sup>94</sup>

While it is promising that an area of Australia's UNHRC pledge in respect of Indigenous peoples has received considerable attention, the lack of an accountability mechanism within DFAT and the neo-liberal policies underlying the motivations for Indigenous investment in developing countries undermine the value of the pledge. This could be addressed by frequent, publicly available reviews of the DFAT Indigenous People's Strategy and Indigenous Investment Priorities, which would provide a transparent understanding of the success of these initiatives. In this respect, many similarities can be drawn to the CTG campaign, as discussed next.

## VI PLEDGE TO CLOSE THE GAP IN DISADVANTAGE

'Recognizing the need for a collaborative approach, tackle indigenous disadvantage in partnership with the Aboriginal and Torres Strait Islander peoples

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<sup>89</sup> Department of Foreign Affairs and Trade, 'Private Sector Engagement in Australia's Aid Program: Operational Framework' (Paper, 28 March 2019).

<sup>90</sup> *Indigenous Business Charter* (n 81) 7; 'Private Sector Partnerships', *Department of Foreign Affairs and Trade* (Web Page) <<https://dfat.gov.au/aid/who-we-work-with/private-sector-partnerships/Pages/private-sector-partnerships.aspx>>.

<sup>91</sup> *Indigenous Business Charter* (n 81) 5; Department of Prime Minister and Cabinet, 'Indigenous Business Australia', *Australian Government Directory* (Web Page) <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/indigenous-business-australia>>.

<sup>92</sup> *Indigenous Business Charter* (n 81) 3.

<sup>93</sup> 'Practical reconciliation' refers to policy aimed at tangible advances in economic and employment areas: see Joan Cunningham and Juan Baeza, 'An "Experiment" in Indigenous Social Policy: the Rise and Fall of Australia's Aboriginal and Torres Strait Islander Commission (ATSIC)' (2005) 33(4) *Policy & Politics* 461, 465.

<sup>94</sup> Rosser (n 85) 376–7.

to improve health, education and employment outcomes, including through a refresh of the Closing the Gap agenda.<sup>95</sup>

The Rudd government's CTG initiative is one of the most recognisable policy actions aimed at improving the socioeconomic determinants that significantly disadvantage Indigenous peoples in Australia. Announced in 2008, the COAG pledged, among other targets, to close the gap in life expectancy by 2030 and halve the gaps in education, health and employment.<sup>96</sup> Prior to the 10<sup>th</sup> anniversary of the agreement, it was announced that COAG would 'refresh' the agenda due to the expiration of four of the seven targets ('CTG Refresh').<sup>97</sup> The fact that four of the targets expired without being reached over the course of the initiative is a notable reflection on the success of the CTG framework overall.

Whilst the CTG initiative had potential to be revolutionary for Indigenous peoples, in practice it has failed to reach its potential, with the 2019 CTG Report announcing that only two targets out of seven were on track (these were Year 12 attainment and early childhood education).<sup>98</sup> Further to this, recent reports indicate that the mortality and life expectancy gaps are actually widening.<sup>99</sup> The results have been shadowed by the difficulty faced in measuring the progress of the targets. It has been found that much of this difficulty can be attributed to the inconsistency in data measurement and sample sizes.<sup>100</sup>

Some of the key barriers to CTG's success have been the 'revolving door of Prime Ministers', unpredictable funding patterns and misalignment between policy intentions and actions.<sup>101</sup> Following Labor's initial commitment to the targets, the Coalition government implemented cuts of \$530 million to the Indigenous Affairs budget, dramatically reducing the initiatives' prospects of accomplishment.<sup>102</sup> While the government has continued to report annually on CTG statistics, there has not been sufficient oversight or evaluation of whether there is a correlation between the

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<sup>95</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>96</sup> National Indigenous Australians Agency (n 7).

<sup>97</sup> Council of Australian Governments, 'COAG Statement on the Closing the Gap Refresh' (Media Release, 12 December 2018) <<https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>> ('Closing the Gap Refresh').

<sup>98</sup> Department of the Prime Minister and Cabinet, *Closing the Gap* (n 6) 10.

<sup>99</sup> Australian Institute of Health and Welfare, *Trends in Indigenous Mortality and Life Expectancy 2001–2015* (Report, 1 December 2017) vii ('*Trends in Indigenous Mortality*').

<sup>100</sup> Australian Institute of Health and Welfare, *Closing the Gap Targets: 2017 Analysis of Progress and Key Drivers of Change* (Report, 23 April 2018) 15 ('*Closing the Gap Targets*').

<sup>101</sup> Chris Holland, 'A Ten-Year Review: The Closing the Gap Strategy and Recommendations for Reset' (Close the Gap Campaign Steering Committee, 8 February 2018) 8.

<sup>102</sup> See *ibid.*

programs and the progress towards the targets.<sup>103</sup> The initial targets themselves also heavily imply personal responsibility for health inequalities, failing to grasp the social impacts of race on health outcomes.<sup>104</sup> The government's top-down, deficit-based approach to achieving statistical equality can be contrasted with strength-focused initiatives led by First Nations Australians.<sup>105</sup> On a whole, the 2008 CTG strategy has been highly criticised, with even the current Prime Minister Scott Morrison stating that it was 'set up to fail'.<sup>106</sup>

Despite poor progress, the government has lauded the CTG program at the international level as a demonstration of its commitment to achieving equality for Indigenous peoples.<sup>107</sup> Indeed, the ambitious targets of the CTG program reflect Australia's apparent dedication to achieving change, but sufficient policy support and practical outcomes are lacking. In 2015, Australia relied on CTG in its UPR, accepting 37 of 49 recommendations from other Member States in relation to Indigenous affairs on the basis of existing law, policy and action (effectively claiming that these recommendations are already being attended to through CTG initiatives).<sup>108</sup>

The government further relied on the quality of the CTG program in its pledge for membership of the UNHRC.<sup>109</sup> The relevant pledge recognised the role that Indigenous perspectives can play in shaping government policy affecting Indigenous peoples.<sup>110</sup> Indeed, the inclusion of a pledge to engage in a 'collaborative approach' in 'partnership' with Indigenous peoples to address inequalities appears to have produced more substantive and measurable action than some other areas of Australia's

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<sup>103</sup> Australian National Audit Office, *Closing the Gap* (Report No 27, 2018–2019).

<sup>104</sup> See Chelsea J Bond and David Singh, 'More Than a Refresh Required for Closing the Gap of Indigenous Health Inequality' (2020) 212(5) *Medical Journal of Australia* 198.

<sup>105</sup> Sandy O'Sullivan, 'Practice Futures for Indigenous Agency' in Joy Higgs, Steven Cork, and Debbie Horsfall (eds), *Challenging Future Practice Possibilities* (Brill Sense, 2019) 91, 92. For discussion of the concept of 'strengths-based' approaches in literature and in practice, see Deborah A Askew et al, 'Closing the Gap between Rhetoric and Practice in Strengths-Based Approaches to Indigenous Public Health: a Qualitative Study' (2020) 44(2) *Australia and New Zealand Journal of Public Health* 101.

<sup>106</sup> Deborah Snow and Fergus Hunter, 'Mixed Responses to Government's Closing the Gap Statement', *The Sydney Morning Herald* (online, 14 February 2019) <<https://www.smh.com.au/politics/federal/mixed-responses-to-government-s-closing-the-gap-statement-20190214-p50xwi.html>>.

<sup>107</sup> See, eg, Ian Anderson, 'Statement' (Speech, Permanent Forum on Indigenous Issues, 17<sup>th</sup> sess, Agenda Item 4, 19 April 2018) 1 <<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0192/39747f9c.dir/PF18ANDERSON040416.pdf>>.

<sup>108</sup> *UPR Report Australia* (n 31) [28].

<sup>109</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>110</sup> Holland (n 101) 6; *UPR Report Australia* (n 31) [104]; Australian Human Rights Commission, 'New Approach to Closing the Gap Strategy Welcomed' (Media Release, 13 December 2018) <<https://www.humanrights.gov.au/news/media-releases/new-approach-closing-gap-strategy-welcomed>>.

UNHRC commitment. This is despite the early stages of the CTG Refresh process being criticised as rushed, lacking clarity, and reinforcing an agenda based on governmental views which were not developed through engagement with First Nations peoples.<sup>111</sup> Indigenous organisations informed Morrison that new targets should not be set without sufficient input from the Aboriginal and Torres Strait Islander communities.<sup>112</sup> The Prime Minister's response led to the establishment of the Joint Council on Closing the Gap, a committee of state and territory ministers, members of the National Coalition of Aboriginal and Torres Strait Islander Peak Organisations (a group of almost 40 Indigenous, community controlled peak bodies), and a representative from the Local Government Association.<sup>113</sup> The body participated in the decision-making process for the design, implementation, monitoring and evaluation of the CTG Refresh.<sup>114</sup> In early 2019, the Joint Council announced formal partnership arrangements, including the appointment of Indigenous representatives.<sup>115</sup> The new *National Agreement on Closing the Gap* ('*National Agreement*') was finally released in July 2020, doubling the number of targets to 16 and adding four priority reforms.<sup>116</sup>

Many of the refreshed targets have been reframed as absolute targets as opposed to being relative to non-Indigenous populations. This is a beneficial change as it will draw attention solely to progress in Indigenous wellbeing, instead of seeing fast-paced non-Indigenous improvements detracting from the success of CTG targets by maintaining or widening the gap (as was documented in relation to child mortality).<sup>117</sup> However, early reports of the refreshed agenda included a target of incarceration parity by 2093, a stark indicator of the government's indifference towards breaking the cycle of incarceration. When this indifference was illuminated by Indigenous leaders, the government was quick to reframe the target as a reduction of at least 15% by 2031—a similarly disappointing trajectory.<sup>118</sup> Nonetheless, it is encouraging that the new targets focus on being more evidence-based and achievable, in contrast to

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<sup>111</sup> Holland (n 101) 9.

<sup>112</sup> Calla Wahlquist, 'Indigenous Leaders in "Crisis Talks" with PM over Closing the Gap', *The Guardian* (online, 11 December 2018) <<https://www.theguardian.com/australia-news/2018/dec/11/Indigenous-leaders-crisis-talks-scott-morrison-closing-gap>>.

<sup>113</sup> Joint Council on Closing the Gap, *First Meeting of the Joint Council on Closing the Gap* (Communique, 27 March 2019) 1 <<https://www.naccho.org.au/wp-content/uploads/ctg-joint-council-communique.pdf>>.

<sup>114</sup> *Ibid* 1–2.

<sup>115</sup> National Indigenous Australians Agency, 'About Closing the Gap' (n 7).

<sup>116</sup> National Indigenous Australians Agency, 'National Agreement on Closing the Gap: At A Glance', *Closing the Gap in Partnership* (Web Page) <<https://www.closingthe-gap.gov.au/national-agreement-closing-gap-glance>>.

<sup>117</sup> *Trends in Indigenous Mortality* (n 99) vii.

<sup>118</sup> Greg Brown, 'Wyatt Shuns Closing the Gap Incarceration Target', *The Australian* (online, 3 July 2020) <<https://www.theaustralian.com.au/nation/wyatt-shuns-closing-the-gap-target-for-incarceration-target/news-story/353ce459100937186e9b4774073d609d>>.

the original targets that research had shown were overly ambitious and unachievable in the target timeframes.<sup>119</sup>

The refreshed agenda has expanded on the government's usual focus on employment and education, however, it fails to explore the impacts that other less measurable factors have on progress across relevant policy areas. The focus of the targets reflect a trend of 'practical reconciliation' which has been seen throughout governmental approaches to Indigenous affairs since the early 2000s, under then Prime Minister John Howard.<sup>120</sup> 'Practical reconciliation', as coined by Howard, referred to tangible gains in health, education, housing and employment,<sup>121</sup> and rejected a parallel focus on what were depicted as purely 'symbolic' reforms. This approach artificially distinguishes between policy consideration of the impacts of Australia's colonial past from the contemporary practical needs of Indigenous peoples.<sup>122</sup> The new *National Agreement* acknowledges the relevance of systemic flaws to Indigenous disadvantage in Australian institutions.<sup>123</sup> However, practical targets to address intergenerational trauma and racism, which cause significant impacts to Indigenous populations, are absent.<sup>124</sup>

The partnership agreement for the CTG Refresh emphasised its embodiment of self-determination as 'key to achieving changes in the lives of Aboriginal and Torres Strait Islander people'.<sup>125</sup> However, it is hard to comprehend how a CTG agenda negotiated by a coalition of community-controlled service providers could ensure uncompromised commitment to statistical equality, when the funding of each organisation is dependent on government contracts. As noted by Davis, while the contributions of the Coalition of Peaks are 'a triumph and a testament to the peerless activism of pioneers in the health and services sector', they have not been elected

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<sup>119</sup> Closing the Gap Refresh (n 97); Australian Institute of Health and Welfare (n 100) 15.

<sup>120</sup> Cunningham (n 93) 465.

<sup>121</sup> Ibid 469.

<sup>122</sup> Deirdre Howard-Wagner, 'Governance of Indigenous Policy in the Neo-Liberal Age: Indigenous Disadvantage and the Intersecting of Paternalism and Neo-Liberalism as a Racial Project' (2018) 41(7) *Ethnic and Racial Studies* 1332, 1337–8.

<sup>123</sup> National Indigenous Australians Agency, 'National Agreement on Closing the Gap: At A Glance' (n 116) 12.

<sup>124</sup> *UPR Report Australia* (n 31) [27]–[31]; Judy Atkinson, Jeff Nelson and Caroline Atkinson, 'Trauma, Transgenerational Transfer and Effects on Community Wellbeing' in Nola Purdie, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Australian Institute of Health and Welfare, 1<sup>st</sup> ed, 2010) 135, 137.

<sup>125</sup> Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Council of Australia Governments, *Partnership Agreement on Closing the Gap 2019–2029* (Agreement, 27 March 2019) 2.

to represent First Nations Australians and their seat at the table cannot equate to self-determination.<sup>126</sup>

At its inception, the CTG initiative had tremendous potential to make considerable changes to Indigenous peoples' lives in Australia, yet it failed to meet expectations. The CTG Refresh provided the government with a second chance to make these changes, but a new policy orientation is necessary. We discuss further in VII that the *Uluru Statement* and associated advocacy offers the foundation of that new orientation.

## VII PURSUING A CONSTITUTIONAL RECOGNITION REFERENDUM

'Pursue a referendum to recognise Aboriginal and Torres Strait Islander peoples under the Constitution. Australia is determined to ensure that no Australian is subject to violence and discrimination, and it strives to realize the economic, social and cultural rights of all citizens, but recognises that there is more work to be done, particularly for Indigenous Australians.'<sup>127</sup>

Constitutional recognition has been a key political issue for a number of years and is another area which has received significant government attention.<sup>128</sup> Howard expressed commitment to a referendum to 'recognise' Indigenous peoples in Australia on the eve of the 2007 federal election.<sup>129</sup> However, as Dylan Lino and others note, questions regarding the status of Indigenous peoples in Australia predate this and indeed, a constitutional preamble recognising Aboriginal and Torres Strait Islander Peoples was rejected by referendum in 1999.<sup>130</sup>

Following Howard's 2007 commitment, a series of parliamentary bodies were formed to further this commitment, including the 2010 appointment of the Expert Panel on Constitutional Recognition by the Gillard government,<sup>131</sup> the 2015 and 2018 Joint

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<sup>126</sup> Megan Davis, 'New Agreement Won't Deliver the Change Indigenous Australians Need', *The Sydney Morning Herald* (online, 8 July 2020) <<https://www.smh.com.au/national/new-agreement-won-t-deliver-the-change-indigenous-australians-need-20200705-p5593d.html>>.

<sup>127</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>128</sup> Jackie Huggins and Rod Little, 'A Rightful Place at the Table' in Shireen Morris (ed), *A Rightful Place* (Schwartz Publishing, 2017) 74, 76–7.

<sup>129</sup> Referendum Council, *Final Report of the Referendum Council*, (Report, 30 June 2017) iii.

<sup>130</sup> Dylan Lino, *Constitutional Recognition* (Federation Press, 2018); '1999 Referendum', *Australian Electoral Commission* (Web Page, 24 January 2011) <[https://www.aec.gov.au/Elections/referendums/1999\\_Referendum\\_Reports\\_Statistics/1999.htm](https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/1999.htm)>.

<sup>131</sup> Jenny Macklin, Julia Gillard and Robert McClelland, 'Expert Panel on Constitutional Recognition of Indigenous Australians Appointed' (Media Release, Australian Government, 23 December 2010).

Select Committees on Constitutional Recognition,<sup>132</sup> and the Referendum Council appointed in 2015.<sup>133</sup> Despite public expectation that the recommendations arising from these bodies would result in constitutional recognition through a referendum, no such opportunity has yet been presented to the Australian electorate. Instead, and crucially, significant commentary from Aboriginal and Torres Strait Islander peoples has emphasised the need for more substantive change as opposed to solely symbolic recognition.<sup>134</sup>

In response to a number of recommendations from other Member States during Australia's 2015 UPR,<sup>135</sup> the government outlined its strong commitment to pursue a referendum to recognise Indigenous peoples as Australia's first inhabitants and expressed its intention to 'consider the recommendations of the Parliamentary Committee on Constitutional Recognition'.<sup>136</sup> This statement was announced merely weeks after both the then Prime Minister Tony Abbott and the then Leader of the Opposition Bill Shorten met with 40 Indigenous leaders who had made it clear that a minimalist approach to constitutional change would not be acceptable to Aboriginal and Torres Strait Islander peoples.<sup>137</sup> The subsequent Prime Minister, Malcolm Turnbull, with bipartisan support, then created the Referendum Council, a body that was tasked with investigating the 'next steps' towards constitutional recognition.<sup>138</sup>

Less than a month prior to the announcement of Australia's pledge for membership of the UNHRC in June 2017, the Referendum Council published its final report which specifically excluded a purely symbolic statement of recognition within the *Constitution*, and instead promoted the idea of an extra-constitutional Declaration of Recognition and a Voice to Parliament for Indigenous Peoples.<sup>139</sup> These recommendations aligned with the *Uluru Statement*, the result of an unprecedented dialogue process involving consultations with the most proportionately representative Aboriginal and Torres Strait Islander delegates ever seen. Each dialogue took place over three days in 12 communities across Australia, bringing together traditional owners, native title bodies, community leaders and members of the Stolen Generations to speak their truth and have a voice in the constitutional reform debate. The significance of the First Nations Regional Dialogues should not be understated; indeed, they represent the most substantial constitutional consultation in Australian history, incorporating the perspectives of 1200 Aboriginal and Torres Strait Islander

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<sup>132</sup> 'Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015', *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/2015\\_Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples)>.

<sup>133</sup> Referendum Council (n 129) 3.

<sup>134</sup> *Ibid* 11.

<sup>135</sup> See UPR Info (n 50).

<sup>136</sup> Attorney-General's Submission for Second UPR (n 30) 2.

<sup>137</sup> Referendum Council (n 129) 4.

<sup>138</sup> *Ibid* 3, 46.

<sup>139</sup> *Ibid* 2.

delegates out of approximately 600,000 Indigenous people nationally.<sup>140</sup> This is particularly significant given that the pre-Federation constitutional debates entirely excluded Indigenous attendees.<sup>141</sup>

Arising from the Uluru Convention, the *Uluru Statement* called for three constitutional reforms: Voice, Treaty, and Truth. As discussed in Section II, the *Uluru Statement* sets the practical and meaningful groundwork of how to implement, protect and enforce self-determination, in line with Australia's *UNDRIP* commitment to self-determination.<sup>142</sup> As a first priority, First Nations people called for a Voice to Parliament enshrined in the *Constitution* to address the structural inequality faced by Indigenous peoples. The body was visualised as having the capacity to challenge discriminatory legislation prior to its passage through Parliament. Where non-discrimination clauses act as a partial shield, the *Uluru Statement* envisaged the Voice as more of a sword — a powerful institution, comprising Indigenous representatives elected from within their communities, actively combatting racial discrimination in the heart of Australia's federal law-making institution. Racially discriminatory laws would no longer need to wait for a litigious challenge to be struck down, the Voice would be able to act as a front-line defence.<sup>143</sup> While the Voice would be solely an advisory body, the public support in a referendum necessary to enshrine it within the *Constitution* would bolster its impact,<sup>144</sup> and government dismissal of its recommendations would contradict public interest. Such a body could also provide the Parliament with advice on how domestic legislation could give greater effect to the *UNDRIP*.

The Voice could also oversee the development of the second much sought after reform: Treaty. Despite calls for a treaty echoing for decades through the Indigenous rights movement, it is crucial that the Voice is the first proposed reform that would ensure the government and legislature have an opportunity to hear from Aboriginal and Torres Strait Islander peoples when developing a treaty and surrounding policy. Without a Voice constitutionalising institutional listening,<sup>145</sup> the ability for Indigenous peoples to negotiate with the state is constrained by a significant power

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<sup>140</sup> Ibid 10.

<sup>141</sup> Ibid 109; Shireen Morris, “‘The Torment of Our Powerlessness’: Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement’s Call for a First Nations Voice in Their Affairs’ (2018) 41(3) *University of New South Wales Law Journal* 629, 647–648.

<sup>142</sup> Synot (n 16).

<sup>143</sup> Megan Davis, ‘The Long Road to Uluru: Truth before Justice’ (2018) 60 *Griffith Review* 13, 32.

<sup>144</sup> Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making laws for Indigenous Affairs’ (2015) 26(3) *Public Law Review* 166, 185 (‘The Argument for a Constitutional Procedure’).

<sup>145</sup> See generally Gabrielle Appleby and Eddie Synot, ‘A First Nations Voice: Institutionalising Political Listening’ (2020) 20(10) *Federal Law Review* 1–14.

imbalance, underscored by decades of constitutional vulnerability and paternalistic policies,<sup>146</sup> and limitations in gaining an Indigenous consensus.

The third reform centres around truth-telling. Truth-telling was not an initiative that the Referendum Council took to the First Nations Regional Dialogues, yet it emerged as a constant theme from the discussions between delegates. To ascertain what meaningful reform would involve within their own communities, delegates reflected on their own experiences, and engaged in truth-telling in order to lead the discussion.<sup>147</sup> Truth-telling is not simply an exercise for Indigenous peoples in Australia, but is a crucial step in reconciliation for all Australian citizens. For decades, misinformation, ignorance and denial has omitted Indigenous history. To correct the record, an independent truth-telling process should be undertaken. Makarrata is a Yolngu word meaning 'coming together after a struggle', and the *Uluru Statement* has called for a Makarrata Commission to acknowledge the truth of Australia's history, stimulate healing and reconciliation, and ensure all Australians are conscious of the past.<sup>148</sup>

Following the publication of the Referendum Council's Final Report on 30 June 2017, which contained the *Uluru Statement* in full, Turnbull quickly dismissed the Voice to Parliament proposal, describing the Voice as a 'third chamber of parliament' that is inconsistent with principles of unity and equality.<sup>149</sup> Nevertheless, the July 2017 Australian bid to the UNHRC contained a pledge to continue to pursue a referendum to 'recognise Aboriginal and Torres Strait Islander peoples under the *Constitution*'.<sup>150</sup> This suggests that the Referendum Council's recommendations were summarily dismissed in the formulation of the UNHRC pledges.

In the early stages of Australia's UNHRC term, we have seen the re-appointment of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.<sup>151</sup> In the Joint Select Committee's Final Report, the *Uluru Statement* was labelled a 'major turning point' in the debate as it had rejected years of proposals for constitutional recognition in favour of the Voice. However, in line with recent governments' opposition to the substantive realisation of Indigenous self-determination, Morrison has continued to reject any addition

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<sup>146</sup> Morris, 'The Torment of Our Powerless' (n 141) 635–8.

<sup>147</sup> Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 503–8.

<sup>148</sup> Referendum Council (n 129) 21.

<sup>149</sup> Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, Parliament of Australia, 26 October 2017).

<sup>150</sup> *Australian UNHRC Pledge* (n 9) [18].

<sup>151</sup> Parliament of Australia, 'Finding Common Ground and a Way Forward for Indigenous Recognition' (Media Release, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 28 March 2018).

of a constitutionally-enshrined Indigenous Voice to Parliament.<sup>152</sup> The Coalition government is instead pursuing a co-design process to legislate the Voice to Government.<sup>153</sup> Such a body would be subject to the political whims of the party in power and an act of Parliament away from abolishment, demonstrated historically by the watering down of the *Native Title Act 1993* (Cth) and the demise of the Aboriginal and Torres Strait Islander Commission.<sup>154</sup> Notably, the former Leader of the Opposition, Bill Shorten, publicly spoke out in support of the Voice to Parliament and committed to ensuring a referendum to enshrine the Indigenous representative body in the first term of a Labor government.<sup>155</sup> However, this was not realised due to the 2019 federal election outcome.

Despite contrary claims by the former Prime Minister, Malcolm Turnbull,<sup>156</sup> a symbolic statement of recognition is more likely to fail than a constitutionally enshrined Indigenous voice. It is evident from the most comprehensive engagement of Indigenous communities to date that a mere statement of symbolic recognition, without supplementation of other substantive reform, will not gain the support of Indigenous communities.<sup>157</sup> It would be unconscionable to hold a referendum without the support of Indigenous communities.<sup>158</sup> The significance of recent polling indicating that 71% of Aboriginal and Torres Strait Islander people would vote yes to constitutionally-enshrining the Voice to Parliament cannot be understated.<sup>159</sup> It must also be remembered that a referendum to impose a constitutional preamble recognising

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<sup>152</sup> Paul Karp, 'Scott Morrison Claims Indigenous Voice to Parliament Would Be a Third Chamber', *The Guardian* (online, 26 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/26/scott-morrison-claims-indigenous-voice-to-parliament-would-be-a-third-chamber>>.

<sup>153</sup> 'Indigenous Voice Co-Design Process', *Indigenous Voice* (Web page) <<https://voice.niaa.gov.au/>>; Greg Brown, 'Referendum on Recognition "Feasible": Ken Wyatt', *The Weekend Australian* (online, 31 May 2020) <<https://www.theaustralian.com.au/nation/referendum-on-recognition-feasible-ken-wyatt/news-story/9fc6881bc2631966fce7493d6836924d>>.

<sup>154</sup> Morris, 'The Torment of Our Powerlessness' (n 141) 638–40. For a discussion of lessons to be learnt from the abolishment of ATSIC, see also Morris, 'The Argument for a Constitutional Procedure' (n 144) 189.

<sup>155</sup> "'Long Overdue": Shorten Stands by Indigenous Referendum Plan Despite Criticism', *SBS News* (online, 27 April 2019) <<https://www.sbs.com.au/news/long-overdue-shorten-stands-by-indigenous-referendum-plan-despite-criticism>>.

<sup>156</sup> See Turnbull, Brandis and Scullion (n 149).

<sup>157</sup> Referendum Council (n 129), 11. See also Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012) 113–15.

<sup>158</sup> Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91(5) *Australian Law Journal* 350, 354.

<sup>159</sup> Shahni Wellington, "'Hugely Encouraging": Voice to Parliament Advocates Boosted by Poll', *NITV* (online, 16 July 2020) <<https://www.sbs.com.au/nitv/article/2020/07/15/hugely-encouraging-voice-parliament-advocates-boosted-poll>>. See also Morris, 'The Torment of Our Powerlessness' (n 141) 635.

Aboriginal and Torres Strait Islander Peoples was rejected by the Australian public on 12 August 1999,<sup>160</sup> and there is no strong argument as to why it would now be successful.<sup>161</sup> The government is well aware of Indigenous distaste for symbolic recognition, evident from the disbandment of the key government marketing strategy *Recognise* in 2017.<sup>162</sup> Incrementalists who argue that a symbolic statement will pave the way for further substantive changes should consider the history of this approach in the Australian Indigenous policy context. Kevin Rudd's 2008 symbolic apology was an incremental step which did not translate into a national restitution scheme for victims.<sup>163</sup> An incrementalist approach stalls momentum on substantive reforms by providing an inflated illusion of impact and delays reforms which deserve immediate attention.

Fundamentally, constitutional reform is about much more than acknowledgement — it is about shifting the power imbalance.<sup>164</sup> Much of the incompatibility between the visions of successive governments and Indigenous communities can be attributed to the former's inability to acknowledge the continuing conflict that remains to this day. A statement of recognition means nothing without true acknowledgement of the legacy of colonisation.<sup>165</sup> The reason why the Voice to Parliament is preferable to recognition is that such a body would provide a mechanism to manage the relationship between the government and Indigenous peoples, rather than ignore the ongoing conflict.<sup>166</sup>

It is important to note at this point that these calls to action are predominantly focused on the Commonwealth government. Some of the state and territory governments are advancing reforms which address many of the areas of concern outlined in the prior Parts and within the *Uluru Statement*. For example, the Victorian government recently funded the election of a Victorian Treaty Advancement Commission to undertake treaty negotiations.<sup>167</sup> The Tasmanian government has also established

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<sup>160</sup> *Australian Electoral Commission* (n 130).

<sup>161</sup> Davis, 'The Long Road to Uluru: Truth before Justice' (n 143) 15.

<sup>162</sup> 'Recognise Campaign to be Abandoned: Report', *SBS News* (online, 11 August 2017) <<https://www.sbs.com.au/news/recognise-campaign-to-be-abandoned-report>>.

<sup>163</sup> Morris (n 158) 355.

<sup>164</sup> See Morris, 'The Torment of our Powerlessness' (n 141) 643–46.

<sup>165</sup> Adrian Little, 'Reconciliation After Recognition? Indigenous-Settler Relations in Australia' in Isbandi Rukminto Adi and Rochman Achwan (eds), *Competition and Cooperation in Social and Political Sciences* (Routledge, 2017) 3, 6.

<sup>166</sup> *Ibid* 5.

<sup>167</sup> 'The Treaty Process in Victoria', *Australians for Native Title and Reconciliation Victoria* (Web Page) <<https://antarvictoria.org.au/treaty-process>>; 'Treaty Bodies', *Aboriginal Victoria* (Web Page, 9 October 2019) <<https://www.aboriginalvictoria.vic.gov.au/treaty-bodies>>.

a joint management plan over protected cultural wilderness areas,<sup>168</sup> implemented an Indigenous education curriculum,<sup>169</sup> and regularly holds open-door forums with Aboriginal peoples and government departments and agencies to ensure sincere consultation and contribution.<sup>170</sup>

## VIII RECOMMENDATIONS

Australia's UNHRC pledge to advance the rights of Indigenous peoples around the globe presents an opportunity to improve Australia's domestic and international compliance and commitment in this area. Based on our analysis in the preceding sections, we offer the following recommendations. In summary, these relate to: first, the importance of the *Uluru Statement*; second, Australia's support for the *UNDRIP*; third, action on CTG; and fourth, Australia's promotion of Indigenous human rights within the UN and options for elevating Indigenous perspectives within UN bodies.

First, at a domestic level, full and complete governmental support of the *Uluru Statement* is one of the most effective ways to address many of the gaps in the government's approach to Indigenous policy. This has been noted numerous times both here and at the international level. Domestically, support is evident from both sides of the political spectrum, as well as in the corporate sector and at a community level.<sup>171</sup> Internationally, in December 2017, just before the commencement of Australia's UNHRC term, the UN Committee on the Elimination of Racial Discrimination reported on Australia's compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* and specifically recommended Australia to 'accelerate its efforts to implement Indigenous Peoples' self-determination demands, as set out in the *Uluru Statement from the Heart*'.<sup>172</sup> The Special Rapporteur on the Rights of Indigenous Peoples participated in the First

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<sup>168</sup> See generally Emma Lee and Benjamin J Richardson, 'From Museum to Living Cultural Landscape: Governing Tasmania's Wilderness World Heritage' (2017) 20 *Australian Indigenous Law Review* 78.

<sup>169</sup> 'The Orb', *Department of Education (Tas)* (Web Page) <<https://www.theorb.tas.gov.au/>>.

<sup>170</sup> Jacquie Petrusma, 'Another Significant Milestone in Resetting the Relationship' (Media Release, Department of Premier and Cabinet (Tas), 12 September 2018).

<sup>171</sup> Since 2017, many corporate companies and Indigenous organisations have publicly declared their support: see 'Our Support', *The Uluru Statement* (Web Page) <<https://ulurustatement.org/our-support>>. For liberal and conservative perspectives on an Indigenous voice: see Damien Freeman and Shireen Morris (eds), *The Forgotten People* (Melbourne University Press, 2016).

<sup>172</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, 94<sup>th</sup> sess, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017, adopted 6-7 December 2017) 2 [5]; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

Nations Regional Dialogue in Cairns, and recommended that the government 'act on the proposals put forth by the Referendum Council'.<sup>173</sup>

While the government has repeatedly rejected the calls for implementing the Voice to Parliament,<sup>174</sup> it has allocated \$7.3 million to 'further support local and regional decision-making processes' through increasing Indigenous involvement in policy development and service delivery, consistent with recommendations of the Joint Select Committee 'to co-design with Aboriginal and Torres Strait Islander Australians options for a Voice to Parliament for Indigenous Australians'.<sup>175</sup> However, the government's unilateral decision to pursue a Voice to Government, as opposed to a Voice to Parliament, was made without consulting their hand-picked Senior Advisory Group.<sup>176</sup> This process cannot lead to self-determination for Indigenous Australians when it prevents their voice from reaching the legislative decision-makers.

The government must embrace all aspects of the *Uluru Statement* and bring a referendum to the Australian people. Constitutional reform is unlikely to be achieved without a thorough public education campaign focusing on the practical and legal effects of constitutional reform.<sup>177</sup> The government must ensure that a specific approach to constitutional reform is determined with widespread support by Indigenous peoples prior to taking a referendum campaign to the public.

Second, the government should also commit to fully supporting and implementing the *UNDRIP*. This could be done by giving effect to the *UNDRIP* in domestic law, but given the lack of domestic (particularly federal) laws giving effect to Australia's international human rights obligations under treaties, this seems unlikely. As more progress has been made recently at the state and territory level regarding human rights laws, perhaps legislation at that level is more likely, as has occurred in the province of British Columbia in Canada.<sup>178</sup> Another option is to amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to add the *UNDRIP* to the human rights instruments in s 3(1) of the Act, as recommended by the Australian Human

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<sup>173</sup> *Report of the Special Rapporteur* (n 23) [107(a)].

<sup>174</sup> Turnbull, Brandis and Scullion (n 149); Karp (n 152).

<sup>175</sup> Nigel Scullion, '2019–20 Budget: Supporting a Better Future for Indigenous Australians through Investments in Education, Employment and Safer Communities' (Media Release, Department of Prime Minister and Cabinet, 2 April 2019).

<sup>176</sup> Pat Turner, 'Pat Turner AM: Australian Government is Kicking the Can Down the Road on the Voice to Parliament', *Alice Springs News* (online, 2 October 2020) <<https://alicespringsnews.com.au/2020/10/02/pat-turner-am-australian-government-is-kicking-the-can-down-the-road-on-the-voice-to-parliament/>>.

<sup>177</sup> Bridget Brennan and Isabella Higgins, 'Aboriginal Leaders Want Voice to Parliament Referendum Delayed', *ABC News* (online, 18 October 2018) <<https://www.abc.net.au/news/2018-10-18/aboriginal-leaders-delay-referendum-on-voice-to-parliament/10391714>>.

<sup>178</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

Rights Commission.<sup>179</sup> The development of a national declaration strategy is another implementation mechanism used by a number of UN Member States,<sup>180</sup> and was one of the key recommendations from the 2014 World Conference on Indigenous Peoples.<sup>181</sup> While it is recognised that the *UNDRIP* can be difficult to implement at a domestic level,<sup>182</sup> outlining the most important principles and provisions of the *UNDRIP* would provide a benchmark for assessing both Bills and current domestic laws, and a guiding framework for policy and strategy development and evaluation. For example, the IAS Evaluation Framework is currently based on the criteria of the program under evaluation being relevant, robust, credible and appropriate. It should incorporate relevant *UNDRIP* provisions to ensure funding for Indigenous communities is provided in a manner that meets international standards for Indigenous rights.<sup>183</sup> Further, the principles of the *UNDRIP* could be used by a Voice to Parliament body to review pending legislation in line with international standards. What is clear is that a ‘state’s rhetorical commitment to the Declaration or ritual public incantation of its terms will not automatically lead to meaningful reform’.<sup>184</sup>

Third, the government has an opportunity to deliver on its UNHRC pledge and develop a strong basis for the next 10 years of the CTG strategy. Stable funding for the life of the refreshed CTG agenda is required, regardless of the political party in power or the Prime Minister of the day. The new *National Agreement on Closing the Gap* was not substantiated with any further funding to action the additional eight targets,<sup>185</sup> potentially stalling the initiative’s progress before it even comes into effect. The government needs to stand by the commitment it has made to partner with Aboriginal and Torres Strait Islander peoples and ensure the Partnership

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<sup>179</sup> See Australian Human Rights Commission, *Australia’s Universal Periodic Review* (n 23) 8; *Report of the Special Rapporteur* (n 23) [21], [107].

<sup>180</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*, UN GAOR, 5<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/EMRIP/2012/4 (30 April 2012) 12.

<sup>181</sup> See, eg, discussion of various approaches in Gooda and Kiss (n 14); Tammy Solonec, ‘“We Don’t Even Have a Plan”: Solonec’, *National Indigenous Times* (online, 12 January 2018) <<https://nit.com.au/dont-even-plan-solonec/>>.

<sup>182</sup> Scholars have discussed the difficulty Indigenous peoples face in articulating the best practical way for principles such as self-determination, etc. to be applied in a domestic context. See Davis (n 22) 29; Gooda (n 14) 7.

<sup>183</sup> See generally Department of Prime Minister and Cabinet, *Indigenous Advancement Strategy Evaluation Framework* (Report, 2018).

<sup>184</sup> Harry Hobbs, ‘Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1–2) *The International Journal of Human Rights* 174, 192.

<sup>185</sup> Isabella Higgins, Sarah Collard and Brad Ryan, ‘Closing the Gap Agreement Reset with 16 New Targets to Improve Lives of Aboriginal and Torres Strait Islander Australians’, *ABC News* (online, 30 July 2020) <<https://www.abc.net.au/news/2020-07-30/closing-gap-targets-agreement-aboriginal-torres-strait-islander/12506232>>.

Agreement with the Coalition of Peaks is respected and enforced. In particular, the community-based monitoring system would be truly beneficial as it would allow Indigenous people to have greater control over the programs.<sup>186</sup> Further, as 'shared decision-making' is a priority reform area,<sup>187</sup> the potential for a Voice to Parliament to engage in decision-making at a national level should not be overlooked. Many who were consulted on the CTG targets referred to a representative voice and the *Uluru Statement* when questioned about this priority,<sup>188</sup> yet neither are mentioned in the final release of the reforms. Instead, it is specifically noted that any shared decision making will build on existing structures, as opposed to the creation of a new national body.<sup>189</sup> The government should reconsider this view in line with the *Uluru Statement*.

Fourth and finally, Australia can promote Indigenous human rights through co-operation with relevant bodies and processes, such as UN Special Rapporteurs, and elevate Indigenous perspectives within UN bodies. Australia must be committed to meaningful consultation with Indigenous groups at a domestic level and support further engagement of Indigenous peoples at the UN. Further, by using the UNHRC's UPR, a mechanism with strong State engagement and one with some track record of success, Australia could prioritise Indigenous rights in its recommendations to other States. On the international stage, Australia broadcasted its 'proud and long history of promoting and protecting human rights at home and abroad' at the launch of Australia's UNHRC campaign.<sup>190</sup> These statements have been described as 'hypocritical' by prominent Aboriginal rights activist, and former Co-Chair of the National Congress of Australia's First Peoples, Dr Jackie Huggins, as they fail to reflect the true state of Aboriginal affairs.<sup>191</sup> Rather than engage in merely performative rhetoric, the government should use its statement of intention to play a more active role in international institutions to promote consideration of Indigenous issues, elevate Indigenous perspectives in international decision-making, and bolster the UNPFII and EMRIP.<sup>192</sup> In order for the government to truly engage with multilateral fora for Indigenous peoples, there needs to be a sincere attempt to actively listen to Indigenous voices.

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<sup>186</sup> Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Council of Australia Governments, *Partnership Agreement on Closing the Gap 2019–2029* (Agreement, 27 March 2019) 4.

<sup>187</sup> 'Priority Reforms', *Closing the Gap in Partnership* (Web Page) <<https://www.closingthegap.gov.au/priority-reforms>>.

<sup>188</sup> Coalition of Aboriginal and Torres Strait Islander Peak Organisations, *A Report on Engagements with Aboriginal and Torres Strait Islander People to Inform a New National Agreement on Closing the Gap* (Report, June 2020) 25, 34.

<sup>189</sup> *Ibid.*

<sup>190</sup> Bishop (n 10).

<sup>191</sup> Huggins (n 70).

<sup>192</sup> Marise Payne, 'Australia and the World in the Time of COVID-19' (Speech, National Security College, Australian National University, 16 June 2020) <<https://www.foreign-minister.gov.au/minister/marise-payne/speech/australia-and-world-time-covid-19>>.

## IX CONCLUSION

The 2018–20 UNHRC membership term provides an opportunity for Australia to advance human rights at home and abroad. The membership bid for the UNHRC had potential to serve as a framework for the three-year term outlining key areas of focus and development. A close analysis of the government's actions and policies in respect of the pillar relating to Indigenous rights has provided a useful snapshot of the state of Indigenous affairs policy within Australia, as well as some indications of Australia's engagement with the issue in the UNHRC. We have found that Australia's UNHRC commitments in relation to Indigenous rights replicate decades of Indigenous affairs policy and evidence a persistent focus on 'practical reconciliation'. The Commonwealth government has not, to date, adequately acknowledged the underlying structural issues which continue to degrade the quality of life of Indigenous peoples, such as the lack of representation within the nation's most powerful institutions, and the impacts of racism and intergenerational trauma.

It cannot be said that the circumstances facing Indigenous peoples in Australia are too complex to properly address. We have identified numerous recommendations that, if implemented, would advance Australia's practice and record in Indigenous rights. These recommendations include the need for sincere consultations and Indigenous perspectives in governmental policy, which, in conjunction with genuine engagement with the issues raised at EMRIP, UNPFII and by the Special Rapporteur, would ensure issues facing Indigenous peoples are addressed efficiently and appropriately. Other essential recommendations include the development of a national strategy to incorporate the *UNDRIP* in domestic law, and reform of the IAS Evaluation Framework to ensure government funding is placed with appropriate Indigenous organisations to enhance Indigenous communities' self-determination and prospects of achieving substantive equality. At an international level, Australia has a unique opportunity to use the UNHRC and its monitoring mechanism, the UPR, to maintain a focus on issues raised by Indigenous peoples and to lobby for improvements to the UN fora regarding engagement with Indigenous peoples.

Finally, and most importantly, the government, Parliament and community should engage with the significance of the *Uluru Statement*, which provides a clear framework for change. There is both a clear need and a strongly stated aspiration for the reforms proposed in the *Uluru Statement* — a Voice to Parliament, a truth-telling commission, and treaty. To move forward as a nation, Australia and Australians must acknowledge the dark truths of our shared history and finally listen to the Indigenous voices seeking to be heard.

