

Darren Dick, 'Challenges for implementing the Declaration on the Rights of Indigenous Peoples in Australia', 20 August 2008, Castan Centre for Human Rights Symposium

I would like to acknowledge the Wurundjeri people of the Kulin Nation, the traditional owners of the land where we are meeting and pay my respects to your elders and to those who have come before us.

Thank you to Melissa Castan and to the Castan Centre for Human Rights for the invitation to speak at this workshop.

It's a pleasure to be here to discuss the domestic implementation of the Declaration on the Rights of Indigenous Peoples.

I had the honour to attend the 8th through to the 11th and final session of the working group that negotiated the Declaration in Geneva in my capacity as advisor to the Aboriginal and Torres Strait Islander Social Justice Commissioner.

It was a hard slog to get the Declaration finalised and ultimately adopted by the Human Rights Council and the General Assembly. And as we now look forward to consider how to give meaning to the Declaration here in Australia, I think it is worth briefly recalling that the Declaration emerged over a 30 year period starting in the late 1970s with the Cobo report and the NGO conferences on Indigenous rights, and then the efforts of the Working Group on Indigenous Populations from 1981.

So in beginning, I also want to pay my respects to all of those fierce, passionate, committed advocates from Indigenous nations around the world who struggled for so long to have the rights of their peoples recognised through the Declaration. It is an extraordinary achievement and it has been a long time coming.

I also want to acknowledge the role that Les Malezer had in getting the Declaration through both the Human Rights Council and the General Assembly. Les was the coordinator of the Global Indigenous Caucus that lobbied extremely hard for the Declaration in Geneva at the time of the Human Rights Council and then for several months in New York. Many people involved will tell you that without Les' leadership and tenacity it may well have not happened in the way that it did. So I want to acknowledge Les' role – because he hasn't had the recognition that he should.

I want to briefly set the context by reflecting on what has been happening on the Declaration since September last year. I think that we are now seeing the advocacy of the past generation of Indigenous peoples at the UN starting to bear considerable fruit throughout the UN system.

Internationally, we have a relatively new, and admittedly largely untested, system for the protection of Indigenous peoples' rights that is quite comprehensive. It includes the UN Permanent Forum on Indigenous Issues – which has indicated in very strong language that it intends to use the Declaration as the framework through which it will interpret its mandate and accordingly, the framework through which just about every UN agency will be held to account. It includes the UN Special Rapporteur on Indigenous Issues – whose renewed

mandate last year included a specific role in monitoring compliance with the Declaration – this will include in considering individual communications (or complaints) as well as in country visits and thematic reports. And it includes the new Indigenous Expert Mechanism that will commence its work in October in Geneva. That body has not yet met and so it is not clear how it will operate, although it is highly likely that it will seek to take a role in providing a legal commentary on the Declaration and to explain the standards within the Declaration.

We then have the human rights treaty bodies – who are already interpreting the binding legal obligations of governments under various treaties in accordance with the standards in the Declaration. So, for example, we can expect that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights will continue with a practice they had been using for a number of years of questioning governments as to how they are acting in accordance with Indigenous peoples right to self-determination; or the CERD Committee under the racial discrimination convention will continue to elaborate on the rights of indigenous peoples to effective participation in all aspects of decision making that affects them – particularly in relation to land and resource issues.

There are other developments, but as you can see from these examples, there is a growing momentum around the Declaration at the international level. It is being ‘operationalised’ across the United Nations, and is beginning to exercise a greater influence on the development practices of the UN. So countries are going to have a hard time trying to avoid the Declaration. I believe that the Declaration is already on the path to becoming an enormously influential document in the international human rights system.

And that brings me to talk about the Declaration in the Australian context. What does it mean for Australia?

We are now coming on to the first anniversary of the passage of the Declaration through the General Assembly in September last year. It is well known that Australia was one of just four countries that voted against the Declaration’s adoption. It is also well known that the Australian Labour Party – in Opposition at the time and then again since coming to office – has publicly stated that it will formally support the Declaration and ‘reverse’ the position as put by the previous government. It is probably less known, but perhaps should be known, that the government has come under some pressure from countries who also voted against the Declaration to maintain that position and to *not* reverse its position.

I should note that, being a Declaration, the Government cannot reverse the vote *per se* and it cannot now ‘ratify’ or ‘sign’ the Declaration. Instead, what it can do is indicate to the General Assembly and the Human Rights Council that it now formally supports the Declaration.

But that has not happened as yet. The Government has entered into consultations with the states and territories, as well as other stakeholders, to identify any issues that they have in relation to the government’s proposed support for the Declaration. This process is still underway. Hopefully what it will produce is better understanding among the states and territories of the Declaration and its implications for them, such as in how they engage with Indigenous peoples and design policy and services.

The Government also asked HREOC to consult with Indigenous organisations on what they see as some of the key issues that the government should highlight to the UN when it makes such a statement of support. And we still have a survey on our website for Indigenous people to provide their views in this regard.

At this stage, there is no reason to suggest that the government will not be indicating formally that it supports the Declaration in the near future.

Hopefully, this will occur sooner rather than later. It would, for example, be great to see such support being provided on the occasion of the forthcoming and historic first meeting of the Indigenous Expert Mechanism on 1-3 October.

This step of formally providing support for the Declaration will be very important for Australia. It will make it unambiguous to Aboriginal and Torres Strait Islander peoples and to the world that Australia does respect the standards contained in the Declaration. It will go quite some way to restoring the reputation of Australia within the UN as a country that sits at the forefront of promoting and protecting human rights. This is alongside the many other things that the government is currently in the process of doing to alter our position on a number of issues within the UN human rights system.

So I don't want to underplay the significance of the government providing such a statement of support.

But at the same time, I have a concern that at one level we are also placing too much emphasis on this action by the government. That is because we are not utilising the Declaration in Australia, here and now. We should be.

Aside from the reasons above, which are important symbolically, in the long run it really doesn't matter that much what Australia voted in the General Assembly back in September last year. What is important is that by an overwhelming majority, the Declaration was approved and became a living document within the international system. As the years roll by, no one will remember the vote. And they certainly won't have different expectations for different countries in relation to the Declaration based on how they voted.

To illustrate this – consider the history of perhaps the most celebrated and widely respected of all human rights instruments. The Universal Declaration of Human Rights is being celebrated this year on the occasion of its 60th anniversary. The fact is that the Universal Declaration did not receive anywhere near the same level of support that was provided for the Indigenous Declaration last September - with a greater number of countries voting against it at the time. That has not diminished the status of the Universal Declaration, nor has it prevented its widespread use globally or its use among countries that may have voted against it.

Australia, as a member of the United Nations, is obliged under the Charter of the UN to act in accordance with the rules and declarations of the United Nations. This includes the Indigenous Declaration.

It is also obliged under the Charter to act in a non-discriminatory manner. What the Declaration does is to set out some of the unique characteristics that Indigenous peoples

have and which need to be respected if we are to treat Indigenous peoples in a non-discriminatory manner. So the Declaration goes to the core of whether Australia is seen as a good international citizen and one that respects human rights of its citizens.

And what the Declaration also does, is it recognises rights that are *inherent* for Indigenous peoples. In other words, it is not up to a government to decide whether Indigenous peoples possess such rights or deserve protection and recognition. Such recognition has now been provided by the global community as a whole through adopting the Declaration.

So for these reasons, we should not feel constrained from relying upon the Declaration or from using it as a framework to assist in defining the relationship between Indigenous peoples and the government. We certainly shouldn't feel that we must wait until the Government has clarified its position. The Declaration exists and it is yours to use now.

I want to give you one more example of the type of influence the Declaration is beginning to exert internationally that also illustrates my point. Earlier this year, the United States of America appeared before the UN Committee on the Elimination of All Forms of Racial Discrimination. The USA was one of the four countries that opposed the Declaration, along with Australia.

In considering compliance with the obligations under the CERD treaty, the Committee expressed its concern about reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining or logging, carried out or planned in areas of spiritual and cultural significance to Native Americans. The Committee made some recommendations about this situation and they stated the following:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples. (UN Doc: CERD/C/USA/CO/6, 8 May 2008, para 29).

In other words, protections against racial discrimination will now be interpreted to ensure consistency with the Indigenous Declaration. And how a country voted at the time is *irrelevant* to this fact.

As I said earlier, HREOC was asked to provide advice to the government – based on consultations with Indigenous people – about the Declaration. We are finalising that advice at present and will provide it to the government in the coming weeks. But I wanted to reflect on some of the feedback we have received about the Declaration and the hopes that Indigenous people have for it.

We asked people what steps they think the Government should take to show support for the Declaration and what should the government do to implement the Declaration into the long term. Some of the themes that emerged in peoples responses were:

- There should be widespread education about the Declaration;
- That it is not be seen as merely a symbolic act to support the Declaration – it should be implemented in our domestic legal system.

- That we should see a better working relationship between governments and Indigenous peoples – at the grassroots level and through representative mechanisms.

I'll comment briefly on each of these.

First, the need for community education.

There are two main aspects to this. The first is building awareness and understanding of the Declaration among Indigenous communities. And the second is building understanding among the broader Australian community.

From the work that we do at the Human Rights Commission we see a crying need for community education among Indigenous peoples about human rights generally, as well as Indigenous rights specifically. As Tom Calma has stated on numerous occasions, there is a very limited understanding among many Indigenous people about their rights, yet alone the intersection of people's rights with the mainstream Australian legal system.

Tom has argued that this is a critical issue that goes to the capacity within communities to deal with serious violations of rights such as violence and abuse. Put in a more positive way, better understanding and exercising of rights is something that can empower communities and contribute to better outcomes for those communities. The Declaration gives support to the cultural systems of Indigenous societies and again, can play a role in strengthening these societal structures. Something that is vital if we are to ensure the survival of so many Indigenous cultures.

So community education about the Declaration is going to be critical.

Something that Tom has also stated publicly on several occasions, is his concern that human rights are often used by those trying to prevent some sort of action from occurring. So often they are presented as a 'negative' – setting out what you can't do. This has contributed to human rights having a bad reputation among some people, and led to cries about political correctness and so forth.

What this does, however, is misses the point of human rights. Yes – human rights set out minimum standards of protection for vulnerable people and indicate what type of treatment is considered unacceptable. This is very important. But they do so much more than this.

They provide a framework for engaging on issues and for setting a pathway of action. They provide an objective tool to look beyond the current circumstances that certain people may face and provide a pathway to cut through – this is what the Close the Gap campaign on Indigenous health has been about for instance.

So if we look at the Indigenous Declaration it is a very positive, aspirational document that sets out ambitions for a new partnership and relationship between Indigenous peoples and the nation states in which they live. For example:

- It affirms that indigenous peoples make a unique contribution to the diversity and richness of civilizations and cultures, and promotes cultural diversity and understanding.

- It explicitly encourages harmonious and cooperative relations between States and indigenous peoples, as well as mechanisms to support this at the international and national levels.
- It is based upon principles of partnership, consultation and cooperation between indigenous peoples and States. So for example, Article 46 requires that every provision of the Declaration will be interpreted consistent with the principles of justice, democracy, respect for human rights, non-discrimination and good faith.

I don't recall seeing any public discussion of the Declaration that talks about it in this positive light or that recognises that it is fundamentally a document about partnership. Instead, the public discussion has been much more alarmist and negative in its tone.

Which brings me to the second need for community education – among the general population.

Clearly, the level of understanding of the Declaration and of Indigenous rights generally by the Australian community is very low. Indigenous rights are often seen as something that takes away from the rest of the population, or which creates 'special status' and treatment. What the Declaration highlights is that we have failed Indigenous peoples for centuries and that one of the contributing factors for this has been the lack of support for Indigenous peoples' collective characteristics. This is not about special status, it is about maintenance of identity and ensuring that cultures that – in most countries – are vulnerable to exploitation and are marginalised, are not lost with the full human tragedy that goes with that.

As an example of the lack of understanding of the Declaration, I was recently reading an article by Keith Windschuttle in the June issue of Quadrant magazine. It is specifically about the Declaration. What concerned me most about the article was the clear misrepresentations and inaccuracies that it contained about the Declaration. It suggests that the Declaration will lead to 'a separate Indigenous Parliament', 'a black state' and the 'creation of separate Indigenous states'. It concludes, and I quote:

'It would encourage a secessionist movement that aimed to establish the Aborigines as a politically separate race of people who were entitled to a state of their own, either within or outside of the Commonwealth'.

In this article, no reference is made to Article 46(1) of the Declaration which states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

No reference is made to Article 46(2) of the Declaration which states that 'In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected'.

And no reference is made to the preamble of the Declaration which states that the right of self-determination must be exercised 'consistent with international law'.

So these type of comments are simply misrepresentations of the Declaration. It is the type of scaremongering that was engaged in over the apology for so long. And like the apology, the sky isn't going to fall in by reason of us respecting the rights of Indigenous peoples.

The second issue that has come through the consultations to date is the clear desire that the Declaration not be merely seen as merely a symbolic act, and should instead be something that we rely on and act consistently within Australia.

There are a few ways of looking at this issue. One is that the government could take steps to implement the Declaration in a variety of ways. Another is that the Declaration may be able to be relied upon without any additional steps being taken by the government.

What are some of the ways that the Declaration can be implemented and relied upon now – without any other action required from governments?

It may be possible for people to bring actions under the *Racial Discrimination Act 1975* (Cth). The Act provides protection for a person's human rights and fundamental freedoms on an equal footing with persons of other races.

The case law on the scope of terms 'human rights' and 'fundamental freedoms' under the RDA suggests that the rights contained in the Indigenous Declaration would fall within the ambit of rights that are protected by s 9 and s 10. So formally there is no barrier for people to lodge complaints of discrimination under the RDA based on the rights recognised in the Indigenous Declaration.

I would caution, however, that this is not an easy option – particularly given that the protection of the RDA would depend on the person establishing differential treatment or unequal enjoyment of human rights in relation to rights that have been articulated as they apply only to Indigenous peoples. *Mabo NO. 1* provides a good example of the challenges faced in making out the necessary elements for such an action to succeed.

Another way that the Declaration could be relied upon now, without any change in laws or actions by governments, is in relation to the existing guarantees provided in the Charter of Rights in Victoria and the ACT.

Both provide recognition of cultural group rights – such as in Article 19 of the Victorian Charter – as well as for non-discrimination on the basis of race. It would be incongruous for these provisions to be interpreted in a manner that is not consistent with the Indigenous Declaration. The various mechanisms – such as statements of compatibility – that exist under these charters provide another way of ensuring that indigenous rights are considered in the development of laws and policy.

And the third way is very simple: that Indigenous people just use the Declaration. If you are negotiating with a government or mining company or other entity, insist that they act consistently with your rights as set out in the Declaration. There are land councils, such as in WA, that are doing this already.

Indigenous communities themselves could 'adopt' the Declaration and use it as a framework for engagement and the basis on which they seek partnership with government and others. For example, standards such as free, prior and informed consent could be built into protocols for engagement of a community or of traditional owners be it for a development process, considering whether to leaseback Aboriginal land, and so forth.

Again, it won't be easy and might not work all the time – but ultimately the value of the Declaration will lie in how it is used and building a consistent pattern of usage.

Something that a number of people have also suggested for the Declaration is that there be an 'audit' of how existing laws, policies and practices are consistent with the Declaration. I think this would be very useful – the issue will be how such a process would be done and resourced.

What actions could government's take to implement the Declaration?

Well first, the Declaration is fundamentally about participation and engagement with Indigenous peoples. There are processes currently underway looking at models for a new National representative body. What we know is that since ATSIC's demise there has been limited engagement with Indigenous peoples in policy making processes by the federal government. Tom Calma in his Social Justice Reports has called this the 'fundamental flaw' of the post-ATSIC arrangements and the flaw that will lead to the ultimate lack of success of these processes.

So a representative body is going to have a critical role in filling this gap and in articulating an Indigenous rights perspective for Indigenous policy.

We also know that in the coming months the federal government is going to embark on consultations about the adequacy of human rights protection at the federal level. This may involve consideration of a federal Charter of Rights or strengthening existing human rights protections. The role of the Declaration should be a critical consideration in these debates. We should be considering whether the Human Rights Commission should have its powers extended to formally consider the Declaration when it exercises its educative functions, national inquiry powers or complaint mechanisms. The UN Permanent Forum's latest report urges governments to consider the adequacy of national mechanisms for implementing the Declaration including through national human rights institutions like HREOC so it is appropriate that we consider this issue.

So to conclude, let me return to the third main point raised with HREOC in its consultations – that the Declaration should be the basis for a new partnership with Indigenous peoples.

The Australian government has indicated that it sees the need for this. The Prime Minister and Opposition leader have signed the Statement of Intent to Close the Gap at the National Indigenous Health Equality Summit. This commits to a new partnership with Indigenous peoples, as well as the development of a long term action plan, targeted to need that is capable of closing the gap, and that respects the rights of Indigenous peoples.

So the commitment is there formally. Failure to support the Declaration would be totally inconsistent with the government's pledges to close the gap. And so supporting the

Declaration is the next step. There will then need to be many others to give practical meaning to the Declaration in Australia.

Thank you.