



Mabo Oration 2025

One Land – Two Laws – It’s Black and White

Katie Kiss, Aboriginal and Torres Strait Islander Social Justice Commissioner

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Cairns Performing Arts Centre

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Acknowledgements

Good evening, all

Distinguished Guests, Elders, Aboriginal and Torres Strait Islander Family, Community, Friends and Colleagues - and my Family, children and grandchildren who are here tonight – particularly my sister Kerry who has travelled from Rockhampton to be here, and my Aunty Kathy – my mum’s sister and the matriarch of our family who travelled from Sydney.

My name is Katie Kiss. I am the national Aboriginal and Torres Strait Islander Social Justice Commissioner.

As a proud Kaanju, Birri/Widi Woman from North Queensland who grew up on the lands of the Darumbal People in Rockhampton, I acknowledge and pay my deepest respects to the traditional custodians of the land on which we stand, their Ancestors and Elders - past and present, on whose unceded lands we gather for this momentous occasion today.

I also acknowledge the surrounding Nations within this region.

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Living on this country for 10 years, birthing my son on this place, raising my three children here while working at Cape York Land Council in the early years of Native Title, and now having three of my grandchildren grow up on this country, I hold a special connection to Gimuy – also known as Cairns - and I am always grateful for the opportunity to return to this special place.

Thank you to the Gerib Sik Torres Strait Islander Dancers for your inspiring performance.

Carl and Minjil - thank you for the beautiful smoking ceremony as we arrived at the venue.

It is a protocol and practice steeped in thousands of years of territorial integrity, an ancient system of law and culture, underpinned by values of respect, responsibility and care for each other, this ancient land and our ancient customs.

I also want to acknowledge Aunty Henrietta Marie-Fourmile and her sustained commitment to defending the rights of Indigenous Peoples globally, particularly during her term with the Christensen Fund over ten years ago.

Aunty Henrietta supported the Australian Human Rights Commission in its work to promote the United Nations Declaration on the Rights of Indigenous Peoples here in Australia through funding to produce education materials. We are still using these materials to this day to raise awareness about our rights, and to support our people to use the tools available to them to assert and exercise them.

That leads me to the purpose of this evening's event.

I am truly humbled and honoured to have been asked by the Mabo Family to give this Biennial Mabo Oration – an Oration that pays tribute to a true visionary.

A humble man - determined to right the wrongs of a system imposed on these lands and its Peoples by those seeking to extend their empire. Conquering lands across the seas. Destroying cultures and waging wars against all those who would resist.

A man of conviction. A staunch defender of the rights of Indigenous Peoples and a man who, through his determination to uncover the truth, used the Western Legal System to recognise the legal status of his people, and their ownership of their traditional lands, territories, waters and resources.

A man whose legacy lives on, playing an integral part in the:

- recognition of First Peoples enduring sovereignty, traditional law and custom;
- our prerogative to access and exercise our rights to our lands, territories and resources; and
- to meet our cultural responsibilities to country, our people and our future generations.

I acknowledge the man this Oration pays tribute to – *Dr Koiki Mabo* of the Meriam People – and the landmark High Court Decision which bears his name.

A judgement handed down by the highest court in this land that overturned the legal fiction of *terra nullius* - changing the course of Australian history and the foundations of the Australian legal system forever.

I pay tribute to those who stood with Uncle Koiki in this collective struggle for rights recognition, Reverend Dave Passi, Sam Passi, Celuia Mapo Salee, Barbara Hocking and James Rice – and the legal team who supported them.

And to the late Aunty Bonita who stood alongside her husband while he was with us – and represented his legacy after his passing.

I acknowledge the Mabo family, some of whom I have known for many years working in the native title space.

In particular, daughter Gail and grandson Kaleb, who with the support of Commissioner Scott McDougall of the Queensland Human Rights Commission (QHRC) and Racheal Healy, CEO of the Queensland Performing Arts Centre (QPAC), in organising this event, continue to honour the legacy of their father - the warriors that stood with him - and those who came before them.

And my friend and colleague – Meriba Omasker Kaziw Kazipa Commissioner, C’Zarke Maza – who is connected to both the Meriam and the Yidinji peoples.

These acknowledgements are important, because in a thriving village, everyone plays their part – everyone makes a contribution.

And in the words of another legend – the great Bob Marley – “in this great future – you can’t forget your past” – the path lighting our way into the future, has been set - and well-lit by those who came before us.

And the lessons we *must* learn from our past are well signposted.

Introduction

This year is the 20th Anniversary of the Mabo Oration, and the first time it has been held on Gimuy country.

Those who have given this important oration before me include senior Leaders who have leveraged the Mabo legacy to further advance the rights of Aboriginal and Torres Strait Islander Peoples and have informed my journey as a human rights defender. People like Noel Pearson and former Social Justice Commissioner Tom Calma.

It is events such as this that offer opportunities for our people – Aboriginal and Torres Strait Islander Peoples - to speak truth to the historical and ongoing impact of colonisation across this country and the lived experience of First Peoples. This is particularly important in the absence of a formal national truth-telling or treaty process.

The Mabo decision confirmed the pre-existing and continuing native title rights and interests of First Peoples. It stands for much more than this:

- it fundamentally rejected the notion that First Peoples societies were “without a settled law”;
- it confirmed that our traditional laws and customs survived the imposition of British law; and

- it recognised traditional law and custom as not only a “coherent system”, but as an “additional source of law in Australia that does not derive from the Crown”.¹

As noted by native title and constitutional law experts Brennan, Gunn and Williams:

*Native title adjudication henceforth would become an examination of the way in which two radically different social and legal systems intersect.*²

It is in this spirit that I have titled this year’s Oration *One Land – Two Laws – It’s Black and White*.

I believe that Uncle Koiki’s vision was about rebuilding the village – our Aboriginal and Torres Strait Islander villages.

My predecessor as Commissioner, June Oscar AO, spoke of the systematic dismantling of the social fabric of First Peoples communities at the hands of an ongoing colonisation process.

If we are to progress towards a common purpose - for a future that is strengths-based, self-determining and sustainable for our peoples – we need to re-establish ways of working together to re-centre respect

¹ Australian Law Reform Commission, *The Framework: Mabo [No.2]*, paras 2.39, 2.40 and 2.44, at: <https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/2-framework-for-review-historical-and-international-perspectives/the-framework-mabo-no-2/> (accessed 7 May 2025).

² Australian Law Reform Commission, *The Framework: Mabo [No.2]*, para 2.44, at: <https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/2-framework-for-review-historical-and-international-perspectives/the-framework-mabo-no-2/> (accessed 7 May 2025).

for senior eldership and cultural authority and to rebuild our villages. Villages which:

- Ground our people in our cultures and our obligations to kin and country;
- Provide solid foundations for our young people to develop independence, but provide support when needed, and lift us up when we are struggling;
- Expose young people to the older generations talking, planning, and coordinating, and which slowly and organically build the capacity of future generations;
- Connect First Peoples from across Australia and across the globe to come together respectfully and with a unity of purpose to share knowledge and advocate for our rights; and
- Instil in us the resolve to never compromise on our rights.

In the absence of a treaty being signed at first contact, I believe Uncle Koiki’s legacy set us - the old peoples, First Peoples, and the new peoples - who now call Australia home – on a path to understand how our two worlds co-exist. On one land - recognising and respecting each other’s differences, responsibilities, laws, cultures, values, and needs, without destroying each other.

I believe that for Uncle Koiki it was about making what was fundamentally wrong – right. It was about respecting those who came before and securing a fair and just future for those yet to come.

That would ensure that the oldest living cultures on this earth would continue to survive.

While I never got to meet Uncle Koiki, I know this vision. Because the conversations he was having were also being had around the kitchen table in my family home, and others that I visited in my village. The same conversations are still being had by Indigenous Peoples globally.

Our people have learnt how to navigate the two worlds we are now forced to straddle. But I don't believe that is where our Elders – our leaders – our visionaries – saw this path taking us.

I believe that their vision was to ensure that we did not lose who we are in the face of merciless colonial incursion.

My grandfather Reggie Dodd – would always say – “play the game - succeed in their world – but don't ever forget who you are and where you come from”.

The story of this land since colonisation is a tale of two worlds colliding that has continued for more than eight generations.

The question I seek to engage with tonight is – *how do two radically different social and legal systems co-exist?* How do we move forward - existing together – not trying to devour and destroy each other? And I want to speak to the importance of acknowledging and respecting our rights as fundamental to achieving this.

The focus of tonight's discussion will:

- First, address the ongoing battle for rights and recognition in this country – reflecting on the devastating defeat of the Voice Referendum but also on the mighty successes in our fight for

justice – in the High Court’s recent decisions in the Timber Creek and the Commonwealth vs Yunupingu cases;

- Second, consider the lack of response for breaches of First People’s rights in Australia; and
- Third, consider the domestic legislative arrangements that facilitate greater capacity for the co-existence of two laws on the one land – including how the Native Title Act set a foundation for broader application of cultural law and custom recognised by the Western Legal System – and how the Meriba Omasker Kaziz Kazipa Act builds on this foundation.

Our fight for Justice

For more than 65,000 years, Australia’s First Peoples have managed and sustained these lands, territories and resources. Through active stewardship and custodianship grounded in the law of nature, and our traditional laws and customs.

Unlike other Commonwealth colonies that engaged in treaty processes with Indigenous Peoples early on in their respective colonial incursions, the Australian state, its jurisdictions, its institutions, and its laws were established and developed without even the most tenuous forms of consent.

From 1788 to the present - across the full breadth of this continent, its islands and its waters - our peoples have resisted. Our methods have been diverse, taking on many forms depending on the circumstances we have faced and the tools and mechanisms available to us.

Consistently, wherever we have taken a stand, we have done so drawing upon our deep strength in who we are as First Peoples and our sacred connection to Country, to Law and to one another.

As was the case the world over, the ultimate outcome of the civil rights era in the 1960s and 70s was limited to our recognition as citizens in the western democratic process, and to formal equality before the law – their law.

But this did not address our rights as First Peoples to recognition, to self-determination and to redress for the dispossession of our Country.

From the advocacy of great leaders such as William Cooper and William Ferguson in the 1930s through to the decades of advocacy that led to the Barunga statement in 1988, and the recommendations of the Council for Aboriginal Reconciliation as recent as 2000, successive Australian governments have not come to the table despite our clearly expressed aspirations and offers of reciprocity.

There were, I believe, genuine attempts under the Keating Government to provide a suite of mechanisms to give substance to its official policy of self-determination. However, this was ultimately short-lived.

The Howard Government drew this era to an abrupt close with measures such as the Wik 10-Point Plan, the abolition of ATSIC, focus on practical reconciliation and the removal of protection from racial discrimination for First Nations communities - and only for First Nations communities - through the Northern Territory Intervention.

In doing so, they sought to blame policy failure in Indigenous Affairs on the concept of self-determination, as if self-determination was the causal factor. Today we would call that gaslighting, or mis and dis-information.

The reality is that it was a lack of political will and a lack of respect to even contemplate that we should have a seat at the table and that our voices should be heard.

In the years that have followed, the relationship between First Peoples and the state has essentially relegated us to the role of interest group lobbyists or protestors, rather than autonomous rights-holders with particular and inherent entitlements.

Nevertheless, we persevere in our fight for justice.

While we have worked within the system to try and get fundamental structural reforms, we have never ceded our Country or our sovereignty.

Developments in recent years have seen us move one step forward and sometimes two steps back. These include:

- the establishment and abolition of national representative bodies;
- global agreement on the Declaration on the Rights of Indigenous Peoples in 2007, its acceptance by the Australian Government in 2009, but then limited action to treat it with genuine intent;
- the negotiation of the first Partnership Agreement on Closing the Gap in 2019 after years of advocacy on Indigenous health, seating our representatives at the table with Government on

the delivery of services to our communities; its full potential having, to date, been held back by government inaction or by legislative measures that directly contradict its aims; and

- decades of advocacy on constitutional recognition culminating in the 2017 Uluru Statement from the Heart, and the ultimately unsuccessful campaign for a constitutionally enshrined Voice in 2023.

We’ve also had two landmark decisions in native title since 2019, which I will discuss briefly now.

TIMBER CREEK

Firstly, the Timber Creek decision. In March 2019, the High Court handed down the landmark decision of Northern Territory v Griffiths on behalf of the Ngaliwurru (ŋa:li:wɔru) and Nungali (nɔŋgəli) Peoples.

The Court awarded a total of \$2.5m in compensation for both economic and cultural loss, including interest.

This case, regarded ‘the most significant... since Mabo’³, is the first time the High Court has ruled on compensation for the extinguishment of native title.

We recall that when the Native Title Act was introduced in 1994, it was anticipated that there would be a significant focus on

³ MinterEllison, *Timber Creek: the most significant native title decision since Mabo*, at <https://www.minterellison.com/articles/timber-creek> (accessed 14 May 2025).

compensation for native title that had been extinguished by so-called ‘past acts’ under the legislation.

It is fair to say that the compensation mechanisms under the Native Title Act generally have under-delivered on original expectations and Timber Creek has been a long time coming since 1994.

It is clear that the case is being carefully considered by governments and traditional owners in respect of settlements and negotiations, and that new approaches to compensation are emerging as a result.

COMMONWEALTH v YUNUPINGU

Another key development was the March 2025 High Court judgment in the case of Commonwealth v Yunupingu. This case confirmed:

- that the ‘just terms’ principle – made famous in the Australian movie *The Castle* – applies equally to everyone in Australia;
- that native title is a property right and, like any other property right, if it is taken away by the Commonwealth then native title holders are entitled to compensation on just terms; and
- that the principle of ‘just terms’ compensation applies to the taking of property by the Commonwealth in the Northern Territory. The Commonwealth was responsible for making laws for the Northern Territory from 1911 until 1978 when the Territory obtained self-government.⁴

⁴ Australian Human Rights Commission, *Explainer: Commonwealth v Yunupingu and compensation for native title*, at <https://humanrights.gov.au/about/news/explainer-commonwealth-v-yunupingu-and-compensation-native-title> (accessed 14 May 2025).

I hope that these cases will set a platform for other Aboriginal and Torres Strait Islander nations to be recompensed for their dispossession. Case by case; nation by nation.

But it is an imperfect, expensive and slow way of achieving justice. And so, I hope these cases and what follows will also open a pathway back to discussions about broader processes of treaty and truth-telling.

After the Yunupingu decision, we can expect further cases in the Northern Territory. This should remind the Northern Territory Government about the important benefits that would flow to them, as representatives of all people of the Northern Territory, of the recently ceased treaty process.

Some of our wins over the past 20 years have been retained. Nonetheless, it is a sad truth that many have subsequently been undermined in whole or in part, and it has become clear - not only in Australia but the world over - that the progressive twenty-first century many of us hoped for, has failed to materialise.

At this year’s United Nations Permanent Forum on Indigenous Issues Special Rapporteur, Dr Albert K. Barume, argued that the Rights of Indigenous Peoples around the world are under pressure.⁵

⁵ UNSR Albert Barume, Special Rapporteur on the Indigenous Peoples Rights, *Statement of the Special Rapporteur at the 24th Session of the Permanent Forum*, at <https://unsr.albertbarume.org/site/?p=974> (accessed 14 May 2025).

Validated by statements provided by those participating in the Forum, Indigenous Peoples spoke to actions and activities that are killing Indigenous Peoples – that are systemically designed to harm – that are structurally embedded to maintain control and power – and that constitute genocide.

In order to substantiate genocide, you must be able to demonstrate intent. While this has been a significant challenge under international law, it has not been impossible, with the Indian Residential School System in Canada providing just one recent recognised example of genocide, accepted by unanimous resolution of Canada’s House of Commons on 27 October 2022.⁶

Under the United Nations Genocide Convention – ratified by Australia in 1949, and enacted into domestic legislation in 2002, making genocide and crimes against humanity a crime in Australia - genocide is constituted by acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group.⁷

It includes causing serious bodily or mental harm to members of a group, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part and forcibly transferring children of a group to another group.

⁶ The Conversation, *Residential school system recognized as genocide in Canada’s House of Commons: A harbinger of change*, at <https://theconversation.com/residential-school-system-recognized-as-genocide-in-canadas-house-of-commons-a-harbinger-of-change-196774> (accessed 22 May 2025)

⁷ United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf (accessed 23 May 2025)

This was the focus of the landmark 1997 Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. Referencing the author of the term, Raphael Lemkin, the Report provides that genocide:

- includes the deliberate separation of families...the destruction of the cultural and social life of the oppressed group, and the imposition of the national pattern of the oppressor; and that
- genocide is committed even when the destruction has not been carried out.⁸

The law on genocide in Australia is not retrospective – preventing First Peoples from litigating against past treatment, including that experienced by the Stolen Generations or those subjected to the Protection Acts also referred to as the Assimilation Acts.

However, as we know, colonisation was not a point in time or a one off event. Aboriginal and Torres Strait Islander Peoples have endured a sustained campaign that has been waged against us since first contact, and it includes the ongoing impacts of colonisation – disempowerment, dispossession, assimilation, marginalisation, criminalisation, dehumanisation, physical and mental violence, abuse and trauma.

⁸ Human Rights and Equal Opportunity Commission Report, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Part 4 Reparation*, at <https://humanrights.gov.au/our-work/projects/bringing-them-home-chapter-13> (accessed 22 May 2025).

As highlighted by those who attended the Badarran Marra’Gu Gathering Strength Summit⁹ last week in Magun-djin (Brisbane)

... what is happening in Queensland are egregious breaches of human rights against children, reminiscent of past Queensland Government policies and practices separating children and families. We fear that acts are being committed by the State with the intent to destroy our First Nations by forcibly transferring our children from our responsibility, out of our care, and out of our communities.¹⁰

Is there any wonder that those gathering at the Summit would hold those fears in circumstances where the Statement of Compatibility tabled by the Minister introducing the Making Queensland Safer laws, acknowledged that the laws would disproportionately impact Aboriginal and Torres Strait Islander children; would likely lead to cruel, inhuman or degrading treatment of children; and included this extraordinary concession:

I also recognise that, according to international human rights standards, the negative impact on the rights of children likely outweighs the legitimate aims of punishment and denunciation. The

⁹ Bandarran Marra’Gu Summit, 19-20 May 2025, Brisbane. Information at: <https://www.qhrc.qld.gov.au/about-us/news/news-gathering-strength-first-nations-summit> (accessed 22 May 2025).

¹⁰ Queensland Human Rights Commission, *Bandarran Marra’Gu Gathering Strength Statement*, 20 May 2025, at: https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0004/53977/Bandarran-MarraGu-Gathering-Strength-Summit-Statement-Updated.pdf (accessed 22 May 2025).

*amendments may lead to sentences for children that are more punitive than necessary to achieve community safety.*¹¹

When Queensland was established under Letters Patent in 1859 the Legislative Assembly was empowered to make laws "for the peace, welfare and good government of the colony". How is it that we now have a parliament seeking to extend its reach beyond what is necessary for community safety for the purposes of punishing and denouncing children?

Aboriginal and Torres Strait Islander people can often feel overwhelmed with the blatant attack on our rights. But we are not in isolation – this is a global phenomenon.

Indigenous Peoples rights the world over are under attack. We are in an invisible war for our survival, dignity and wellbeing. One that is not reflected from our perspective on the front page of newspapers or on your television screens. But one that is being lived in our homes, on the streets of our communities, through our most vulnerable and our human rights defenders, and utilising any and all tools available to us to advocate for and secure our rights.

¹¹ The Hon D Frecklington MP, Queensland Attorney-General, Minister for Justice and Minister for Integrity, *Statement of Compatibility, Making Queensland Safer Bill 2024*, p5, at: <https://documents.parliament.qld.gov.au/bills/2024/3232/Making-Queensland-Safer-Bill-2024---Statement-of-Compatibility-c348.pdf> (accessed 22 May 2025).

Securing Domestic Remedies for Human Rights Violations

One of the key messages I want to get across today is the critical importance of reinstating, elevating, and upholding human rights as core values, and about the need to have the right architecture in place to do this.

International and domestic commentators have observed that there is often a disconnect between Australia’s international human rights commitments and how, and to what extent, these are embedded in domestic laws and policies.

One of the challenges we face is that with respect to the implementation of international law, Australia is a dualist rather than a monist regime.

For monist states - including a significant number of countries in the European Union - international law becomes part of their domestic legal framework automatically once they become a signatory to a treaty or convention.

Conversely, under dualist states – including Australia and other countries colonised by the British - international law and domestic law remain separate systems that, ideally, function in parallel through incorporation of aligned provisions into domestic legislation.

International treaties and their articles do not take effect on a dualist states’ domestic legal system unless this second step is implemented.

It is disturbing to the international community, but more importantly to Australians who rely on these human rights protections, for

Australia to commit to a treaty and then not take steps to embed those obligations within domestic law and give them effect.

For too long and on too many issues, Australian governments have been able to talk the talk on human rights, particularly in international fora, without walking the walk back at home.

When the United Nations High Commissioner for Human Rights Michelle Bachelet visited Australia in 2019, she commented on Australia’s relationship with the international human rights framework. She said:

“Sometimes I hear Australian commentators bemoan all this attention, suggesting the UN human rights machinery should focus its attention elsewhere, but this scrutiny is not the function of some international policing system enforcing rules from outside. It is based on international standards that Australia has helped to create; which successive Australian governments have voluntarily adopted; and which Australians themselves have sought to engage and leverage in an effort to make Australia a better, more inclusive and humane place.”¹²

If Australia is to be taken seriously on the world stage when our governments seek to present our country as a leader in human rights - as was the case with our successful bids to sit on the United Nations Human Rights Council in 2017 and to host the 2032 Olympic Games - they cannot do so only to come home and paint the international

¹² Australian Human Rights Commission, *UN Human Rights Commissioner speaks out*, at <https://humanrights.gov.au/about/news/speeches/un-human-rights-commissioner-speaks-out> (accessed 14 May 2025).

human rights framework as an alien bureaucracy seeking to undermine our national sovereignty.

This challenge is further complicated by our federated system of government. The federal government takes on the responsibility to ensure compliance with Australia’s human rights obligations on behalf of all Australian Governments while states and territories shirk their responsibilities.

UNCROC CRITICISM OF QLD AND NT YOUTH JUSTICE MEASURES

Over the past six months, we have seen disregard and the wilful breach of children’s rights proceeding unchecked and unchallenged in Queensland and the Northern Territory as the result of the lack of accountability mechanisms to ensure compliance.

In October 2024, the chair of the United Nations Committee on the Rights of the Child, Ann Skelton expressed the view that the Northern Territory – which has by far Australia's highest rates of children in detention, 94 per cent of whom are Indigenous¹³ - had contravened Australia's international treaty obligations by decreasing the age of criminal responsibility from 12 to 10 years old. To quote, she stated that:

¹³ Australian Institute of Health and Welfare, *Youth justice in Australia 2022–23*, at <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-annual-report-2022-23/contents/fact-sheets/northern-territory> (accessed 14 May 2025).

“What is particularly concerning is that once a state has committed itself and has actually set a minimum age, this idea of going back is, I would say, in contravention of the Convention.”¹⁴

Two months later, in December 2024, Ms Skelton made a second statement, affirming that, as openly admitted by Queensland Attorney-General in her statement of compatibility, the *Make Queensland Safer* legislation passed in November 2024 violates the Convention on the Rights of the Child. To quote, she stated that:

“We do not agree that the so-called 'exceptional circumstances' warrant what will be a flagrant disregard for children's rights under international law... We also don't agree that [these measures] will make Queensland safer.”¹⁵

It speaks volumes that both the NT Chief Minister and the Queensland Premier were unfazed by these rebukes, with Premier David Crisafulli reported to have said:

“This place will govern its laws. This place will determine how we keep Queenslanders safe, and this place will be accountable to Queenslanders, not United Nations boffins.”¹⁶

¹⁴ ABC News, *UN Rights of the Child committee chair says NT government's lowering of criminal age 'contravened' global treaty obligations*, at <https://www.abc.net.au/news/2024-10-18/un-committee-chair-condemns-nt-lowering-criminal-age-law/104490784> (accessed 14 May 2025).

¹⁵ NITV, *UN slams Queensland laws as a 'flagrant disregard for children's rights'*, at <https://www.sbs.com.au/nitv/article/un-slams-queensland-laws-as-a-flagrant-disregard-for-childrens-rights/4oqyo77xh> (accessed 14 May 2025).

¹⁶ The Mandarin, *Governments reject calls for UN intervention in 'youth justice crisis'*, at <https://www.themandarin.com.au/291209-governments-reject-calls-for-un-intervention-in-youth-justice-crisis/> (accessed 14 May 2025).

In March this year, in response to what can only be described as a rapidly escalating crisis of accountability, Associate Professor Hannah McGlade and Professor Megan Davis submitted an urgent complaint to the United Nations Committee on the Elimination of Racial Discrimination regarding youth justice policies and human rights concerns in respect of Aboriginal and Torres Strait Islander children.

The Committee’s consideration of the complaint will take some time. However, should it determine that the complaint is well-founded, this would provide a powerful moral indictment of Australia’s human rights practice.

This was not our first international complaint. Given the lack of support given domestically, Aboriginal and Torres Strait Islander people are more regularly submitting complaints to the United Nations.

In the complaint of Daniel Billy and others v Australia (Torres Strait Islanders Petition), local inhabitants of four small low-lying islands in the Torres Strait — Boigu, Poruma, Warraber and Masig — complained to the U.N. Human Rights Committee that Australia had violated their rights and way of life by failing to adapt to climate change, upgrade seawalls or reduce greenhouse gas emissions.

In July 2022 the U.N. Human Rights Committee issued a ruling which agreed with the Torres Islanders, and recommended local

inhabitants be compensated for the Australian Government’s inaction.¹⁷

The Australian Government has refused — but it is legal action like this which can help to bring stark realities to the fore — to disrupt the heavily curated narratives of States like Australia which style themselves as human rights champions on the international stage, but which fail to meet their human rights obligations at home.

Another example is the UN Committee on the Elimination of All Forms of Racial Discrimination’s ruling in response to a complaint in 2021 regarding human rights breaches in relation to cultural heritage protection in Western Australia. The Committee found that the Australian and Western Australian governments had:

- failed to seek free, prior and informed consent from Aboriginal people in relation to changes to Aboriginal cultural heritage legislation;
- failed to adequately protect Aboriginal cultural heritage; and

that they had

- potentially breached the International Convention on the Elimination of Racial Discrimination.

The Committee called for:

- all work that negatively impacted Aboriginal cultural heritage in Western Australia to cease and desist; and for

¹⁷ United Nations OHCHR, *Billy and others v. Australia*, at <https://juris.ohchr.org/casedetails/3855/en-US> (accessed 14 May 2025).

- all permits issued to mining and development under section 18 of the WA Aboriginal Cultural Heritage Act since November 2023 to be revoked or reviewed to ensure compliance with the Racial Discrimination Convention.¹⁸

The Government is yet to provide a response.

The last example I will cover is the United Nations Human Rights Committee finding in July 2023 that Australia had violated the rights of the Wunna Nyiyaparli (wun-na; nyiyabali) people under the International Covenant on Civil and Political Rights (ICCPR) on account of the Federal Court’s dismissal of the Wunna Nyiyaparli people’s native title claim of 2012, and the Court’s subsequent positive determination of the wider Nyiyaparli people’s claim lodged in 1998.

To provide context, the Wunna Nyiyaparli claim was filed by people who who argue that they were excluded from the wider Nyiyaparli claim in 2010 after anthropological research suggested their ancestor was not a Nyiyaparli person.¹⁹

Importantly, this was the first decision by the Committee concerning Australia’s native title system as well as its first decision concerning

¹⁸ Environmental Defenders Office, *UN committee finds Australian and WA governments potentially breached racial discrimination convention*, at <https://www.edo.org.au/2024/05/28/un-committee-finds-australian-and-wa-governments-potentially-breached-racial-discrimination-convention/> (accessed 14 May 2025).

¹⁹ Native Title Newsletter, *UNHRC decision holds Australia breached rights of Wunna Nyiyaparli people*, at <https://classic.austlii.edu.au/au/journals/NativeTitleNlr/2023/14.pdf> (accessed 14 May 2025).

the due process obligations of States in determining the legal rights of Indigenous peoples to their traditional lands.

The Committee found that Australia has an obligation to provide due process guarantees to the Wunna Nyiyaparli people in their claim for native title rights and interests.

In October 2024, Australia’s Attorney General provided a response to the Committee on behalf of Australia which is reported to have rejected the Committee’s findings and to have stated that:

- The Australian Government does not believe there has been any violation of the ICCPR in relation to the Wunna Nyiyaparli; and that
- The Wunna Nyiyaparli were “entitled to participate throughout all stages of the proceedings” and were given a total of six opportunities to participate in those proceedings.

The Human Rights Committee is yet to comment on the Government’s reply and the further correspondence by the Wunna Nyiyaparli.²⁰

While Australia’s response to UN committee rulings has left a lot to be desired, these Committee decisions carry significant moral weight and, they *do* have an impact – both independently and cumulatively. It is critically important that we demonstrate resolve and use all the

²⁰ MPS Law, *Human rights lessons from the Decision of the United Nations Committee of the Wunna Nyiyaparli People*, at <https://www.mpslaw.com.au/news/human-rights-lessons-from-the-decision-of-the-united-nations-committee-of-the-wunna-nyiyaparli-people/> (accessed 14 May 2025).

tools at our disposal to expose the discrimination we are confronted with across multiple areas of life.

These tools also include:

- advocacy at United Nations fora such as the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples;
- Engagement with United Nations Special Rapporteurs; and
- regular treaty and universal periodic review mechanisms.

Importantly, we also have at our disposal the domestic frameworks and mechanisms already developed here in Australia which governments have committed to.

CLOSING THE GAP

Post Referendum, the National Agreement on Closing the Gap is the Australian Government’s key focus.

However, each of the Agreement’s targets represents breaches of our rights that have not yet been remedied. With many targets either stagnant or going backwards, it is undeniable that without human rights compliance and accountability the National Agreement will continue to be compromised, and our rights will continue to be denied and violated.

The Productivity Commissions Review of the National Agreement notes that governments are not adequately implementing principles of self-determination into practice and argues that mainstream

government systems and culture need to be overhauled, and that stronger accountability is required to drive behaviour change.²¹

The opportunity before us is to engage the human rights framework and bridge the divide between Partnership commitments and international rights obligations by incorporating them into future iterations of the Agreement, of jurisdictional implementation plans, evaluation and reporting metrics, and independent accountability mechanisms.

NATIONAL ANTI-RACISM FRAMEWORK

Another opportunity is to leverage the National Anti-Racism Framework which was launched in November last year by my colleague Race Discrimination Commissioner, Giri Sivaraman, and is currently awaiting a response from the Australian Government.

The Framework is an important milestone. It names racism for what it is. It locates it within the structures that surround us and provides a plan to transform those structures.

Recommendations include that the Australian Government immediately:

- Establish an independent mechanism to monitor and report on the status of the implementation of the Royal Commission into Aboriginal Deaths in Custody;

²¹ Productivity Commission, *Closing the Gap review: Study report*, at <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/report> (accessed 14 May 2025).

- Establish an independent complaints and investigation mechanism for police misconduct and use of force;
- Raise of the age of criminal responsibility to 14; and that
- Australian governments fund and work in partnership with the National Anti-Racism Taskforce to develop and implement a First Nations Anti-Racism Framework Implementation Plan.

The Framework also makes two other key recommendations which I will discuss in more detail. These are:

- The establishment of a national human rights framework with a federal Human Rights Act as its centrepiece; and
- A National Action Plan to give effect to the United Nations Declaration on the Rights of Indigenous Peoples.²²

HUMAN RIGHTS ACT

Alone amongst Western democracies, Australia lacks a comprehensive national charter or set of human rights laws. Instead, we have a patchwork of disparate laws often outdated, unclear, framed only in the negative, and with significant gaps between them.

To plan effectively into the future, we must set the right legal and policy architecture in place.

²² Australian Human Rights Commission, *National Anti-Racism Framework*, at <https://humanrights.gov.au/anti-racism-framework#:~:text=Developed%20by%20the%20Australian%20Human,forms%20of%20racism%20in%20Australia>. (accessed 14 May 2025).

The Australian Human Rights Commission has made a strong and compelling case for the introduction of a new human rights framework.

The Commission’s model Human Rights Act²³—which has been endorsed by the federal Parliamentary Joint Committee on Human Rights— includes important advances to better protect the rights of First Peoples.

It would require government to ensure the full participation of First Peoples in laws, policy and decisions that directly affect us. It proposes that our rights to cultural integrity be protected in all actions of the federal government.

Critically, the proposed Human Rights Act also means that when our human rights are breached, we can deal with them in Australia.

If governments don’t like hearing findings of breaches of rights from the United Nations procedures, then they should bring rights home and ensure that they are effectively addressed in our own legal and political system.

Every UN complaint can only proceed because there is no appropriate domestic Australian process to resolve the issue.

That is not a big threshold to meet when there is no national human rights charter.

²³ Australian Human Rights Commission, *Discussion paper: A model for positive human rights reform*, at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform> (accessed 14 May 2025).

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly in September 2007 was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world.

The Declaration stands as the most comprehensive international instrument on the rights of Indigenous peoples—pulling together existing legal obligations sourced in international human rights treaties and providing a lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.

While the Declaration does not itself create legally binding obligations, it echoes many of the rights already contained in other human rights treaties, but with a focus on First Nations people.

The Australian Government has obligations under binding international instruments to respect, protect and fulfil the rights contained in these treaties. There is therefore a legal and moral imperative to realise these rights domestically.

Adding further weight to the Declaration, is that it was adopted by the General Assembly ‘with the approval of an overwhelming majority of Member States’ and therefore represents a commitment on the

part of Member States to its provisions ‘within the framework of the obligations established by the Charter of the United Nations’.²⁴

The Declaration specifically requires that ‘[s]tates, in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration’.²⁵

This is the standard that Australia voluntarily agreed to in 2009, and which it should stand by.

The primary barrier against the enactment of the Declaration in Australia to date has not been any unassailable legal or constitutional issues associated with domestic implementation.

It has been a lack of political will. A lack of commitment and action to embed human rights in the Australian legal framework.

In November 2023, Australia’s Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs released its report on the Application of the Declaration in Australia. It makes sensible recommendations for implementing the Declaration and setting in

²⁴ J Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, *Report to the Human Rights Council 9th session, UN Doc A/HRC/9/9 (2008)*, at

<http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/AnnualReports.aspx> (viewed 14 May September 2025).

²⁵ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 14 May 2025).

place the policy framework to embed First Peoples voices and perspectives in decision making.²⁶

We eagerly await a response to this Inquiry Report, which recommended the development of a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples, as well as legislative reforms that would require assessment against the Declaration in the design, development and implementation of draft laws presented to the Parliament.

The Co-existence of Two Laws

Returning to the theme of one land, two laws; it is important to emphasise that recognition of Indigenous cultural laws and customs by states *is* supported by international law. Article 34 of the Declaration states that:

*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*²⁷

The Mabo decision’s recognition of native title and the establishment of the Native Title Act demonstrated that the development of

²⁶ Parliament of Australia, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*, at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP/Report (accessed 14 May 2025).

²⁷ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 14 May 2025).

domestic legislative arrangements that facilitate greater capacity for the co-existence of two laws on one land *is* possible in Australia.

In so doing, native title set a foundation for broader application of cultural law and custom recognised by the Western Legal System.

To date, there are only a handful of examples throughout Australia of laws and policies that are generally aligned with the Declaration. Queensland’s now repealed Path to Treaty Act 2023 was one.

Another, is the Meriba Omasker Kaziw Kazipa Act.²⁸

Following through on its election commitment, Queensland’s Palaszczuk Government took an historic step in 2020 by establishing legislation which provides legal recognition of Torres Strait Islander families’ continued use of traditional child rearing practices.

As the Senior Advisor to the Queensland Minister for Aboriginal and Torres Strait Islander Partnerships at the time, I had the privilege of being involved in this process and I would like to acknowledge all the years of hard work invested by Torres Strait Islander leaders and others who were critical to achieving this outcome.

Informed by the Declaration on the Rights of Indigenous People, this Act stands as a clear example of how to give practical effect to our rights:

²⁸ Queensland Government, *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*, at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2020-033> (accessed 14 May 2025).

- By addressing long-standing issues faced by Torres Strait Islander people whose legal identity does not reflect their cultural identity, via application to the Commissioner (Meriba Omasker Kaziw Kazipa) for permanent transfer of parentage from biological parents to cultural parents;
- By providing a sense of stability to the social order which has seen generations of Torres Strait Islander children raised in supportive and loving extended family environments; and
- By making basic administrative tasks that most Australians take for granted such as school enrolment, obtaining a birth certificate and making financial support and basic human rights accessible to Torres Strait Islander families.

Looking to the future, I believe there are opportunities to establish domestic arrangements like the *Meriba Omasker Kaziw Kazipa Act* in other areas of life, and that this is a worthy area of focus as part of a wider set of strategies to give effect to our rights.

Rebuilding our Villages

Friends, in his opening address to this years United Nations Permanent Forum on Indigenous Issues last month, António Guterres, Secretary-General of the United Nations, emphasised that “the individual and collective rights of Indigenous Peoples are *non-negotiable*”.²⁹

²⁹ United Nations, *Individual, Collective Rights of Indigenous Peoples Are Non-negotiable*, Says Secretary-General, Opening Permanent Forum, at <https://press.un.org/en/2025/sgsm22628.doc.htm> (accessed 14 May 2025).

Uncle Koiki knew so well in his heart that this is true. Our rights may not always be reflected in the laws and policies of our country, but we know what they are, they are there all the same, and they are always worth fighting for.

As Social Justice Commissioner, I walk in the footprints of our ancestors.

I am tasked with moving us forward in recognising our rights as First Peoples.

- Truth. Voice. Treaty
- Effective protection against racism
- Domestic protection of our rights
- Support for our cultural practices
- Self-determination.

All of these make us stronger.

All of these enable us to rebuild our villages. To thrive as the proud Peoples, we know we are. And to be our authentic, whole selves.

Please stay with me as we continue the long journey to recognition of our rights.

Thank you.