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The Declaration Dialogue Series:

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Paper No.4 - Ensuring the ongoing survival

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of the oldest living culture in the world

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

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# 1 Introduction

The adoption of the Declaration by the General Assembly of the United Nations in September 2007 was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world. The adoption of the Declaration strengthened and reinforced the international human rights framework.

The Declaration does not contain any new human rights or international standards. Rather it reflects existing legal obligations sourced in international human rights treaties. It simply provides the lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.

It enshrines our right to be different as peoples and affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide. The Declaration therefore provides Australia with an opportunity to move beyond the stalemate that is currently frustrating positive development for Aboriginal and Torres Strait Islander peoples and communities.

While the Declaration covers all areas of human rights as they relate to Indigenous peoples, we believe it also incorporates fundamental foundational human rights principles which could be categorised into four key areas:

- self-determination
- participation in decision-making, free, prior and informed consent, and good faith
- respect for and protection of culture
- equality and non-discrimination.

Although the Declaration was endorsed by the General Assembly in 2007, little action has taken place to incorporate it into policy frameworks in Australia.

The Aboriginal and Torres Strait Islander Social Justice Commissioner considers that the Declaration is the most comprehensive tool available to advance the rights of Indigenous peoples and to address the contemporary effects of oppression and colonisation. As such, he has committed to promote its full implementation during the term of his appointment.<sup>1</sup> The National Congress of Australia's First Peoples has also committed to building a policy platform underpinned by the Declaration.<sup>2</sup>

However, if we are serious about support for the Declaration, an overarching policy framework based on human rights standards is essential to ensure a holistic approach that addresses the needs and priorities identified by Aboriginal and Torres Strait Islander peoples and communities.

A national conversation progressed through a series of dialogues is necessary to ensure the principles and rights outlined in the Declaration are fully integrated into the Australian Indigenous policy landscape. These dialogues are considered integral to a process aimed at developing an agreed understanding of the key principles that underpin the Declaration; and the development of a coordinated response based on these principles to realise the rights outlined in the Declaration in an Australian

context. The anticipated results of this conversation would culminate in a National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples.

By encouraging dialogue between Aboriginal and Torres Strait Islander peoples, governments and other stakeholders, we can move beyond the rhetoric of 'support' for the Declaration and work towards achieving its purpose: to improve the lives of Aboriginal and Torres Strait Islander peoples, Australia's Indigenous peoples.

This Dialogue Series will be informed by a set of focused discussion papers, and it will be supported by other consultative mechanisms including:

- an Aboriginal and Torres Strait Islander Declaration Survey
- high level dialogue meetings with governments and key industry stakeholders
- Aboriginal and Torres Strait Islander community dialogues
- a national summit.

## **1.1 This Paper**

Principles of self-determination; participation in decision-making, free, prior and informed consent, and good faith; respect for and protection of culture; and equality and non-discrimination must underpin relevant legislation, policy, programs and service delivery to ensure that these mechanisms empower rather than disempower communities to address the challenges they face.

While these key principles are inextricably linked and indivisible, this paper specifically discusses the need to respect and protect Indigenous peoples' culture as a key requirement in advancing our livelihoods, including the ongoing maintenance, promotion and survival of our cultural traditions and customs. It also provides guidance to governments about how to work with Indigenous peoples to rebuild cultures that have been devastated by colonisation.

It will consider the viewpoints of Aboriginal and Torres Strait Islander peoples and the Australian Government relating to the promotion and protection of Indigenous culture in Australia, with a particular focus on the importance of cultural knowledge and cultural self-determination. It will also consider what is required in the future to achieve the aspirations developed by the world's Indigenous peoples and governments to ensure the survival of the world's Indigenous cultures.

## **2 Indigenous People**

Because Indigenous peoples have a collective and individual right to identify themselves as Indigenous and to be recognised as such, no strict definition is used. Instead Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities developed a working definition that describes common characteristics of Indigenous peoples:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant

sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence on certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

### **3 What is Culture?**

Simply put, culture incorporates the world views of peoples, ways of being, knowing, and doing. Culture is the foundation of our individual and collective identity.

Socially constructed and maintained, culture can be thought of as:

A complex and diverse system of shared and interrelated knowledge, practices and signifiers of a society, providing structure and significance to groups within that society...Shared knowledge including collectively held norms, values, attitudes, beliefs, and the like, while cultural practices are evidenced in the language, law, and kin relationship practices of a society.<sup>3</sup>

Australia is home to hundreds of nations of Aboriginal and Torres Strait Islander peoples. Each of our nations has its own distinct cultural norms, law, language and identity.

While our culture can manifest in many forms, the survival of our culture is passed on to our future generations through our art, dance, song, language and knowledge. We maintain our culture by asserting and reinforcing:

- our physical and spiritual relationships to each other, our lands, territories and natural resources
- our distinct identities, languages and laws
- our knowledge

- our common responsibilities to promote, maintain and protect each of these elements, now and into the future.

Janine Gertz, a Gugu Bahdun woman from the north east coast of Australia recently commented on the important role our language plays in cultural maintenance:

The loss of indigenous languages signifies not only the loss of traditional knowledge but also the loss of cultural diversity and spirituality as well as laws and customs. Language is central to our cultural and spiritual identity. Language is the medium by which Aboriginal and Torres Strait Islander people describe cultural practices, laws and customs, attachment to land and place, cultural items, and other cultural and spiritual activities. Furthermore, language plays a fundamental part in indigenous people's identity by connecting individuals to communities, therefore providing cultural and spiritual context in the daily lives of Aboriginal and Torres Strait Islander people.<sup>4</sup>

While Indigenous cultures are developed and maintained through the practice of traditional laws and customs, our culture is dynamic and is shaped by the social environment in which it exists.

In the face of change, culture is a source of strength, resilience, happiness, identity and confidence. This is particularly so for those who have been removed from their lands and territories, where access to their culture and lands provides a critical link to their cultural heritage:

...the rights to culture and land are entwined. The right to culture is an important human right in an age where many Indigenous people live away from ancestral lands. Further, it is significant to continue links with cultural knowledge where global information can be digitally recorded, altered, reused and claimed and interpreted by anyone in the world.<sup>5</sup>

Our cultural heritage includes living and historical, both tangible and intangible aspects and is passed on to future generations as an expression of cultural identity. Cultural heritage also includes items that may be created into the future. Cultural heritage includes:

- literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- languages
- scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna)
- spiritual knowledge
- Indigenous ancestral remains
- Indigenous genetic material (including DNA and tissues)
- cultural environment resources (including minerals and species)
- moveable cultural property including burial artifacts
- immovable cultural property (including Indigenous sites of significance, sacred sites and burials)
- documentation of Indigenous peoples' heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings).<sup>6</sup>

### **3.1 Why the promotion and protection of Indigenous culture is so important?**

[A] unique characteristic of ancient Australia, is the ability of its Indigenous people to draw thousands of years of lived experiences into a vast body of tradition, law, knowledge and wisdom that has guided, and will continue to guide the generations to come, about living on and caring for this land.

They passed this knowledge and responsibility on to others, so it never died. They sang its songs, so they would never forget. They recorded this wisdom in their memories. Some of these memories, we know, were laid down long before the first stones of the Great Pyramid of Giza in Egypt or Britain's Stonehenge were placed. Maybe millennia before. Yet they were kept alive all that time, passing from our Elders to our young people.

While non-Indigenous people consider our world to be one of oral transfer of knowledge, our elders have recorded their wisdom through their songs, and their art work, like that included in the Aboriginal Knowledge and Intellectual Property Protocol Community Guide. And the ability to interpret and learn this knowledge was also passed down through the generations. We share with our ancestors over many generations – their insights into the land, how to care for it, respect and prosper from it. This wisdom and knowledge provides our peoples with a sense of how we belong to this land and abide by its unwritten rules for life.<sup>7</sup>

At the heart of the identity of Indigenous peoples is our distinct culture, deeply rooted in tradition, knowledge and the land of which we are a part. Our essence is steeped in the wisdom we have inherited from our ancestors.

We cannot survive as distinct peoples, nor can we exercise our fundamental rights as peoples unless we are able to conserve, revive, develop and teach that wisdom. Without the connection with our cultural heart, the enjoyment of all other rights is a superficial shell.<sup>8</sup>

Aboriginal and Torres Strait Islander peoples belong to the oldest continuing culture in the world. However, unfortunately our culture and our cultural identities have endured significant pressure as a result of colonisation and subsequent policies of dispossession and oppression.

The Federation of Aboriginal and Torres Strait Islander Languages and Culture (Corporation) argue that:

The slow breakdown of traditional language and culture have been instrumental in the escalation of drug and substance abuse, domestic violence, suicide and self-harm as Aboriginal people have lost their strong identity in whom they are; where they are from and where they are going.<sup>9</sup>

The treatment of Indigenous culture in Australia has focussed on integrating and assimilating Indigenous peoples into the mainstream or dominant society. The Indigenous Peoples Organisations Network of Australia (IPO Network) asserts that:

Despite policy espousals of self-determination these have all been crafted and permitted on the basis that the ultimate outcome was to be assimilation and the



removal of the vestiges of what constituted the essence or expressions of Indigenous peoples culture.<sup>10</sup>

This has occurred through mechanisms such as education, legislation, policy and the media.

This is not an experience of the past – it is an ongoing effect of colonisation. To this present day, we continue to manage change that is imposed upon us and our society that threatens the maintenance of our unique culture.

For example, in the transfer of our language and cultural knowledge between the generations, we are competing with many other interests and pressures. The tensions between sustaining our culture, customs and traditions, and engaging in development are immense.

Too often the protection and promotion of Indigenous cultures and languages<sup>11</sup> is compromised by the economic priorities of States and other third parties. This has, more often than not, been to the detriment of Indigenous peoples' access to and enjoyment of our right to our identity and ability to maintain and transmit our culture and language into the future. The IPO Network argues that:

We need to bring language and customary law understanding into all of our areas of concern so that our young ones can see the place of language and customary law in a positive light and that it has a place in all that we do. For example if we are talking about science or geography, medicine, drama, arts, biology, anger management, relationship issues, counselling, respectful communication and behaviour toward others or any other subjects in life, we should not limit ourselves into thinking that western education learning is the only source of which we can inform ourselves from, you can be sure that Indigenous knowledge on these subject areas exist within our community – our Indigenous knowledge base and source need to be given equal consideration and participation within all spheres of learning.<sup>12</sup>

The protection and promotion of our cultural identity is paramount to our social and emotional well-being.

June Oscar, a Bunuba Aboriginal woman from the Fitzroy Valley in the remote Kimberley region of far north Western Australia, highlighted the importance of acknowledging the challenging and complex environment we live in as Indigenous peoples. She discussed the challenges we face in 'seeking justice and trying to raise our families' in a colonised state, while 'holding onto the lived practices of our beliefs in accordance with our customs and traditions' as Indigenous peoples:

We as Indigenous People live out our lives in two worlds according to our custom and tradition and the modern reality. Yet this acknowledgement has never ever been forthcoming. Because the western lens is applied to everything we encounter. Our reality is very different. At a human and personal level, how is it that we cope and maintain our strength and well-being as we continue to navigate through this complex maze in our attempts to achieve a positive outcome?...Perhaps, a new skillset may be required for these new times, skills which incorporate a blend of: activism, development of intellectual capacity, anchored by the knowledge and lived practice we hold of who we are and meeting the real truth by combining this knowledge with modern western thinking...The community resilience of the Fitzroy Valley based on commitment to culture, strong leadership and innovative thinking has been frustrated

by the incapacity of government to reform its governance structures and deliver services that are relevant to people of the Valley and people living within two worlds.<sup>13</sup>

Aboriginal and Torres Strait Islander culture also forms an important part of the Australian identity. The loss of our culture, identity and language not only has significant human rights implications for Indigenous peoples, it will also diminish the national identity.

Further, elements of our culture, such as our language, have much to offer broader society, particularly in terms of the incorporated knowledge that provides for the protection of our country's unique biodiversity and cultural and environmental heritage. Often this knowledge is not capable of being holistically interpreted into English so we are left without important information about, in some cases, endangered ecosystems as a result of the loss of our Indigenous languages.

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has stressed in its study into the role of languages and cultures in the promotion and protection of the rights and identity of Indigenous peoples that our 'languages and cultures will only flourish in environments when they are more broadly respected in their own right and for their contribution to an understanding of humanity'.<sup>14</sup>

## **4 The Existing Framework**

The protection and promotion of Indigenous culture and cultural knowledge is included in a number of international treaties and Australian domestic legislation.

### **4.1 The International Human Rights Framework**

As affirmed in the *Universal Declaration of Human Rights* everyone has the right to freely participate in the cultural life of the community.<sup>15</sup> The right to culture is also affirmed in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).

Article 15 of ICESCR states that everyone has the right to:

- (a) take part in cultural life
- (b) enjoy the benefits of scientific progress and its applications
- (c) benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The ICESCR also clearly outlines the legal obligations State Parties have in realising the right to culture, including that they take steps necessary for the conservation, development and the diffusion of culture.<sup>16</sup>

Article 27 of the ICCPR provides that in 'those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.<sup>17</sup>

In its Concluding Observations on Australia from the year 2000, the United Nations Human Rights Committee recognised that the high level of exclusion and poverty

facing Indigenous peoples is indicative of the lack of adequate protection of Indigenous peoples' cultural rights recognised in Article 27.<sup>18</sup>

The protection of culture and cultural knowledge is also given consideration under other key human rights treaties and mechanisms including:

- Article 7, the Convention on the Elimination of all Forms of Racial Discrimination
- Article 30, the Convention on the Rights of the Child
- International Labour Organisation (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) (1989)
- Article 8(j) of the Convention on Biological Diversity (1992)
- the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)
- the UNESCO Universal Declaration on Cultural Diversity (2001)
- the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
- the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

The Declaration<sup>19</sup> reflects these international standards and provides clear guidance on the promotion and protection of culture and State's responsibilities in this regard. While the entire Declaration is underpinned by the principle of respect for and protection of culture, Article 11 specifically provides that Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes:

- the right to 'maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'
- the right to effective mechanisms, which may include the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Work is currently progressing internationally to develop the human rights standards contained within the Declaration and enhance protections of Indigenous people's culture:

- studies have been conducted at both the United Nations Permanent Forum on Indigenous Issues and the EMRIP concerning the protection and promotion of culture and language.
- the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which met for the first time in 2001, is currently in discussions about draft provisions for the enhanced protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse.<sup>20</sup>

#### *The Domestic Human Rights Framework*

The Australian legislative and policy fabric currently provides some protection of our culture through the national languages policy and environmental and cultural heritage laws.

A number of domestic mechanisms have been in place for a significant amount of time. Some of them directly respond to our international human rights obligations as outlined above. They include:

- The *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) which provides protection and regulation concerning the export and import of national and international cultural property, including Indigenous art and artefacts and other historical material. The PMCH Act gives effect to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* which aims to preserve and protect areas and objects on lands and waters that are of particular significance to Indigenous people in accordance with their traditional law and custom.<sup>21</sup> Most states and territories also have legislation concerning the protection or regulation of cultural heritage.
- The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). This is the Australian Government's central piece of environmental legislation and was enacted in response to Australia's ratification of the Convention on Biological Diversity. This Act provides for the establishment of the National Heritage List and the Commonwealth Heritage List, however the heritage lists are limited to matters of national environmental significance. Issues of non-national significance come under the jurisdiction of states.
- The *Native Title Act 1993* (Cth), which is federal legislation establishing principles for the recognition of customary property rights, including rights in knowledge, based on the traditional laws and customs observed and practiced by the native title holders. A number of states and territories also have land rights legislation that provide recognition of the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources.
- National Indigenous Languages Policy<sup>22</sup> which highlights the need to maintain a focus of Aboriginal and Torres Strait Islander languages as the oldest living languages in the world. It aims to reinforce the use of partly spoken languages and restore rarely spoken or unspoken languages as much as possible. It also promotes bilingual education through the teaching and learning of Indigenous languages in Australian schools. Some states and territories also have Indigenous language policies that regulate bilingual education. In the Northern Territory, bilingual education was effectively dismantled in 2008 under a policy that mandates that the first four hours of education in all Northern Territory schools is to be conducted in English.<sup>23</sup> This policy is inconsistent with the national policy approach as well as international standards.

While the above framework provides some recognition and protection, it is predominantly regarded through an environmental lens, restricting its capacity to protect Indigenous culture and it is often compromised by conflicting state and territory laws and policies. Further work is required to ensure that all aspects of our cultures as outlined in the Declaration are adequately protected under our domestic legislation and policy frameworks.

For example, Australian domestic policy provides for the recognition of Indigenous traditional knowledge (or intellectual property) only in its environmental protection regulations, and focuses particularly on knowledge held by Indigenous peoples about biological resources.

Non-Indigenous intellectual property is protected under various intellectual property laws, including:

- the *Copyright Act 1968*<sup>24</sup>
- the *Patents Act 1990*<sup>25</sup>
- the *Trademarks Act 1995*.<sup>26</sup>

However, these laws are limited in their capacity to protect the intellectual property and traditional knowledge of Aboriginal and Torres Strait Islander peoples because of the collective nature of our cultural knowledge. The knowledge we gain as individuals from our cultural traditions, laws and customs, languages, cultural expressions and heritage is intergenerational and in most instances it does not belong to one person – it belongs to the group. Mainstream intellectual property laws are currently designed to protect individual rights rather than collective rights.

The Australian Government is currently developing a National Cultural Policy.<sup>27</sup> Consultations on the draft policy have involved the arts and culture sector, creative industries, the public at large and government.<sup>28</sup> International standards require the full and effective participation of Aboriginal and Torres Strait Islander peoples in the design of such mechanisms to ensure that they achieve outcomes which benefit Indigenous peoples. A National Cultural Policy must address the gaps in cultural protection outlined above, and this will rely on the good faith and commitment of governments at all levels.

## **5 The Challenge – providing comprehensive protection and promotion of Aboriginal and Torres Strait Islander people’s cultures**

The primary responsibility for protecting and promoting our culture, identity, and language lies with Indigenous peoples. This responsibility arises as a result of our law and custom. However, as highlighted above, Australia is comprised of hundreds of Aboriginal and Torres Strait Islander nations with their own distinct language, identity and social norms, so a one size fits all approach will not be appropriate.

Colonisation has been a major distraction for Indigenous peoples in undertaking this responsibility. Our daily lives have become about either struggling to straddle the two worlds in which we now exist, or responding to non-Indigenous investigations of our culture. This distracts us from fulfilling our responsibilities to maintain, protect, promote and transmit our culture to our future generations.

The native title system and land rights regimes are the perfect example of this. Our elders are engaged daily in conversations about our culture, our relationships to our lands, territories and resources, our kinship relationships, our sacred places, and knowledge that support our systems of governance. However, rather than this knowledge being passed to those it was meant for, defined by our laws and customs,

this knowledge is being transferred to non-Indigenous beneficiaries, who in turn become experts on ‘us’; or experts who make judgements as to our legitimacy as Indigenous peoples.

The EMRIP<sup>29</sup> study on the role of languages and culture in the protection and promotion of the rights and identity of Indigenous peoples, highlights the need for States to ensure that Indigenous peoples rights to languages and cultures includes the collective right to self-determination and protection from discrimination, forced assimilation and destruction.

In accordance with the *Expert Mechanism Advice No. 3 (2012): indigenous peoples’ languages and cultures*, and the Declaration, this will require that States work with Indigenous peoples to design, develop and implement legislation, policies and programs that promote the maintenance, practice, revitalisation, use, development and transmittal of our cultures and languages. This includes our histories, languages and oral traditions; our philosophies, writing systems and literatures; having a say in our education including providing education in our own languages; and maintaining and strengthening our distinct political, legal, economic, social and cultural institutions, while also retaining our right to fully participate, if we so choose, in the political, economic, social and cultural life of the State.

In a domestic context, Terri Janke in *Our Culture: Our Future* found that there are certain fundamental rights that Indigenous people need in order to maintain and continue their cultures. These rights include:

- the right to own and control Indigenous Cultural and Intellectual Property (ICIP)
- the right to control the commercial use of Indigenous ICIP in accordance with traditional laws and customary obligations
- the right to benefit commercially from the authorised use of ICIP
- the right to full and proper attribution
- the right to protect sacred and significant cultural material.<sup>30</sup>

Governments’ role in this space is to facilitate the development of structures that support Indigenous peoples to promote and protect their unique and diverse culture and identity. The Declaration requires that governments provide the resources necessary to ensure that culture is a key priority in policy and community development programs. Governments must ensure that programs provide support for the maintenance and preservation of culture with the strategic inclusion and full participation of Indigenous peoples, including youth.

This will require those working within governments and acting on behalf of governments to ensure that they are culturally competent and that their actions are carried out in a culturally secure and safe way that does not negatively impact on Aboriginal and Torres Strait Islander peoples and our diverse cultures.

## **6 Cultural Safety and Security**

Cultural safety encapsulates the relationships that we need to foster in our communities, as well as the need for cultural renewal and revitalisation. The concept

of cultural safety is drawn from the work of Maori nurses in New Zealand and can be defined as:

[A]n environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening.<sup>31</sup>

For Aboriginal and Torres Strait Islander peoples a culturally safe environment is one where we feel safe and secure in our identity, culture and community. According to the Victorian Aboriginal Child Care Agency, the concept of cultural safety:

is used in the context of promoting mainstream environments which are culturally competent. But there is also a need to ensure that Aboriginal community environments are also culturally safe and promote the strengthening of culture.<sup>32</sup>

Cultural security on the other hand, speaks more to the obligation of those working with Aboriginal and Torres Strait Islander communities to have policies and practices in place which ensure that all interactions adequately meet cultural needs.

A culturally secure environment cannot exist where external forces define and control cultural identities. The role for government and other third parties in creating cultural safety is ensuring that our voices are heard and respected in relation to our communities' challenges, aspirations and identities. In this way cultural security is about government and third parties working with us to create an environment for a community to 'exert ownership of ourselves'.<sup>33</sup> Through this ownership we are empowered.

Whatever words you use, cultural safety and security requires the creation of:

- environments of cultural resilience within Aboriginal and Torres Strait Islander communities
- cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.

## **7 Conclusion**

The Declaration is underpinned by the principle of respect for and protection of culture. The protection and promotion of culture can only be fully achieved if Indigenous peoples are afforded self-determination and full participation in decisions affecting our cultures. We need governments to work alongside us to ensure that mainstream structures do not adversely affect our culture, and that they promote equality and are non-discriminatory.

There are a number of areas of consideration which must be addressed to ensure that we are able to provide appropriate mechanisms to promote and protect our culture. These include:

1. Should the protection and promotion of our cultures, languages and knowledge be provided through legislative mechanisms? If so, what does this look like? If not, what other options are there?

2. With regard to the above, should Indigenous cultures and languages be protected federally and require state and territory frameworks to comply?
3. How is cultural integrity maintained in a process of negotiation on the promotion and protection of Indigenous culture? For example, customary law?

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<sup>1</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* Australian Human Rights Commission (2011), p 12. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport10/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html) (viewed 20 October 2012); and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 2. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport10/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html) (viewed 20 October 2012).

<sup>2</sup> National Congress of Australia's First Peoples, *National Congress Report 2011*, (2011), p 5. At <http://nationalcongress.com.au/wp-content/uploads/2011/08/ReportPart1.pdf> (viewed 20 October 2012).

<sup>3</sup> M J Halloran, *Cultural maintenance and trauma in Indigenous Australia*, (Paper presented at the 23<sup>rd</sup> Annual Australia and New Zealand Law and History Society Conference, Perth, Western Australia, 2-4 July 2004), p 2. At <http://www.murdoch.edu.au/elaw/issues/v11n4/halloran114.html> (viewed 9 April 2012).

<sup>4</sup> Gugu Badhun Limited on behalf of the Indigenous Peoples Organisations Network of Australia (Statement to the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9-13 July 2012), Item 5: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples. At [http://www.humanrights.gov.au/social\\_justice/international\\_docs/2012\\_EM RIP\\_item5.html](http://www.humanrights.gov.au/social_justice/international_docs/2012_EM RIP_item5.html) (viewed 3 August 2012).

<sup>5</sup> T Janke, *Follow the stars: Indigenous culture, knowledge and intellectual property rights*, (Mabo Oration 2011, Queensland Performing Arts Centre, Brisbane, 3 July 2011). At [http://www.adcq.qld.gov.au/ATSI/Oration\\_2011.html](http://www.adcq.qld.gov.au/ATSI/Oration_2011.html) (viewed 10 April 2012).

<sup>6</sup> T Janke, *Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property Rights*, the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (1998), pp xvii, xviii.

<sup>7</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Our Right to Protect our Knowledge*, (Speech delivered at the Launch of the Aboriginal Knowledge and Intellectual Property Protocol Community Guide, Parliament House, Canberra, 24 September 2009). At: [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2009/20090924\\_DKCRRC.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2009/20090924_DKCRRC.html) (viewed 15 August 2012).

<sup>8</sup> M Dodson, *Cultural Rights and Educational Responsibilities*, (The Frank Archibald Memorial Lecture, University of New England, Armidale, 5 September 1994). At: [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/educational\\_responsibilities.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/educational_responsibilities.html) (viewed 10 April 2012).

<sup>9</sup> The Federation of Aboriginal and Torres Strait Islander Languages and Culture (Corporation), *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into language learning in Indigenous Communities*, (15 September 2011), p 1. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=atsia/languages/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/languages/submissions.htm) (viewed 8 August 2012).

<sup>10</sup> Indigenous Peoples Organisations Network, *Statement to the Seventh Session of the United Nations Permanent Forum on Indigenous Issues, Agenda Item 4 – Indigenous Cultures – Implementation of recommendations on the six mandated areas and on Millennium Development Goals*, (New York, 14-15 May 2007), p 2.



<sup>11</sup> Indigenous languages are critically endangered and they continue to die out at a rapid rate. Prior to colonisation, Australia had 250 distinct languages which can be broken down into 600 dialects. Without intervention, it is estimated that Indigenous language usage will cease in the next 10-30 years in Australia. See J Lo Bianco, *Organizing for Multilingualism: Ecological and Sociological Perspectives A TESOL Symposium on Keeping Language Diversity Alive* (2008), p 11, Alice Springs, Northern Territory, Australia, July 9, 2008.

<sup>12</sup> Indigenous Peoples Organisations Network, note 12, p 2.

<sup>13</sup> J Oscar, *Recognising and Encouraging Honour and Determination*, (Speech delivered at the Annual National Native Title Conference 2012, Townsville, Australia, 4 June 2012).

<sup>14</sup> Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and cultures in the promotion and protection of the rights and identity of indigenous peoples*, UN Doc A/HRC/EMRIP/2012/3 (2012), p 21.

<sup>15</sup> *Universal Declaration of Human Rights*, 1948, Article 27.

<sup>16</sup> *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 15 (2).

<sup>17</sup> *International Covenant on Civil and Political Rights*, 1966, Article 27.

<sup>18</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

<sup>19</sup> The Declaration on the Rights of Indigenous Peoples, note 4, Articles 3, , 5, 8, 9, 11, 12, 13, 14, 15, 31, and 34.

<sup>20</sup> The World Intellectual Property Organisation, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*. At: <http://www.wipo.int/tk/en/> (viewed 4 August 2012).

<sup>21</sup> Australian Government, Department of the Environment, Water, Heritage and the Arts, *Heritage, Protecting Indigenous heritage places*. At:

<http://www.environment.gov.au/heritage/about/indigenous/index.html> (viewed 8 August 2012).

<sup>22</sup> Australian Government, Department of Regional Australia, Local Government, Arts and Sport, *National Indigenous Languages Policy*, at <http://www.arts.gov.au/indigenous/languages> (viewed 4 August 2012).

<sup>23</sup> M Scrymgeour, 'Education restructure includes greater emphasis on English', Media Release, 14 October 2008. At

<http://newsroom.nt.gov.au/adminmedia/mailouts/4599/attachments/081014%20restructure%20and%20language.pdf> (viewed 12 December 2012).

<sup>24</sup> Copyright is a set of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, films and audio recordings. Copyright does not need to be registered as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, M Frankel and T Janke, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998), p 51.

<sup>25</sup> A patent is a right to protect inventions. The patentee is granted the exclusive right (for 20 years), to exploit and to authorise another person to exploit the invention. To be patentable, an invention must include a product or process which is new, involve an inventive step and be useful. Patent protection is not automatic and patents must be applied for by the Australian Industrial Property Organisation, as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, M Frankel and T Janke, note 26, p 565.

<sup>26</sup> A trademark is a sign used to indicate the trade origin or source of goods or services. A trade mark is registered for up to 10 years initially and applications can be made to have the trademark renewed. *Trade Marks Act 1995* (Cth), ss 17, 72(3) & 75.

<sup>27</sup> See Australian Government Department of Regional Australia, Local Government, Arts and Sport, *National Cultural Policy*, at <http://culture.arts.gov.au/> (viewed 4 August 2012).

<sup>28</sup> See Australian Government Department of Regional Australia, Local Government, Arts and Sport, note 30.

<sup>29</sup> The Expert Mechanism on the Rights of Indigenous Peoples, established in 2007, is a subsidiary body of the United Nations Human Rights Council. For more information see OHCHR, *The Expert Mechanism on the Rights of Indigenous Peoples*, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> (viewed 8 August 2012).

<sup>30</sup> M Frankel and T Janke, note 26, pp xx-xxi.

<sup>31</sup> R Williams, 'Cultural Safety – what does it mean for our work practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213, p 213.

<sup>32</sup> R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': A Framework for Maintaining and Restoring Cultural Safety in Aboriginal Victoria*, Victorian Aboriginal Child Care Agency (2010), p 12.

<sup>33</sup> M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *The End in the Beginning: Re(de)fining Aboriginality* (Speech delivered at Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1994). At [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/end\\_in\\_the\\_beginning.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/end_in_the_beginning.html) (viewed 2 December 2012).