



Australian
Human Rights
Commission

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The Declaration Dialogue Series:
.....
Paper No.2 - Self-determination – the fundamental
.....
right of Aboriginal and Torres Strait Islander peoples
.....
to shape our own lives
.....

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Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series - Discussion Paper 2: Self-determination – the fundamental right of Aboriginal and Torres Strait Islander peoples to shape our own lives

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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.

Table of Contents

July 2013

1	Introduction.....	4
2	What is meant by self-determination?:	5
3	What is meant by the right to self-determination?	7
4	Self-determination for Aboriginal and Torres Strait Islander peoples.....	9
5	Conclusion.....	10

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.¹ The National Congress of Australia's First Peoples has also committed to building a policy platform underpinned by the Declaration.²

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.

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 focuses specifically on the principle of self-determination. It considers the views of Aboriginal and Torres Strait Islander peoples, Australian governments and human rights advocates in order to frame the starting point for a constructive dialogue.

2 What is meant by self-determination?

At its core, self-determination 'is concerned with the fundamental right of people to shape their own lives'.³

Self-determination can mean different things to different groups of people. While there can be no pre-determined outcome of what self-determination looks like, it can be characterised as follows. Self-determination:

- affirms that human beings, individually and as peoples, are equally entitled to be in control of their own destinies
- and to live within governing institutional orders that are devised accordingly
- is a human right that has both individual and collective elements, and it applies universally and equally to all segments of humanity
- is grounded in the precepts of freedom and equality, and opposes both prospectively and retroactively, patterns of empire and conquest
- affirms that peoples are entitled to participate equally in the development of the governing institutional order, including the constitution, under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis
- includes the dual aspects of self-governance and participatory engagement
- is a regulatory vehicle that broadly establishes rights for the benefit of all peoples, including Indigenous peoples
- is an instrument of reconciliation and conciliation, particularly for peoples who have suffered oppression at the hands of others
- promotes the building of a social and political order based on relations of mutual understanding and respect

- cannot be viewed in isolation from other human rights but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime.⁴

The challenge for Indigenous peoples and governments is to come to an agreed understanding about what international law requires of governments in responding to their obligations concerning self-determination, and how those requirements are applied in a domestic context.

Individual vs collective self-determination

The importance to individual wellbeing of the collective right to self-determination is well-recognised⁵ and it is the collective right to self-determination of peoples which forms the international legal 'right to self-determination'.

However, human rights generally prioritise the rights of individuals over those of the collective, for example the right not to be tortured or the right to the highest attainable standard of health.

The right to self-determination has individualist elements to it and this is well-encapsulated by a quote used in the 2011 Social Justice Report:

Self-determined people are causal agents; they make things happen in their lives. They are goal oriented and apply problem-solving and decision-making skills to guide their actions. They know what they do well and where they need assistance. Self-determined people are actors in their own lives instead of being acted upon by others.⁶

However, the state of being and feeling in control of one's own life does not come about without the fulfillment of the collective right of self-determination. For Indigenous peoples, it is the collective right to self-determination, among other collective rights, such as the right to culture, which defines the extent to which we are able to exercise and enjoy our individual human rights.

In a keynote address to a conference organised by Aboriginal and Torres Strait Islander people in Townsville, North Queensland in 1993 to celebrate the International Year of the World's Indigenous People, Lowitja O'Donoghue (then the Chairperson of the Aboriginal and Torres Strait Islander Commission) said:

[Collective rights] complement, and indeed strengthen, our individual human rights. History has shown that it is precisely where our collective rights as peoples have been ignored, that our individual rights in such areas as equal opportunity to the provision of education, employment and health care, equity in application of law and justice or participation in the political process, have also been neglected.

It is only when our collective rights are acknowledged that the disadvantage we suffer as individuals can be redressed.⁷

Self-determining communities are able to make decisions collectively about how their priorities are progressed.

3 What is meant by the right to self-determination?

3.1 *The International Human Rights Framework*

The concept of self-determination is well established in international law.

The United Nations, established by the world's governments, has confirmed in its Charter that its purpose is to promote 'equal rights and self-determination of peoples', 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion', and conditions of 'economic and social progress and development'.⁸

Self-determination is affirmed in common Article 1 of both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to which Australia is a party. Article 1 provides that:

1. All peoples have the right of self-determination. By virtue of that right they freely pursue their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The right of self-determination is held by 'peoples'. Ordinarily this has meant the people within a nation state. The exercise of this right is usually met by participatory democratic process.

The situation of indigenous peoples worldwide is seen as different to this. As indigenous peoples have been colonised, they have not freely participated in the formation of the nation states in which they now live. They have retained a separate identity, distinct from the nation state. Accordingly, the *United Nations Declaration on the Rights of Indigenous Peoples* affirms that indigenous peoples the world over have retained their right to self-determination.

Article 3 of the Declaration provides that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith all form key elements of the foundational principle of self-determination.

The Australian Government and the right to self-determination for Aboriginal and Torres Strait Islander peoples

Self-determination has long been contentious in the Australian Indigenous policy dialogue. A detailed historical analysis of the international and domestic dialogues concerning self-determination was prepared by Dr William Jonas AM in his role as the Aboriginal and Torres Strait Islander Social Justice Commissioner.⁹

After several decades of increasing Australian Government support for self-determination during the 1970s, 1980s and early 1990s, the 1996 Coalition Government reversed that position, using the concept of ‘practical reconciliation’. Since then, the Government has implemented self-determination in a way that is inconsistent with both international human rights law and the popular view of Indigenous peoples worldwide to support their steadfast rejection of Indigenous self-determination.¹⁰ This includes concerns expressed by the Government that:

- to confer collective rights on a people will diminish individual rights
- the recognition of the right of self-determination for Indigenous peoples will result in more rights for one group of people that are not afforded to others
- the recognition of Indigenous self-determination will provide legitimacy to claims of secession, the creation of separate Indigenous states, or the recognition of independent sovereignty.¹¹

Consequently, the right of self-determination as it applies to Aboriginal and Torres Strait Islander peoples domestically has been systematically reduced to something less than all other Australians are entitled to – a limiting version of self-determination rather than one which enables us to reach our full potential.

The oppositional approach taken by the Australian Government concerning self-determination has set Aboriginal and Torres Strait Islander peoples up as ‘competitors of government’¹² and has limited the recognition and exercise of our human rights.

Despite active participation in the development of the Declaration, on 13 September 2007 when the world’s governments were called to vote on its adoption in the United Nations General Assembly, Australia was one of only four countries to vote against it.¹³

Self-determination and free, prior and informed consent were put forward as critical issues in Australia’s decision to vote no.¹⁴

Australia has now reversed its opposition and formally endorsed the Declaration on 3 April 2009. In the Australian Government’s statement endorsing the Declaration, it acknowledged its role in fulfilling the right of self-determination as it applies to Aboriginal and Torres Strait Islander peoples. Minister for Indigenous Affairs, the Hon. Jenny Macklin confirmed that:

[t]hrough the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully...We support Indigenous peoples’ aspirations to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity...We also respect the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with lands and waters...[and] [w]here possible, the Australian Government

encourages land use and ownership issues to be resolved through mediation and negotiation rather than litigation.¹⁵

4 Self-determination for Aboriginal and Torres Strait Islander peoples

In a practical sense, self-determination means that Indigenous peoples have the freedom to live well and humanly, to determine what it means to live humanly, and to live according to our own values and beliefs.¹⁶

As Lowitja O'Donoghue affirmed in her 1993 address, 'there is possibly no right more fundamental for Indigenous peoples than that of self-determination' and that 'its centrality to addressing our general disadvantage and oppressed condition has always been self-evident to Aboriginal and Torres Strait Islander people'.¹⁷

Aboriginal and Torres Strait Islander peoples were actively engaged throughout the development of the *Declaration on the Rights of Indigenous Peoples* which included participation in the conversations about self-determination.

During those deliberations Indigenous peoples around the world, including those from Australia, agreed that achieving self-determination does not necessarily equate to an aspiration of secession; nor does it amount to a collective right of veto.¹⁸ Article 46 of the Declaration clearly reflects this position.¹⁹

However, there has been extensive debate in Australia regarding the justification of settlement based upon *terra nullius* and the ongoing sovereignty of Aboriginal and Torres Strait Islander peoples over our lands, territories and resources. The resolution of this debate remains a part of the 'unfinished business' in the Australian polity. While the High Court decision in *Mabo*²⁰ addressed the issue of '*terra nullius*', the subsequent native title system has been inadequate in providing recognition of ongoing rights to lands, territories and resources, including self-determination and the maintenance of cultural integrity.

As such, achieving self-determination for Aboriginal and Torres Strait Islander peoples of Australia would involve a redistribution of power to Aboriginal and Torres Strait Islander communities, where Aboriginal and Torres Strait Islander peoples are the key decision-makers in our own lives.

Following on from this, the exercise of self-determination can only be achieved if we have good community governance. This means the existence of 'effective, accountable and legitimate systems and processes' where Aboriginal and Torres Strait Islander peoples can 'articulate their interests, exercise their rights and responsibilities and reconcile their differences'.²¹

Self-determining communities are therefore able to make decisions collectively about how our community goals are prioritised and progressed.

The exercise of self-determination for Aboriginal and Torres Strait Islander peoples is central to the achievement of a number of goals and objectives including:

- our own representative bodies

- our own schools
- our own justice systems
- our own health systems
- having control over our lives
- being subject to our own laws
- land entitlement and compensation for dispossession
- recognition of customary law
- community self-governance
- involvement in Commonwealth and state or territory government policy, planning and program implementation
- economic independence
- sharing in mineral and other resources from our lands
- aspirations of independent Indigenous self-government.

This final point concerning self-government, relates specifically to our internal and local affairs including:

culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.²²

In the 1970s Aboriginal and Torres Strait Islander peoples became tired of the inability of Government to provide appropriate levels of service and took matters into their own hands. This saw the beginning of national, state and local Aboriginal and Torres Strait Islander representative bodies across a broad range of sectors including health, law and justice, housing, land, women and children's rights.

More recently the National Congress of Australia's First Peoples has been established by Aboriginal and Torres Strait Islander peoples. The establishment of these organisations was seen as the manifestation of the right to self-determination.

However, Aboriginal and Torres Strait Islander peoples and organisations are often disappointed by the lack of political will and good faith demonstrated by governments to ensure our active participation and engagement in policy and legislative developments. For example, the watering down of native title legislation, the abolition of ATSIC and the recent Northern Territory Emergency Response and subsequent Stronger Futures Program have been regarded by Aboriginal and Torres Strait Islander peoples as undermining our right of self-determination and excluding us from making decisions about our futures.

5 Conclusion

Self-determination for Aboriginal and Torres Strait Islander peoples in Australia could take a number of different forms and would be different in each community. Consistent with the principle of self-determination, it will involve a devolution of power to communities. Some examples of how it might look already exist and include regional governance structures such as the Torres Strait Regional Authority, Aboriginal land councils, various different types of local community governance structures, and community controlled service delivery organisations.

The Australian Government's support for the Declaration on the Rights of Indigenous Peoples provides the blueprint for improving the lives of Aboriginal and Torres Strait Islander peoples.

A National Implementation Strategy on the Declaration on the Rights of Indigenous Peoples provides a possible framework to progress this.

However, self-determination is not a simple concept and it is interpreted by governments, non-Indigenous stakeholders and Indigenous peoples differently. In order to realise the right of self-determination for Aboriginal and Torres Strait Islander peoples in Australia, we must first understand each other's aspirations, views and concerns regarding self-determination.

The first step in progressing this critical element to improving the situation of Aboriginal and Torres Strait Islander peoples in Australia is a dialogue between Aboriginal and Torres Strait Islander peoples and Australian governments to address self-determination.

This dialogue will require the input of many people, both Indigenous and non-Indigenous, sometimes separately, sometimes at the table together. However, all parties must come to this dialogue committed to listen to each other and ready to engage respectfully, in good faith and committed to addressing the issues.

A number of questions that may assist this dialogue include:

1. What do Aboriginal and Torres Strait Islander peoples mean by 'self-determination'? What does this look like in a practical sense?
2. Can Aboriginal and Torres Strait Islander peoples across Australia agree on the elements that reflect the collective understanding of self-determination in order to guide local development?
3. What needs to happen within the Aboriginal and Torres Strait Islander community to facilitate self-determination?
4. What changes need to happen in the policy and legislative environment to facilitate Aboriginal and Torres Strait Islander people's right of self-determination?
5. What do Aboriginal and Torres Strait Islander peoples need from Australian governments to facilitate self-determination?
6. What are governments' concerns with the concept of self-determination and what is required to make it work in the Australian context?
7. What do governments need from Aboriginal and Torres Strait Islander peoples in order to facilitate our right of self-determination in Australia?

These are not easy questions. They are loaded with historical sensitivity and will be extremely difficult for many to participate in.

However, achieving an agreed approach to self-determination will result in a positive cultural and social change in Australia – a change that would enable Aboriginal and Torres Strait Islander peoples to own our challenges and own the solutions, appropriately supported by governments and other members of our Australian community.

The status-quo is not an option.

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- ¹ 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 (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 (viewed 20 October 2012).
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- ³ C Fletcher, 'Introduction' in C Fletcher (ed), in *Aboriginal Self-Determination in Australia* (1994), p xi.
- ⁴ S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters & R Stavenhaven (eds), *Making the Declaration Work* (2009) pp 184-196.
- ⁵ M Bamblett, H Bath & R Roseby, *Growing them strong, together: Promoting the Safety and Wellbeing of the Northern Territory's Children*, Report of the Board of Inquiry into the Child Protection System in the North Territory (2010), p 116. At http://www.childprotectioninquiry.nt.gov.au/report_of_the_board_of_inquiry (viewed 10 August 2012).
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- ⁸ *Charter of the United Nations*, 1945, Articles 1 and 55. At <http://www.un.org/en/documents/charter/index.shtml> (viewed 2 December 2012).
- ⁹ W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport02/chapter2.html (viewed 18 October 2012).
- ¹⁰ Jonas, note 9.
- ¹¹ O'Donoghue, note 7, p 8.
- ¹² Jonas, note 9.
- ¹³ Australia along with Canada, New Zealand and the United States of America voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in the General Assembly in New York on 13 September 2007. United Nations Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward Towards Human Rights For All, Says President' Sixty-first General Assembly Meeting, GA/10612, (Media Release 13 September 2007). At <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (viewed 18 October 2012).
- ¹⁴ United Nations Department of Public Information, note 13.
- ¹⁵ J Macklin, Minister for Families, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At <http://www.jennymacklin.fahcsia.gov.au/node/1711> (viewed 13 August 2012).
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- ¹⁷ L O'Donoghue, note 8, p 10.
- ¹⁸ United Nations Department of Public Information, note 13.
- ¹⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Article 46. At www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 19 October 2012).
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- ²¹ National Centre for First Nations Governance, *Principles to Support Effective Governance*, Discussion Document (2008), p 1. At http://fngovernance.org/publication_docs/Governance_Principles2008.pdf (viewed 12 October 2012).
- ²² L O'Donoghue, note 8, pp 9-10.