

THE RIGHT OF SELF-DETERMINATION FOR INDIGENOUS PEOPLES IN AUSTRALIA

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A submission to the National Human Rights Consultation

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Since 2005 I have been conducting doctoral research in relation to the contemporary scope and application of the right of self-determination. I have been particularly concerned with self-determination for Indigenous peoples in Australia. My research has included 14 in-depth interviews with a range of Indigenous respondents, each of whom commented on their perceptions of the meaning of self-determination, its importance for Indigenous peoples in Australia, the degree to which the right is currently inadequately protected, and the means by which law could more effectively promote the realisation of self-determination.¹ The data gathered through this research forms the basis for this submission.

1. Which human rights should be protected and promoted?

This submission is concerned with the protection of the right of all peoples to self-determination. Australian governments and the Australian community could do much more to promote the realisation of this right by Indigenous peoples in Australia.

All human rights enshrined in the general and specific international instruments should be protected and promoted. The Australian government may rely on the constitutional 'external affairs' power to enact legislative rights protection that is reflective of the full range of obligations Australia has undertaken through international treaties. The universality of the human rights system relies on the recognition that rights are indivisible. It is crucial that Australia's future human rights frameworks protect the whole spectrum of rights, rather than offer a mere extension of

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¹ See further: Amy Maguire, 'Law Protecting Rights: Restoring the law of self-determination in the neo-colonial world' (2008) 12 *Law Text Culture* 12.

the piecemeal protection currently available. Rights make sense when they are seen in the context of the entire framework. Conversely, if some rights are offered special protection while others are ignored, this can cause or exacerbate inequality in society. Such an approach can promote the view that some human rights are subordinate to others. This is a position not supported by the structure and content of the international legal framework of human rights.

Self-determination has a crucial place in this framework. This right is protected by Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine 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 States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.²

In 2009, Australia gave its support to the Declaration on the Rights of Indigenous Peoples, which affirms the right of self-determination:

Article 3: 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.³

² *International Covenant on Civil and Political Rights*, GA Resolution 2200A (XXI) (1966); *International Covenant on Economic, Social and Cultural Rights*, GA Resolution 2200 A (XXI) (1966).

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution A/61/L.67 (2007).

Self-determination is the only substantive right protected by both the ICCPR and ICESCR, and has been recognised as ‘a configurative principle or framework complemented by the more specific human rights norms’.⁴ Yet, the Australian state has been historically reticent in regards to the promotion of self-determination for Indigenous peoples in Australia.⁵ Governments have often suggested that the right of Indigenous peoples to self-determination entails a territorial or sovereign claim in competition with Australia’s national sovereignty.⁶ This is an inaccurate perception both of the nature of self-determination generally, and of the types of claims to the right typically advanced by Indigenous peoples in Australia. The current process of consulting on improved rights protection for Australia provides an ideal opportunity for Australia to reposition itself in regard to Indigenous self-determination.

The definition of self-determination under international law is necessarily flexible, as the right must be exercised in the particular circumstances, and for the benefit, of many distinct claimant groups. It has been recognised that self-determination is a right with many ‘faces’; rather than requiring the establishment of an independent state in all circumstances, self-determination may entail the exercise of group autonomy within the borders of an existing state.⁷ The claims to self-determination by Indigenous peoples around the world – and notably in Australia – take this form. They do not, therefore, pose a threat to Australian sovereignty. Rather, they demand recognition of the distinct status of Indigenous peoples, and their entitlement to determine their relationships with Australia as a state founded in colonialism.

Self-determination is of special significance for Indigenous peoples, due to their experience of dispossession and marginalisation. The protection of the right of Indigenous peoples in Australia to self-determination would provide those peoples a belated opportunity to participate in building an Australia that is committed to substantive equality, acknowledgment of our colonial history, and reconciliation.

⁴ S James Anaya, *Indigenous Peoples in International Law* (1996), 77.

⁵ This was recently demonstrated through the disbandment of the Aboriginal and Torres Strait Islander Commission in 2004-2005.

⁶ For example, this was offered as Australia’s justification for refusing to agree to the Declaration on the Rights of Indigenous Peoples at its adoption in 2007. In a positive recent development, the current Commonwealth government committed itself to this Declaration in 2009.

⁷ Frederic L Kirgis, Jr., ‘The Degrees of Self-determination in the United Nations Era’ (1994) 88 *American Journal of International Law* 304, 307.

Respondents to my research clarified the meaning and significance of self-determination in particular contexts for Indigenous peoples in Australia. Although it is crucial to respect the distinct status of the numerous Indigenous groups in Australia, Irabinna Rigney identified a key unifying factor in their claims to self-determination, namely that self-determination means ‘the right for Indigenous peoples to be Indigenous’:

The right to be Indigenous is the right to practice, uphold, maintain, revive, reaffirm the rights of Indigenous cultures and languages to exist in Indigenous peoples into the future.⁸

Other factors respondents acknowledged as central to self-determination include the need to provide a space in which Aboriginal law might function,⁹ the right to be consulted and to give or withhold free, prior and informed consent to decisions that will affect Indigenous people,¹⁰ the requirement for a settlement – whether through a treaty or other agreement – between Indigenous peoples and the Australian state,¹¹ and recognition of the fundamental significance of the connection between Indigenous self-determination and land.¹²

Indigenous respondents to my research engaged with self-determination as a right capable of advancing their struggle for equality and recognition in Australian society.

2. Are there human rights currently sufficiently protected and promoted?

The right of self-determination of Indigenous peoples is not currently sufficiently protected and promoted in Australia. This is apparent in a range of legal and social examples, including:

⁸ Irabinna Rigney, *Interview conducted by Amy Maguire with Associate Professor Irabinna Rigney, Flinders University, Adelaide, 29 August (2006)*

⁹ Irene Watson, *Interview conducted by Amy Maguire with Irene Watson, Adelaide, 30 August (2006)*

¹⁰ Larissa Behrendt, *Interview conducted by Amy Maguire with Professor Larissa Behrendt, University of Technology, Sydney, 8 September (2006)*; Tom Calma, *Interview conducted by Amy Maguire with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, Sydney, 11 December (2006)*; Mick Dodson, *Interview conducted by Amy Maguire with Professor Mick Dodson, Australian National University, Canberra, 22 September (2006)*

¹¹ Mick Dodson, *Interview conducted by Amy Maguire with Professor Mick Dodson, Australian National University, Canberra, 22 September (2006)*

¹² Linda Burney, *Interview conducted by Amy Maguire with Linda Burney, Member of the Legislative Assembly, NSW Parliament, 15 November (2006)*

- The lack of acknowledgment of, or protection for, Indigenous self-determination in any Australian statute, despite Australia's status as a signatory of the ICCPR and ICESCR.
- The absence of a representative governance structure for Indigenous peoples and the under-representation of Indigenous people in government.¹³
- The legal and practical obstacles in the path of those who seek to assert their native title rights.¹⁴
- The vastly poorer outcomes for Indigenous Australians in all areas of social life, for example, health, life expectancy, unemployment and education.¹⁵
- Continued experiences of racism and discrimination.¹⁶
- Lack of governmental concern for the importance of empowering Indigenous peoples to give free and informed consent before decisions are made which affect their lives.¹⁷ This was particularly apparent in the recent 'Intervention' in Northern Territory Aboriginal communities, including the suspension of the *Racial Discrimination Act 1975* in this context.
- Refusal to recognise and respect Indigenous laws or Indigenous sovereignties.¹⁸

Interview respondents expressed frustration with the lack of progress in relation to Indigenous self-determination throughout Australia's history. John Maynard asserted: 'Indigenous voices have been discussing the issues, problems and possible solutions for all these years, but they're always ignored...'¹⁹ Irene Watson argued that

¹³ Aden Ridgeway, *Interview conducted by Amy Maguire with Aden Ridgeway, Tourism Australia, Sydney, 28 November (2006)*

¹⁴ These obstacles include the requirement for Indigenous claimants to establish an unbroken link between their 'traditional laws and customs' as practised at the time of European colonisation, and those laws and customs which they continue to practise today in connection with their traditional lands: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58; *Native Title Act 1993* (Cth) s223.

¹⁵ See, for example: The Aboriginal and Torres Strait Islander Social Justice Commissioner and the Steering Committee for Indigenous Health Equality, *Close the Gap: National Indigenous Health Equality Targets*, 2008, http://www.hreoc.gov.au/social_justice/health/targets/health_targets.pdf.

¹⁶ Larissa Behrendt, *Interview conducted by Amy Maguire with Professor Larissa Behrendt, University of Technology, Sydney, 8 September (2006)*

¹⁷ Tom Calma, *Interview conducted by Amy Maguire with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, Sydney, 11 December (2006)*; Mick Dodson, *Interview conducted by Amy Maguire with Professor Mick Dodson, Australian National University, Canberra, 22 September (2006)*

¹⁸ Irene Watson, *Interview conducted by Amy Maguire with Irene Watson, Adelaide, 30 August (2006)*

¹⁹ John Maynard, *Interview conducted by Amy Maguire with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle, Australia, 9 November (2006)*

Indigenous people in Australia have been presented with a series of illusory forms of recognition of their right to self-determination, culminating in the establishment and then disbandment of ATSIC.²⁰ Aden Ridgeway reflected in similar terms on the degree to which self-determination has been realised in Australia:

I think at best it's been a compromised form and it hasn't really lived up to a full expression of Indigenous peoples' right to make decisions about their cultural identity or their opportunities to sustain and maintain culture and identity.²¹

Mick Dodson commented on the frustration of Indigenous legal claimants, when they are successful before the courts but then find that the government either appeals against a judgment in their favour, or changes legislation to weaken Indigenous rights.²²

The protection and promotion of the right of Indigenous peoples to self-determination is crucial to empowering those peoples to achieve their communal and individual goals within Australian society.

3. How could Australia better protect and promote human rights?

Proposal One:

That the right to self-determination be included in an Australian human rights statute²³

As self-determination is a fundamental principle in the framework of human rights, it must be protected by any future national human rights statute. Human rights statutes in other jurisdictions have adopted a narrow focus, for example by including only civil and political rights protections. The central importance of self-determination for Indigenous peoples in Australia demonstrates that such an approach would fail Indigenous rights claimants. Instead, an Australian human rights statute should

²⁰ Irene Watson, *Interview conducted by Amy Maguire with Irene Watson, Adelaide, 30 August (2006)*

²¹ Aden Ridgeway, *Interview conducted by Amy Maguire with Aden Ridgeway, Tourism Australia, Sydney, 28 November (2006)*

²² Mick Dodson, *Interview conducted by Amy Maguire with Professor Mick Dodson, Australian National University, Canberra, 22 September (2006)*

²³ This submission assumes that the primary form of human rights protection that will emerge from the Consultation process is a national statute, which may be called a Human Rights Act or similar.

embrace the indivisible and universal nature of all human rights enshrined in international law.

It is a challenge to provide protection for the full range of human rights. However, this is not an excuse for refusing to extend such protection. An Australian human rights statute should incorporate mechanisms for resolving inconsistencies or conflicts between different rights. International law provides guidance in this context, in the sense that human rights are typically not regarded as absolute values. Self-determination is certainly capable of being balanced with other human rights, by ensuring that any rights claim is evaluated in light of the rights framework as a whole. Compromise, rather than the abrogation of rights, is possible and desirable.

Proposal Two:

That Indigenous-specific human rights protections be included in an Australian human rights statute

The Universal Declaration of Human Rights (UDHR), along with the ICCPR and ICESCR, form the basis of the universal human rights framework under international law. Over the past four decades, it has become clear to the community of states that particular groups of people also require specific rights protections. This is because universally-phrased rights standards are incapable of adequately addressing the particular needs of marginalised and disempowered groups. A very recently adopted example of group-specific rights protection is the Declaration on the Rights of Indigenous Peoples (2007).

Indigenous peoples are the most disadvantaged minority group within Australia. They also have unique status as the First Peoples of this land. Considering the marginalisation and experience of dispossession of Indigenous peoples in Australia, an Australian human rights statute must specifically address the rights of Indigenous peoples. One important means by which this can be achieved is through the specific recognition of the right of Indigenous peoples to self-determination. It would also be helpful to include in the preamble to a human rights statute a special commitment, on the part of the Australian state and community, to promote the fullest possible realisation of substantive equality and human rights for Indigenous peoples.

Proposal Three:

That Australian parliaments be bound to actively protect and promote Indigenous self-determination

Under the ‘race power’ in s51(xxvi) Constitution, the Commonwealth Parliament may make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. The 1967 referendum supported the broadening of this power to include Indigenous peoples. As a consequence, Parliament was empowered to enact legislation giving some effect to the rights of Indigenous peoples in various contexts, for example the *Racial Discrimination Act 1975 (Cth)*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* and the *Native Title Act (1993)*.

In 1997, through the *Hindmarsh Island Bridge Act*, the Commonwealth Parliament excluded an area of the traditional lands of the Ngarrindjeri people in South Australia from the scope of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This decision was taken in order to facilitate the development of a bridge to Hindmarsh Island by private investors. The traditional owners complained that the Parliament’s decision was an invalid exercise of the constitutional ‘race power’, as that power was designed to facilitate laws beneficial to Indigenous peoples. In *Kartinyeri v Commonwealth* [1998] HCA 22, the High Court ruled by majority that the ‘race power’ also permitted the enactment of laws detrimental to the interests of particular groups, including Indigenous peoples.

With this recent history in mind, one of the essential reasons for the protection of Indigenous self-determination in an Australian human rights statute is to ensure that Australian parliaments be bound to actively protect and promote Indigenous self-determination. The protection of this right in a human rights statute ought to ensure that parliaments will not, in future, enact laws which violate or limit the right of Indigenous peoples to self-determination. This could be guaranteed through the inclusion of a provision in the human rights statute that requires Commonwealth, state and territory parliaments to make laws which accord with the rights protections contained in the new legislation. In this way, Australian parliaments would be empowered to set an example of respect for Indigenous self-determination that could translate into the right’s realisation throughout Australian society.

Proposal Four:

That Australian government departments be bound to actively protect and promote Indigenous self-determination

The inclusion of the right of Indigenous peoples to self-determination in a national human rights statute ought to require that Commonwealth, state and territory government departments promote realisation of the right through their policy-making and implementation of government programs. In this context, it is particularly important that government departments be bound to seek and obtain the free, informed and prior consent of Indigenous peoples in relation to decisions affecting their lives and communities.

In passing a human rights statute, the Commonwealth Parliament must develop and entrench arrangements to ensure that rights protection is provided equally in all Australian jurisdictions, by both parliaments and government departments.

Proposal Five:

That the judiciary be empowered to promote Indigenous self-determination

Australian courts and tribunals are often called upon to make decisions affecting Indigenous rights claimants. They should be empowered to make such decisions in specific accordance with the right of self-determination, and all the other human rights to be protected under Australian law. Should the High Court be called upon to rule upon the validity of Commonwealth legislation, that legislation should be interpreted in accordance with the right of Indigenous peoples to self-determination. If a statute or proposed statute is found to be inconsistent with the right of Indigenous peoples to self-determination, the High Court should be empowered to refer this matter to Parliament, where the inconsistencies may be remedied. Should there be a constitutional barrier to this approach, an alternative should be made available by any new Australian human rights statute. This might involve increased powers for the Australian Human Rights Commission to refer right-inconsistent laws to Parliament.

Australia should also investigate means by which Indigenous communities may take collective action through the courts in the assertion of their right to self-determination.

Proposal Six:

That the Commonwealth government instigate and coordinate a national conversation regarding Indigenous self-determination

If the passage of national human rights legislation is to effect social change, it must be accompanied by attitudinal change. The Australian people deserve ongoing opportunities to engage with human rights and become familiar with what increased legal protection for rights requires of both government and the community.

The right of Indigenous peoples in Australia to self-determination has not been adequately discussed in Australian social discourse. If the right is to be protected in national human rights legislation, self-determination needs to be subject to a national conversation regarding how it can be progressively realised. This conversation may include discussion of whether a treaty or other form of settlement is required between Indigenous peoples and the rest of the Australian community. It is certainly necessary to explore how both governments and the community as a whole may promote the realisation of self-determination by Indigenous peoples. A public education campaign focusing on the significance of self-determination for Indigenous peoples, and the ways in which self-determination may promote reconciliation in the wider Australian community, should be undertaken by government. This should be supported by the teaching of Indigenous rights issues and rights promotion in all schools. Increased resources should be allocated to the Australian Human Rights Commission to develop and promote these processes.

Proposal Seven:

That an Indigenous representative governance structure be developed as an element in the exercise of Indigenous self-determination

The Aboriginal and Torres Strait Islander Commission (ATSIC) was the only experiment with separate Indigenous representative governance in Australian history. There were significant flaws in the design of ATSIC, most particularly a lack of adequate consultation with Indigenous peoples, however the abolition of ATSIC has resulted in a vacuum of representative governance for Indigenous Australians. Therefore, protection for Indigenous self-determination in any national human rights

statute ought to be complemented by the development of Indigenous representative governance structures, designed and administered in a manner appropriate to Indigenous laws, customs and community structures. A process is currently underway to promote the development of a new representative governance structure. Any structure evolving from this process should be empowered through legislation and government funding to promote the progressive realisation of self-determination by Indigenous peoples.

A representative governance structure would also provide another forum through which Indigenous peoples could complain if their right to self-determination is undermined or denied by governments or others in the Australian community. The governance structure could be empowered to act on behalf of complainants.

4. Concluding comments – Constitutional support for self-determination

I understand that the terms of reference of the National Human Rights Consultation preclude the recommendation of a constitutionally-entrenched Bill of Rights. However, I wish to make one brief comment on the constitutional protection of human rights.

The denial of the right of Indigenous Australians to self-determination has, since colonisation, been entrenched through a range of legal mechanisms. The most essential law of Australia, the Constitution, explicitly discriminated against Indigenous peoples until its reform following the referendum of 1967. As stated above, even following the 1967 amendments, the ‘race power’ may now be relied upon to authorise laws detrimental to the rights and status of Indigenous peoples. In its current form, the Australian Constitution contains very minimal rights protections. The Constitution is a document of its time; a framework for governance of a colonial settler state, which had little regard for the status or rights of its First Peoples.

For these reasons, and because the Constitution has a central place in the Australian legal and governance framework, the right of Indigenous peoples to self-determination ought to be recognised in the Constitution itself. One means by which this recognition might be achieved is through amendment of the Preamble to the

Constitution. Should the National Human Rights Consultation result in the development of a national human rights statute, the Commonwealth government could signal the commitment of the Australian state to the ongoing protection and promotion of human rights by recommending an amended constitutional Preamble to the Australian people. This Preamble ought to include a statement of the commitment of Australia and its people to respect for the full range of universal human rights. It should also recognise the unique position of Indigenous peoples in Australia, and make a special commitment to the promotion and realisation of their rights to self-determination and substantive equality.

I would like to thank the Consultation Committee for their efforts in encouraging the Australian community to contribute to this highly important national discussion. I appreciate the opportunity to put forward my arguments in favour of full protection for the right of Indigenous peoples to self-determination.

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