

Factsheet

# Self-Determination 2022

# ANTAR



# Self-Determination

**‘Makarrata is the culmination of our agenda ... It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.’<sup>1</sup>**

The Uluru Statement from the Heart explains that Aboriginal and Torres Strait Islander peoples desire a relationship with the people of Australia based on ‘justice and self-determination’. Self-determination is a fundamental concept in international law and is frequently identified as a key goal of the Aboriginal rights movements. But what is self-determination? And what might it mean in Australia?

## International Law

The right to self-determination is a foundational international human right. It is guaranteed in the two primary international human rights treaties: the International Covenant on Civil and Political Rights (the ICCPR)<sup>2</sup> and the International Covenant on Economic, Social and Cultural Rights (the ICESCR).<sup>3</sup> Common Article 1 of these treaties’ states:

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

Self-determination has both an external and internal dimension.<sup>4</sup>

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<sup>1</sup> [Uluru Statement from the Heart, 26 May 2017](#).

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).

<sup>4</sup> Drawn from Harry Hobbs, ‘Self-Determination and Treaty-Making’ in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia Volume 1* (Lawbook Co., 2021) 353, 355.

The external aspect has the process of decolonisation, through which the population of a colony may freely determine their political status by choosing whether to secede and form their own state. The external aspect of self-determination has transformed international law and international relations, but it is generally not applicable for Indigenous peoples, except in extreme circumstances.

The internal aspect is generally understood as encompassing the right for all citizens to participate freely without discrimination in the public affairs of the state. The internal dimension of self-determination is thus linked to several other provisions of the two Covenants, including those that guarantee the right to participate in political life on a non-discriminatory basis.

The right to self-determination is especially important for Indigenous peoples around the world. Yawuru man and law professor, Mick Dodson, has described self-determination as ‘the heart and soul’ of the United Nations Declaration of the Rights of Indigenous Peoples (the UNDRIP),<sup>5</sup> ‘constituting the river in which all other rights swim’.<sup>6</sup>

Article 3 of the UNDRIP provides that Indigenous peoples may ‘freely determine their political status and freely pursue their economic, social and cultural development’. Articles 4 and 5 expand on this right, explaining that Indigenous peoples have the ‘right to autonomy or self-government’ in relation to ‘internal and local affairs’, as well as the right to maintain their distinct political, legal, economic, social and cultural institutions while ‘retaining the right to participate fully... in the political, economic, social and cultural life of the State’.

Together, these international instruments set out what self-determination means for Indigenous peoples. The right to self-determination entitles Indigenous peoples to participate in the political life of the state *and* to preserve and develop their own distinct societies within the state.

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<sup>5</sup> GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (‘UNDRIP’).

<sup>6</sup> Cited in Craig Scott, ‘Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea’ (1996) 18 *Human Rights Quarterly* 814, 814.

In the words of Sámi scholar Matthias Åhrén, ‘to exist side-by-side with the majority society’.<sup>7</sup>

Australia is a party to the ICCPR and ICESCR and has endorsed the UNDRIP. Australia must therefore respect and ensure all people within its territory and subject to its jurisdiction enjoy these rights. As the Human Rights Committee has explained, this means that Australia must:

- Refrain from taking any measures that would violate these rights;
- Take action to ensure that those rights are not inhibited by third parties; and
- Adopt ‘legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations’.<sup>8</sup>

## The Self-Determination Era in Australia

In 1993, the Aboriginal and Torres Strait Islander Social Justice Commissioner described self-determination as ‘the right to make decisions’.<sup>9</sup> For many generations and decades after colonisation, British and Australian governments denied Aboriginal and Torres Strait Islander peoples this right. Aboriginal and Torres Strait Islander peoples were prohibited from voting in Federal elections in several states until as late as 1962, and a huge amount of legislation and policy discriminated against them in myriad ways. However, led by the committed and passionate activism of Aboriginal and Torres Strait Islander people, the government gradually changed its approach.

The election of the Gough Whitlam Labor government in 1972 marked a key moment in the recognition of the right to self-determination.

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<sup>7</sup> Matthias Åhrén, *Indigenous Peoples Status in the International Legal System* (Oxford University Press, 2016) 132.

<sup>8</sup> Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [7].

<sup>9</sup> Human Rights and Equal Opportunity Commission, ‘Aboriginal and Torres Strait Islander Social Justice Commission: First Report’ (Commonwealth, 1993) 41.



Prime Minister Whitlam and Jim Cavanagh, the Minister for Aboriginal Affairs, argued that self-determination would allow Aboriginal and Torres Strait Islander peoples to 'take a real and effective responsibility for their own [economic, social and political] affairs'.<sup>10</sup> This policy would aim to satisfy the 'most important objective' of 'restor[ing] to Aboriginals the power to make their own decisions about their way of life'.<sup>11</sup>

Federal government policies did not exactly reflect the idea of self-determination in international law. However, the policy recognised the right of Indigenous peoples to participate in and assert a degree of control over public policy decisions that affected them. It also recognised Aboriginal and Torres Strait Islander peoples' right to manage their own affairs.

The Malcolm Fraser-led Coalition government moved away from 'self-determination', preferring to use the term 'self-management'. Nonetheless, between 1972 and the election of the John Howard government in 1996, successive Federal governments 'participated in the process of building the institutions and agencies of self-determination'.<sup>12</sup> This included:

- Enactment of land rights legislation recognising traditional owners' rights to country
- Encouraging and funding Aboriginal community organisations to incorporate so that they may deliver services to their community
- Passing the *Racial Discrimination Act 1975*; and
- Establishing national First Nations representative bodies designed to develop and provide policy advice to the government.

The high point of this policy was the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1990.

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<sup>10</sup> Jim Cavanagh, 'Review of Aboriginal Progress' (5 December 1973) in *Selected Policy Statements on Aboriginal Affairs 1973 – 1974* (1974) 4.

<sup>11</sup> Gough Whitlam, 'Speech by the Prime Minister at the Opening of the National Seminar on Aboriginal Arts', 21 May 1973.

<sup>12</sup> V Watson, 'Axing ATSIC: Australian Liberalism and the "Government of Unfreedom"' (2005) 23 *Policy and Society* 57, 64–66.

Gerry Hand, the Minister for Aboriginal Affairs, announced that ATSIC was intended to give Aboriginal and Torres Strait Islander peoples 'a real say in the management of their own affairs', and 'a real say in the decision-making process'. ATSIC was 'an acknowledgement by all of us that it is no longer acceptable for governments to dictate what is best for the Aboriginal and Torres Strait Islander people; they should decide for themselves what needs to be done'.<sup>13</sup>

ATSIC sought to combine a government bureaucracy with elected regional representative structures. It was a unique experiment, combining political representation, service delivery, policy advice and a monitoring role over government activity. At its peak, ATSIC was responsible for approximately half of the Commonwealth expenditure on Indigenous-specific programs. Decision-making was devolved down not only to 35 Regional Councils, but also to the more than 1000 Aboriginal and Torres Strait Islander organisations given responsibility for the delivery of services such as child welfare support, housing, and health, legal and employment services.<sup>14</sup>

ATSIC empowered First Nations peoples with a genuine capacity to exercise independent policy and decision-making power in certain areas. However, burdened by paternalistic government control, the Commission was impeded from serving as a real instrument of First Nations self-determination. Nonetheless, it remains the most significant national Aboriginal and Torres Strait Islander representative institution in Australian history.

## **Self-Determination after ATSIC**

In 2004, ATSIC was abolished with bipartisan support. The demise of ATSIC was seen as the end of the era of self-determination.<sup>15</sup>

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<sup>13</sup> Cited in Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 118.

<sup>14</sup> George Williams and Harry Hobbs, *Treaty* (Federation Press, 2<sup>nd</sup> ed, 2020) 129.

<sup>15</sup> Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs' (Parliamentary Library, 9 August 2004).

It has been followed by a revival of paternalistic and discriminatory law and policy, such as the Northern Territory Intervention. Despite some work around the edges, today at the federal level 'Indigenous affairs policy remains largely centralised and marked by top-down interventions and a failure to listen to Aboriginal and Torres Strait Islander representative organisations'.<sup>16</sup>

Nonetheless, the dismantling of ATSIC has not silenced the voices of Aboriginal and Torres Strait Islander peoples calling for self-determination. In December 2019, Aboriginal representatives held the inaugural meeting of the First Peoples' Assembly of Victoria—a First Nations representative body. Developed as part of that State's treaty process, the Assembly is responsible for working with government to develop a treaty negotiation framework and manage a self-determination fund for individual Aboriginal nations. The Assembly also provides advice to government on Aboriginal affairs. As Nira Illim Bulluk man of the Taungurung nation and Co-Chair of the Assembly, Marcus Stewart, [notes](#):

**"The formation of the First Peoples' Assembly is in and of itself a hopeful and bold act of self-determination. It's living proof that sovereignty was never ceded. Having the ability to make decisions about your own life and have a say in the decisions that affect your community isn't just a moral issue, it also produces better outcomes."**

Other governments are considering establishing similar First Nations representative bodies. The Uluru Statement from the Heart calls for a constitutionally entrenched First Nations Voice to speak directly to Parliament and government. A First Nations Voice is self-determination in action.

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<sup>16</sup> George Williams and Harry Hobbs, *Treaty* (Federation Press, 2<sup>nd</sup> ed, 2020) 88.

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**With thanks:**

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**ANTAR is proud to acknowledge and pay our respects  
to First Nations Peoples as the traditional owners  
of the lands on which we work across the continent.**

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