

Inquiry into Australia's Human Rights Framework
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This submission will focus on the current inquiry on Australia's human rights framework, regarding the necessity of a federal Human Rights Act. Alongside the strong support of this implementation, will be a core focus on including the entirety of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Furthermore, the importance of legislating self-determination rights will be explored. It will be contended that Australia should implement a national Human Rights Act, and the UNDRIP, most specifically, self-determination rights, should be an integral aspect of the legislation for Australia's First Nations peoples.

The UNDRIP provides extensive and necessary rights for all Indigenous peoples across the world. Rights that are otherwise not protected in other international declarations or treaties. Despite the international declaration not yet creating binding legal obligations in Australia's domestic system, it importantly maintains "international norms as well as evolving human rights standards pertaining to Indigenous peoples".¹ Indigenous peoples need further and more specialised rights for various reasons, a lot of which comes down to a collective experience of colonisation, dispossession, assimilation and continued traumatic effects of such. The UNDRIP protects and allows enjoyment of an array of cultural rights, that enable the innately disadvantaged groups to some form of equitable livelihood. The implementation of the UNDRIP is critical for Indigenous peoples in Australia as it "establishes a universal framework of minimum standards... and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples."²

Implementing the UNDRIP within a federal human rights Act is a critical step in achieving justice for Australia's First Nations peoples. The Declaration has "become an unavoidable parameter of reference when dealing with Indigenous peoples rights".³ This is largely due to the highlighted importance of self-determination. As per article 3 of the UNDRIP, self-determination enables Indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development."⁴ Such interpretation is comparable to the right to self-determination found in both International Covenants, which give self-determination rights to "All peoples".⁵ This, however, gives self-determination rights to the domestic systems of governance, not necessarily to individuals.⁶ This change in interpretation would not dismiss or detract from the authoritative systems of governance,

¹ Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 465.

² United Nations Department of Economic and Social Affairs, *United Nations Declaration On The Rights Of Indigenous Peoples* (20 May 2023) <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

³ Felipe Gomez Isa, 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) *The International Journal of Human Rights* 7, 21.

⁴ UNDRIP.

⁵ International Covenant on Civil and Political Rights, Article 1.

⁶ Dylan Lino, 'The Politics of inclusion: the right of self-determination, statutory bills of rights and Indigenous peoples' (2010) 34(3) *Melbourne University Law Review* 839, 869.

but would provide First Nations peoples opportunities to take control of their own lives in a culturally appropriate manner.

Implementing articles of the UNDRIP is necessary when considering implementing a federal legislation regarding human rights as First Nations people continue to experience disproportionate disadvantage in many facets of life. As highlighted and recognised by the Special Rapporteur in their 2017 report on Australia, "Indigenous Australians generally experience significantly lower standards of health, education, employment and housing, and are drastically overrepresented compared with non-Indigenous people in the criminal justice system, among children in out-of-home care and amount of victims of family violence."⁷ Despite governmental efforts to subside such outcomes, a common theme of lack of adequate and genuine participation and self-determination of Australia's Indigenous population, foresees the continual failure to embed any substantive results. This continuous cycle of implementing lacklustre policies further aggregates the declining and expandingly disproportionate outcomes for First Nations peoples and communities.

With such indicators continuing to decline, it is of paramount importance that the government empower First Nations peoples to make decisions affecting their communities through the collective right of self-determination. The Special Rapporteur contends that "a more comprehensive human rights legislative framework would provide stronger protection for the rights of Indigenous peoples"⁸, which in turn shall rely on the articles of the UNDRIP.

There may be, and have certainly been, reservations regarding the implementation of substantive cultural rights. Such concerns may arise from uninformed and unrealistic views of how such would occur in practice. Although self-determination may have a number of related definitions, at its core for Indigenous people, it would mean the "assertion of identity, language, cultures, tradition, self-management and autonomy."⁹ As expressly stated in article 46(1) of the UNDRIP, "Nothing in this Declaration may be... construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."¹⁰ Thereby conclusively stating that Indigenous self-determination would not, in practice, or in theory, overrule the governance of Australia¹¹. Embedding self-determination would not threaten state sovereignty, but would provide necessary rights to First Nations peoples as the traditional owners, carers and kin of the land.

Self-determination, having the ability to be autonomous, "is not only instrumental but also necessary for Indigenous peoples to control the development of their distinctive cultures,

⁷ United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia* (Aug 2017).

⁸ Ibid.

⁹ James Anaya, 'Indigenous Peoples in International Law' (1996) 79 *Oxford University Press* 86.

¹⁰ UNDRIP.

¹¹ Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', in Philip Alston, 'Peoples' Rights' (2001) 69 *Oxford University Press* 93, 95.

including the use of land and resources...".¹² Therefore, embedding such an integral human right within federal legislation would enable enormous growth in many areas that have for decades struggled. Legislating on self-determination for First Nations peoples would in many ways provide for a legal means of decolonisation.¹³ This is because self-determining rights would in practice, enable First Nations peoples to have control of their own lives and areas specifically important to culture. This may be as simple as enabling Aboriginal and Torres Strait Islander organisations to support Aboriginal and Torres Strait Islander people and communities, or more complex to regard processes of land rehabilitation and rights.

Australia is not however completely foreign to the concept of a Human Rights Act. Unfortunately, though, much of the UNDRIP and culturally specific rights were overlooked in their creation. It is noted that the Australian Capital Territory's Act has since been amended to include such a provision. The Aboriginal and Torres Strait Islander specific provision legislates to maintain, control, protect and develop cultural heritage, languages and knowledge, kinship ties, and rights related to material and economic relationships with traditional lands.¹⁴ While this provision may seem to provide considerable rights, it does not necessarily provide an avenue for how this would effectively work. Implementing a provision specific to self-determination would enable First Nations people to decide, as a collective, how such processes would work, and what would be prioritised.

When creating a federal Human Rights Act, it is critically important to implement all articles of the UNDRIP. As such legislation shall "provide a powerful tool to challenge injustice, enabling people and communities to take action and seek justice if their rights are violated."¹⁵ Implementing articles of the UNDRIP into Australian federal law would ensure that significant cultural rights are protected for each and every First Nations person and community. It would provide for a pathway of adequate and genuine protection, as well as providing accessible remedies for any possible breaches to such rights.

In conclusion, this submission strongly supports the creation and implementation of a federal Human Rights Act. The states and territories that have already made their own Charters shall be recognised and commended on their strategic efforts in advancing human rights protection in Australia, and much can be learned from such legislations. It is strongly advised that the committee, as well as those in the federal legislature, take into consideration all articles of the UNDRIP. It would be of best interests of Australia's First Nations peoples that all articles be implemented and protecting in federal legislation. Fundamentally, the right of self-determination for Indigenous peoples shall be prioritised by people of the committee, and it is urged that such a significant cultural right is rightly placed within the Act.

¹² Ricardo Pereira and Orla Gough, 'Permanent sovereignty over natural resources in the 21st century: natural resource governance and the right to self-determination of Indigenous peoples under international law' (2013) 14(2) *Melbourne Journal of International Law* 451, 495.

¹³ Antonio Cassese, 'Self-Determination of Peoples: A Legal Reappraisal' (1995) *Cambridge University Press*.

¹⁴ *Human Rights Act 2004* (ACT) s 27(2).

¹⁵ Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better: Here are 101 cases showing how*.