

Occasional Paper

Indigenous self-determination

and the Charter of Human Rights and Responsibilities
– A framework for discussion

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Victorian Equal Opportunity
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Contents

Background	2
Two approaches to self-determination and the Charter	2
The Charter of Human Rights and Responsibilities	4
Self-determination and international law	6
International law	6
Indigenous people in international law	6
Self-determination in international law	7
Practical examples from other jurisdictions.....	9
United States.....	9
Canada	10
New Zealand.....	10
The rights of Aboriginal people in Australia: A timeline	12
What Aboriginal Victorians had to say	18
Key themes arising from discussions with Aboriginal Victorians.....	18
Self-determination covers a range of rights	21
Recognition of self-determination in the Charter	24
Options for including a concept of self-determination in the Charter	26

Background

The Charter of Human Rights and Responsibilities (the Charter) requires the Attorney-General to undertake a review of its first four years of operation and a report based on the review must then be tabled in parliament in October 2011. One of the specific issues that the review must address is whether the right to self-determination should be enshrined in the Charter.

In making the recommendation that self-determination not be included in the Charter when it was first enacted in 2006, but be considered as part of the four-year review, the Human Rights Consultation Committee stated:

The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.

This discussion paper is designed to explore the concept of self-determination. It aims to provide a starting point for a conversation with Victorian Aboriginal people about whether the right to self-determination should be included in the Charter and what it might mean if it is included.

The discussion paper will be used to facilitate community consultation regarding self-determination over the course of 2010.

Two approaches to self-determination and the Charter

It should be recognised from the outset that the concept of self-determination is not an easy one to define. While it generally may be agreed that it rests on a foundation of control of one's future destiny – whether as an individual or as a community – what that precisely involves depends upon the aspirations of the individual or group involved, making it difficult to pin down.

There are two approaches to the questions of what self-determination means and how its inclusion in the Charter might impact upon Aboriginal Victorians. Both will be addressed in this discussion paper:

1. The Charter is designed to be a living document that is interpreted according to contemporary and evolving international human rights standards and values. Therefore, it is important to understand how the right to self-determination has been interpreted in international law so as to gain an understanding of how it might be interpreted if included in the Charter.
2. The second approach is to consider the Charter by asking: "What are the aspirations of the Victorian Aboriginal community and how may the Charter be used to fulfil those aspirations?" While it is clear that Aboriginal communities are not the same and that people do not speak with a single voice, to provide a starting point for this conversation a number of Aboriginal people have been asked about their aspirations and vision. It is hoped that their points of view may spark discussion during the broader community-wide consultation process to be undertaken throughout 2010.



Overwhelmingly, Indigenous people prefer to define self-determination themselves rather than have concepts under international law imposed on them. This paper will look at what self-determination means under international law. It will then look at what it could mean if Aboriginal people in Victoria took the lead in defining it. One person said:

One would hope that the Koori community would define Indigenous self-determination but there is scepticism about including self-determination in the Charter and concern that it wouldn't be defined or determined by Aboriginal people. Recognition in the Charter would need to be based on words and concepts of the Koori community, arising from negotiation and not mere consultation.

No government can tell us what self-determination is. Only we can determine what self-determination means to us. That is the first step to self-determination.

The Charter of Human Rights and Responsibilities

The Charter of Human Rights and Responsibilities sets out freedoms, rights and responsibilities that are protected by law in Victoria. The Victorian Government, public servants, local councils and other public authorities must act consistently with the Charter and observe human rights in their day-to-day operations. Human rights must be taken into account when making laws, setting policies and providing services.

The Charter affects the operation of the legislature, the executive (including public authorities), and the courts:

- A statement of compatibility with the Charter must be tabled with all Bills on their introduction to parliament that tells parliament whether they meet the standards set by the Charter.
- All legislation (including subordinate legislation) must be assessed for compatibility with human rights by the Scrutiny of Acts and Regulations Committee.
- Public authorities must act in accordance with human rights and give proper consideration to human rights in decision making.
- Courts and tribunals must interpret and apply legislation consistently with human rights and may have regard to international, regional and comparative domestic human rights law.
- The Supreme Court has the power to declare that a law is inconsistent with human rights but does not have the power to strike it down.

Although some human rights were protected in various other laws, several basic and important rights, such as freedom of speech, freedom from forced work and freedom from degrading treatment, had no clear legal protection. The Charter is essentially a form of insurance to ensure that human rights are a priority for governments when making laws and providing such services as health care, education and law enforcement.

Rights protected by the Charter include:

- recognition and equality before the law
- right to life
- protection from torture and cruel, inhuman or degrading treatment or punishment
- freedom from forced work
- freedom of movement
- privacy and protection of reputation
- freedom of thought, conscience, religion and belief
- peaceful assembly and freedom of association
- protection of families and children
- right to take part in public life
- cultural rights
- property rights
- right to liberty and security of person
- humane treatment when deprived of liberty
- a fair hearing
- certain rights in criminal proceedings
- right not to be tried or punished more than once
- protection from retrospective criminal laws.

The protection of cultural rights specifically applies to Aboriginal people.

People with a particular cultural, religious, racial or linguistic background have the right to enjoy their culture, declare and practise their religion and use their language. Aboriginal people have the right to enjoy their identity and culture. They have the right to maintain their language, kinship ties and spiritual and material relationship with the land, waters and other resources to which they have a connection under traditional laws and customs.



The right broadly reflects the protection of Indigenous cultural rights over land and waters that has been recognised by the United Nations human rights committees, including the Human Rights Committee, Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights.

The Charter does not provide new avenues for legal action for a breach of the Charter. Instead, the Charter primarily establishes mechanisms to scrutinise laws for their compatibility with human rights at the planning and policy stage. It is important to understand that laws that are not compatible with human rights are nonetheless valid and must be complied with – laws cannot be struck down because they do not comply with human rights. However, where people have an existing case before a court or tribunal, they can raise human rights arguments.

If parliament has made laws that are compatible with human rights, then public authorities must make decisions and must act in a way that complies with human rights. If public authorities do not comply with human rights, then their actions may be unlawful and an affected person could bring an action in court to stop the unlawful behaviour.

Perhaps more importantly, the Charter has allowed people to raise human rights considerations in their dealings with public authorities. Some have had success in overturning policy or decisions and have been able to participate in and affect decisions as they are being made.

Self-determination and international law

Indigenous peoples worldwide have never ceded their sovereignty. At the time of European “discovery” of the New World, Indigenous peoples were sovereign entities with total control over their own affairs. They did not rely on any external sources of power for legitimacy. Conflict was inevitable, therefore, when Europeans professed to claim sovereignty over all the territories of the New World and power to override Indigenous authority. Indigenous peoples have been attempting to regain control over their own affairs ever since.

International law

International law is the body of law that governs relationships between sovereign states, covering a diverse range of issues from rules of war to trade rules to human rights. International law and international forums now provide Indigenous people with important mechanisms to lobby for their rights and complain of rights violations. Ironically, however, international law once provided the justification for the colonisation of the New World by the European States and for the forcible taking of Indigenous lands.

Historically, the fundamental principles of international law were State sovereignty/non-interference and territorial integrity. States were presumed to be independent and protected from interference in their internal affairs. However, over the last 60 years since the establishment of the United Nations, there has been a dramatic shift in those assumptions that once were the foundations of international law. We have witnessed the evolution from a State-centric system to one that recognises individual rights, some group rights and challenges to State sovereignty, admittedly on a limited basis. Indeed, non-State actors now play an important role in shaping international law.

Indigenous people in international law

One emerging area of international law and especially in human rights law is international law as it specifically relates to Indigenous peoples. This expanding recognition has largely been driven by Indigenous peoples themselves, who have taken every opportunity to assert their rights using international documents and bodies and who are no longer mere subjects for discussion.

The United Nations has created specific bodies to deal with Indigenous issues, including the:

- Working Group on Indigenous Populations (WGIP)
- Permanent Forum on Indigenous Issues
- Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples.

After 20 years of intensive debate, the Declaration on the Rights of Indigenous Peoples drafted by the WGIP was adopted on 13 September 2007. The only States to oppose the adoption were the United States, New Zealand, Canada and Australia, although Australia recently reversed its position to support the Declaration in April 2009.

Treaty-monitoring bodies including the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) examine the activities of State parties, comment on their compliance with the various conventions and make recommendations. The committees have emphasised particular obligations in relation to Indigenous people, including the obligation to protect cultural integrity and cultural practices, rights to land and land use, economic activity and political organisation.

Self-determination in international law

The right to self-determination is a foundational principle of international law, enshrined in a number of United Nations instruments including the:

- United Nations Charter
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Declaration on the Rights of Indigenous Peoples.

Self-determination is held to be the most fundamental of all human rights and is widely acknowledged to be a principle of customary international law and even *jus cogens*, which means that States cannot deny that it applies to them. It has been described by the HRC as an “essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”

Article 1 of the ICCPR and ICESCR states:

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.

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.

The States Parties to the present Covenant ... 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.

Under the United Nations instruments, self-determination applies to “peoples”, the meaning of which has proven to be controversial. According to its

plain meaning it would obviously apply to Indigenous peoples, but historically it was argued that it did not apply to enclaves of people, such as Indigenous people living within the boundaries of independent States, including Australia. Self-determination was linked to decolonisation but only in limited circumstances. The blue water or salt water thesis was developed defining self-determination as applying to the whole population of peoples within colonial borders, so long as there was blue water between the colonial territory and the colonising State.

The Human Rights Committee has now clarified that the principle of self-determination applies not only to colonised peoples but to all peoples including Indigenous peoples.

Indigenous people, however, have never meekly accepted that they were not “peoples” unable to exercise the right of self-determination. They have argued for a broadening of the definition and have challenged the exclusion of Indigenous peoples as being racially discriminatory. More potently, they have lobbied for and obtained alternative forms of recognition through the WGIP, the Permanent Forum and expression in the Declaration on the Rights of Indigenous Peoples, which states in articles 3, 4 and 5:

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.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Content of self-determination

The content of self-determination is not easily identified. There has been a mistaken tendency to equate self-determination with secession or with the right to form an independent State, which has led to its rejection by some States. That secession is not the general aspiration of Indigenous peoples is clarified in article 46 of the Declaration on the Rights of Indigenous Peoples:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Although self-determination is the principal right of the ICCPR, procedural requirements mean Indigenous peoples have not been able to argue that their right to self-determination has been violated under article 1. They have, however, been successful in arguing that their cultural integrity has been breached, which the HRC has declared can be interpreted through the lens of self-determination.

Treaty-monitoring bodies have developed these key principles which help to define what self-determination means in practice. They have:

- emphasised the essential requirement for Indigenous participation in decisions that affect them (CERD requires informed consent)
- called for increased Indigenous participation in State institutions
- criticised the lack of forums for consultation with governments
- recommended the strengthening of existing self-governance programs
- cautioned that, rather than trying to assimilate Indigenous peoples, State parties should endeavour to protect their cultural identity

- repeatedly emphasised the role of Indigenous peoples in decision making on issues affecting their traditional lands and resources, and economic activities
- criticised natural resource concessions granted without full consent of the communities concerned
- supported rights to develop language and culture and, in particular, the right to communicate with government authorities in their native language
- urged the adoption of measures to safeguard Indigenous communities' rights and freedoms to which they are entitled individually and as a group.

The Human Rights Committee has accepted that the terms "self-management" or "self-empowerment" rather than "self-determination" can be used to express Indigenous peoples exercising meaningful control over their affairs. The Committee expects positive action and not words.

Practical examples from other jurisdictions

Aboriginal and Torres Strait Islanders and other Indigenous peoples worldwide who are minorities within independent States have continued to struggle for self-determination which is often described as having two arms:

1. The drive for greater autonomy for Indigenous people over their political, social, cultural and economic destiny without outside interference, manifest in self-government.
2. The demand for greater participation in the institutions of the State, sometimes in the form of guaranteed representation.

Some Indigenous peoples have their own parliaments, such as the Sami Parliaments of Finland, Norway and Sweden; some have varying degrees of self-government as in the United States and Canada or forms of home rule as in Nunavut or Greenland; others have dedicated seats in parliaments of mainstream government, including in New Zealand.

This section provides a brief overview of the relations between the State and the Indigenous peoples of the former British colonies with which Australia is most often compared – the United States, Canada and New Zealand – with regard to the State's relationship with Indigenous people.

United States

Native American tribes in the United States hold a unique position in regards to their relationship with the State. From the outset, the relationship was one of nation to nation, where tribes entered into treaties with the British colonisers, first in relation to trade and military allegiance, and later in relation to cession of certain lands with guaranteed rights in return. Although these treaties are enforceable legal documents (unlike the Treaty of Waitangi for

instance), they were largely ignored and the rights contained within them whittled away. Nonetheless, the continued sovereignty of tribal governments was first recognised by the courts in the mid-1800s, although in a modified form. Tribes have retained powers of law making and self-government as “domestic dependent nations” and continue to be ruled by their own laws while being subject to Federal Government jurisdiction.

Although the Federal Government has enormous power over Native American tribes this is tempered by specific obligations toward Indians. The Federal Government's relationship is classified as a trusteeship or guardianship and it is supposed to act according to the highest fiduciary standards. State governments do not have jurisdiction within the boundaries of reservations and most state laws do not apply to Native Americans on reservations.

Rights not specifically ceded by treaty are considered to be reserved. Tribal governments exercise legislative, judicial and regulatory powers ranging from tribal courts, taxation, zoning ordinances, environmental controls, and business and health regulations to water management controls. Tribes run their own schools, health services, police and courts, tribal businesses and tourism ventures and manage the land. They control significant resources including coal, oil, uranium and other minerals. Decision as to how, and indeed if, these resources will be developed rests with the tribe.

While the United States does not use the term self-determination in its dealings with Native American tribes, it recognises a form of sovereignty and through constitutional arrangements and policy approaches ensures that tribal governments, including tribal courts, continue to exist on land owned by Native American tribes.

Canada

The landscape in Canada is quite different from Australia where modern treaty-making continues, following a practice going back to first European contact. From 1973, when the existence of Aboriginal title was recognised over land that had not been dealt with by historical treaties, Canada has negotiated “comprehensive settlements” with First Nations people that have greatly expanded in scope over the last 30 years. Negotiated matters include harvesting rights; participation in land, water, wildlife and environmental management; financial compensation; resource revenue sharing; economic development strategies; management of heritage resources and parks areas; and, usually, full ownership of certain portions of the settlement area. At the same time, the specific claims process was instituted to deal with allegations of breaches and unfulfilled obligations under existing treaties.

Canada has gone further, creating a self-government agreement process that exists due to government policy. Self-government agreements allow for Aboriginal law-making authority (whether negotiated within a comprehensive claims or specific claims process or as separate agreements) in relation to matters that are internal to their communities; integral to their unique cultures, identities, traditions, languages and institutions; and with respect to their special relationship to their land and their resources. Agreements cannot result in sovereign independent Aboriginal nation states. Interestingly, agreements may include matters that strictly go beyond those internal matters and may on occasion apply to non-members, if explicitly stated.

Given the differing aspirations of Indian, Inuit and Métis – some want self-government on their own land base, some within a wider public governance structure and others want institutional arrangements – agreements vary in content and the negotiation process itself. Agreements range from public government over Inuit territory, such as the Nunavut territory, to Métis self-government without a land base (including devolution of programs and services and the development of institutions delivering services).

One of the most significant developments for Aboriginal people in Canada was the adoption of s35(1) of the *Constitution Act 1982* that “recognises and affirms” existing Aboriginal and treaty rights. The Canadian Government has explicitly stated that the inherent right of self-government acknowledged by the self-government agreements is an “existing right” and has Constitutional protection.

Self-determination in Canada has been driven by both the constitutional protection of the rights of First Nations people and government policy.

New Zealand

Te Tiriti o Waitangi/the Treaty of Waitangi is necessarily the starting point for examining relations between Maori and Pakeha in Aotearoa/New Zealand, but has been extremely controversial due to difficulties in reconciling the English and Maori texts. The Maori did not and do not accept that they ceded absolute sovereignty to the British. Instead, they interpreted and continue to interpret the Treaty as providing for “parallel paths of power under a single nation state” and continued to exercise their own laws after signing.

Very soon after signing, Maori started to complain of breaches of the Treaty but it was not until 1975 that the Waitangi Tribunal was established to inquire into claims by Maori that the Crown’s legislation or actions are or were inconsistent with the principles of the Treaty. The Tribunal inquires into and makes recommendations on claims submitted to the Tribunal; and examines and reports on proposed legislation referred to it by the House of Representatives or a minister. The Tribunal makes recommendations including what may be done to compensate claimants or to remove the harm or prejudice suffered. Treaty reports often instigate negotiations, managed by the Office of Treaty Settlements, which have led to a range of major settlements including the \$170 million Sealords settlement and the establishment of Maori as an official language of New Zealand.

The legal status of the Treaty is also contested and courts have held that it only has legal force to the extent that it is incorporated into law. However, the principles of the Treaty that are applied by the Tribunal to government action, and that are increasingly incorporated into legislation, provide some measure of accountability and impact on government policy and practice.

A second means of exercising autonomy occurs through the establishment of reserved Maori seats in parliament. At the time of their introduction in 1867, there were four seats. Since 1993, the number of seats depends upon the proportion of the population and in recent elections increased to seven. People of Maori descent choose to put their names on the Maori electoral roll or the general electoral roll. The reserved seats have been highly controversial and their abolition has been canvassed by Maori and Pakeha. However, their influence cannot be doubted, with – at one time – the members holding the balance of power in the New Zealand Parliament.

The Treaty of Waitangi has been a mechanism through which the Maori can assert rights that underpin the concept of self-determination. It has provided a basis for the protection of the Maori language – a key aspect of Maori culture and identity – and, through the ability to protect land and fishing rights, an economic base or economic self-sufficiency.

Experiences in other countries highlight that the establishment of a framework for self-determination is not divisive and has been achieved to a greater extent than in Australia. In those countries, greater protection of the rights of Indigenous people has been achieved through mechanisms such as government policy, constitutional protection, treaties and legislation.

The rights of Aboriginal people in Australia: A timeline

Aboriginal and Torres Strait Islander resistance to colonisation and assertion of inherent sovereign rights are not new phenomena in Australia. Victorian Aboriginal people have a proud history of asserting their rights, which continues today.

- 1770 Lieutenant James Cook claims to take possession of the whole east coast of Australia by raising the British flag at Possession Island off the northern tip of Cape York Peninsula. Cook's instructions that he was "with the consent of the Natives to take possession" of lands not already "discovered or visited by any other European power" were ignored on his second and third voyages.
- 1788 The First Fleet of British convicts, soldiers and officials arrives at Botany Bay. On 26 January, Captain Arthur Phillip raises the British flag at Sydney Cove and the invasion begins. The Aboriginal population is estimated at between 750,000 and one million at the time.
- 1836 John Batman sails to Port Phillip Bay from Tasmania and negotiates two treaties with Kulin Elders over 600,000 acres of prime farming land, but the treaties are declared to be "void and of no effect against the Crown" by Governor Bourke, the governor of the colony of NSW.
- 1843 Billibellary, a Woiworung Elder and signatory to the Batman treaty, petitions the Port Phillip Protector of Aborigines for land on the Yarra River to be reserved for living on and for cultivation. The Woiworung repeatedly make requests for land over the next few years.
- 1846 The protests of Aboriginal people of Van Diemen's Land who were forced to Flinders Island culminate in a petition to Queen Victoria claiming that the Colonial Government had broken its promises and complaining about the appalling conditions they had to endure.
- 1847 The directive from the Secretary of State for the British Colonies to the NSW Colonial Government that land be reserved for Aboriginal people is ignored.
- 1851 The Port Phillip District separates from New South Wales to become the new colony of Victoria.
- 1858 Select Committee established to inquire into the "condition of the Aborigines of the colony, and the best means of alleviating their absolute wanes". Largely due to the advocacy of the Kulin, the committee recommends the establishment of reserves.
- 1859 A Taungurong delegation assisted by Simon Wonga, Billibellary's son, demands land leading to the establishment of a reserve on the Acheron River. The reserve is ultimately overrun by white settlers who destroy the fences, buildings and crops, and the Aboriginal residents are forced to move to Mohican Station which the Guardian of Aborigines predicted would be an "utter failure". He declared it was too far from their cherished lands and would "deter Aboriginal people from ever having confidence in promises held out to them." The Woiworung suffer a similar fate, being first granted land in 1860 in the Yarra Valley and later being moved on to Mohican Station.
- 1860 The Victorian Central Board for the Protection of Aborigines is established.
- 1861 The Lake Tyers Mission Station is established by the Church of England. It is gazetted as a reserve in 1863.
- 1861 Framlingham is gazetted as a reserve but very little is done to establish an Aboriginal station. In 1865, the Church of England establishes a mission but hands back responsibility to the Protection Board one year later.



- 1863 Tired of waiting for government to select a suitable site, the Woiworung and Taungurong, led by William Barak and Simon Wonga and assisted by John Green, trek across the Great Dividing Range to settle at a site of their choosing, which becomes Coranderrk Aboriginal Reserve. Other Kulin join them and a farming community is established with the aim of becoming self-sufficient.
- 1867 The Protection Board decides to close Framlingham and move the residents to Lake Condah. Many people refuse to leave, and so in 1890 the Colonial Government reserves 500 acres for use of the Aboriginal people at Framlingham but refuses to staff the station, provide education, or install equipment or livestock.
- 1869 Aboriginal protection legislation is enacted in Victoria giving the Board for the Protection of Aborigines power to determine places of residence, oversee labour contracts, control property and assume custody of children.
- 1870s In the early 1870s, the Protection Board intervenes in the operation of Coranderrk and introduces hop farming. The men are no longer entitled to work independently on and off the station. Instead, they are forced to work for wages but in actuality receive little or no payment. By the mid 1870s, the Protection Board attempts to wrest control of Coranderrk from the Kulin and tries to break it up. The Kulin strenuously reject the board's interference and assert the rights of self-government that they had previously exercised. William Barak and Tommy Bamfield lead a decade-long struggle for control, writing petitions to politicians and to newspapers, and forming deputations to appeal to politicians.
- 1881 After extensive lobbying and advocacy by the Kulin, a board appointed to inquire into the management of Coranderrk finds that the problems were created by the Protection Board's removal of Green and its determined efforts to close the station.
- 1883 St Mary's Church is established at Lake Condah; Aboriginal men carry out the construction work. The church is an important community meeting place until it is demolished in 1957 with the use of explosives, after which the remaining residents of Lake Condah are expelled from the mission.
- 1884 Between 1882 and 1884, "half castes" are forcibly removed from Coranderrk, which severely undermines its viability. Many move to Maloga Mission, established in 1874, which becomes Cumeragunga Reserve in 1883.
- 1886 Formalising policy operating since the early 1880s, legislation is passed in Victoria forcing Aboriginal people of "mixed descent" from the missions and reserves to be dispersed in the general community. The Act divides families and communities.
- 1887 The Yorta Yorta petition for ownership of land – "not less than 100 acres per family" – seeking for Cumeragunga Reserve to be apportioned into farms.
- 1901 At federation, the six self-governing British colonies join together to become states of the Commonwealth of Australia.
- 1917 The Protection Board decides to concentrate all "full blood" and "half-caste" Victorian Aboriginal people on the Lake Tyers Station.
- 1919 The Protection Board closes Lake Condah Reserve but Koori people continue to live there until the 1950s. Requests that the reserve be transferred to Aboriginal ownership are rejected.

- 1924 Coranderrk is closed as an Aboriginal reserve, the stock is sold and the community is encouraged to move to Lake Tyers.
- 1932 The Australian Aborigines League is formed to gain for Aboriginal people the human and civil rights that they are being denied. Foundation members include Pastor Doug Nicholls, William Cooper, Eric Onus, Bill Onus, Kaleb Morgan, Thomas James, Marge Tucker and Ebenezer Lovett. The Aborigines Progressive Association, formed in NSW by William Ferguson and Jack Patten, follows in 1937.
- 1933 At 72 years of age, William Cooper has to leave his beloved home at Cumeragunga and move to Melbourne, as residence on the reserve made him ineligible for the age pension.
- 1935 William Cooper drafts a petition, which is signed by 2000 people, to King George V seeking representation in Federal Parliament for Aboriginal Australians in proposed Aboriginal electorates.
- 1938 On 26 January, a National Day of Mourning is held in Sydney during an Aboriginal congress organised by William Cooper and Jack Patten. Approximately 100 Aboriginal people attend to protest over discrimination against Aboriginal people on the 150th anniversary of European invasion.
- 1938 On 6 December, several weeks after Kristallnacht, William Cooper leads a delegation of Aboriginal people who walk from Footscray to the German Consulate in South Melbourne to deliver a petition which condemns the "cruel persecution of the Jewish people by the Nazi government of Germany."
- 1939 Aboriginal men and women walk off Cumeragunga Reserve in New South Wales due to poor and deteriorating living conditions and settle in Barmah, Echuca, Shepparton, Mooroopna and Fitzroy. Jack Patten and William Cooper call for an immediate inquiry.
- 1949 The *Australian Citizenship Act 1948* gives Aboriginal people the right to vote in Commonwealth elections if they are enrolled for state elections or have served in the armed services. Aboriginal men can legally vote in Victoria, Tasmania, South Australia and NSW. However, as few Aboriginal people know their rights, few vote.
- 1951 The Victorian Government hands over nearly all of Lake Condah Reserve to the Soldier Settlement Commission for farm lots to be given to soldiers returned from World War II. This land is not available to Koori returned servicemen and women, even those from Lake Condah.
- 1953 The Protection Board closes Cumeragunga as a managed reserve.
- 1957 The Protection Board is replaced by the Aborigines Welfare Board that advocates a policy of assimilation. It proposes to close the remaining reserves at Framlingham and Lake Tyers.
- 1958 The Federal Council for Aboriginal Advancement (later called the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders) is formed after calls for a national organisation by, among others, the feminist campaigner Jessie Street. It has wide-ranging objectives with an emphasis on rights of citizenship rather than Aboriginal rights. Pastor Doug Nicholls plays an important role in the organisation from the beginning.
- 1962 All Aboriginal people are given the vote in Commonwealth elections by the Menzies Government.
- 1965 Led by Charles Perkins, a group of students from the University of Sydney undertake a bus trip – dubbed "The Freedom Ride" – through the towns of western NSW to conduct a survey of Aborigines' conditions and expose racial discrimination and segregation in country areas.

- 1966 In May and August, Dexter Daniels leads the Gurindji workers in withholding their labour from the Wave Hill cattle station in the Northern Territory in protest against an Arbitration Court ruling to postpone the payment of equal wages for Aboriginal pastoral workers for three years. Later that year the industrial action is transformed into a land claim for the Gurindji, led by Vincent Lingiari.
- 1966 The most significant step in dismantling the White Australia Policy is taken by opening immigration to non-Europeans, with the final vestiges being removed by the Whitlam Government in 1973.
- 1967 Ninety-one per cent of Australian citizens vote “yes” in a referendum to count Aboriginal people in the census and give the Commonwealth the power to make laws for Aboriginal people. Ultimately, the power is interpreted by the High Court as being able to be exercised to the detriment of Aboriginal people, despite the intention behind the referendum.
- 1970 Aboriginal ownership of Framlingham resumes with transfer of the reserve to the Framlingham Trust under the Victorian *Aboriginal Lands Act 1970*. Lake Tyers Reserve is returned to the local Koori community in 1971.
- 1971 The Yirrakala people on the Gove Peninsula mount a land claim to win back control of their traditional lands and stop the mining company Nabalco from extending its operations. Despite holding that the Yirrakala had “a subtle and elaborate system” that “provided a stable order of society”, Justice Blackburn rejects the land claim on the basis that Australia had been “settled”, and this could not be challenged.
- 1972 Aboriginal activists such as Gary Foley, Bobbi Sykes and Chicka Dixon respond to Prime Minister William McMahon’s rejection of Aboriginal land rights on Australia Day by setting up the Tent Embassy on the lawns of Federal Parliament House, symbolising their sense of being foreigners in their own land. It continues to be a site of political struggle.
- 1973 The National Aboriginal Consultative Committee (NACC) is established by the Whitlam Government to liaise with the minister and the Department of Aboriginal Affairs (DAA). The sincerity of the government is questioned as the DAA is seen to only pay lip service to the NACC.
- 1973 The Northern Aboriginal Land Council is formed, followed by the Central Land Council in 1977. Unlike their predecessors, these organisations receive government funding and have administrative functions and the responsibility to deliver services.
- 1976 The *Aboriginal Land Rights (Northern Territory) Act 1976* is passed by the Fraser Government. It represents a watered-down version of the 1975 Whitlam Government Bill but provides recognition of Aboriginal land ownership to about 11,000 Aboriginal people.
- 1977 The NACC is replaced by the Fraser Government with the National Aboriginal Conference that has even more restricted powers than the NACC.
- 1983 The NSW *Aboriginal Land Rights Act 1983* passes as a fundamental recognition of the need to redress past injustices and alleviate social and economic disadvantage.
- 1983 The NSW Government grants 1200 acres of former Cumeragunga Reserve to the Yorta Yorta Land Council.
- 1984 The Victorian Government returns 53 hectares of the original Lake Condah Reserve to the local Koori community.

- 1988 While mainstream Australians celebrate 200 years of European settlement on Australia Day, over 40,000 Indigenous people and supporters march from Redfern Oval to Hyde Park as part of the Invasion Day demonstration. The march is in support of the Aboriginal struggle for peace, justice and freedom.
- The Barunga Statement is presented to Prime Minister Hawke, calling on the Australian Government to support Aborigines in the development of an International Declaration of Principles for Indigenous Rights, as well as a treaty recognising prior ownership, continued occupation and sovereignty and affirming Aboriginal human rights and freedoms.
- 1990 The Aboriginal and Torres Strait Islander Commission (ATSIC) is established as the peak representative Indigenous agency in Australia and includes a unique elected arm.
- 1991 The final report of the Royal Commission into Aboriginal Deaths in Custody makes 339 recommendations, mainly concerned with procedures for persons in custody, liaison with Aboriginal groups, police education and improved accessibility to information.
- 1992 In a landmark decision, the High Court of Australia recognises native title in the *Mabo* case. The court also overturns the doctrine of *terra nullius*, which Aboriginal people see as justice finally being delivered. By contrast, the response among some non-Aboriginal people is panicked, even hysterical. Non-Indigenous Australians are told to fear for their backyards and that the wellbeing of the nation is at risk.
- 1993 Federal Parliament passes the *Native Title Act 1993*. The Act is technical, complex and unwieldy, reflecting the haste with which it was drafted against a background of demands for “certainty”.
- 1996 The High Court delivers the decision in the *Wik* case, finding that pastoral leases (covering approximately 40 per cent of Australia) do not necessarily extinguish native title. Again, there is shock and outrage leading to the Howard Government’s amendments to the *Native Title Act 1993*, dubbed the Ten Point Plan.
- 1997 The *Bringing Them Home* report investigates the forcible removal of children without reason from their families and communities since the early days of European colonisation of Australia. The report details the devastating impact of removal on the children, their families and their communities and the intergenerational grief, trauma and dysfunction that resulted.
- 1998 A greatly reduced portion of the original Coranderk Reserve is purchased by the Indigenous Land Corporation and returned to the descendants of the original community.
- 1998 The United Nations Committee on the Elimination of Racial Discrimination, acting under its early warning procedures, holds that the amendments to the *Native Title Act 1993* create legal certainty for governments and third parties at the expense of Indigenous title and asks Australia to address the issues as a matter of urgency.
- 2000 The Australian Declaration towards Reconciliation and the Roadmap for Reconciliation are presented to the nation’s leaders as a part of the Corroboree 2000 Summit in Sydney. Over 300,000 people join the Peoples’ Walk for Reconciliation across Sydney Harbour Bridge.
- 2002 In the *Yorta Yorta* case, the High Court spells out the requirements for proving continuing native title such that Aboriginal and Torres Strait Islanders in areas of intense colonisation, or who were forcibly removed or who live in urban environments, will find it very difficult to prove continuity since European occupation.

- 2005 ATSIIC is formally abolished at midnight on 24 March 2005, removing its regional and state structures and returning funding for Indigenous programs to the relevant departments. Following Mark Latham's election to the leadership of the Labor Party in December 2003, there was bipartisan support for the abolition of ATSIIC. On 28 May 2004, the Howard Government introduced into the Federal Parliament legislation to abolish the agency. After a delay, the Bill finally passed both houses of parliament in 2005.
- 2006 The Victorian Government passes the Charter of Human Rights and Responsibilities.
- 2007 On 21 June, the Federal Government introduces the Northern Territory Emergency Response (the Intervention) that imposes control over almost every aspect of the lives of Aboriginal people living in prescribed areas in the Northern Territory. The Intervention controls how people may spend their social security entitlements; removes the right to negotiate under the *Native Title Act 1993*; gives the minister extraordinary rights over Aboriginal organisations; imposes compulsory five-year leases without consent; and removes considerations of customary law and cultural practice to any crime in the Northern Territory.
- 2008 On 13 February, Prime Minister Kevin Rudd delivers an apology to the Stolen Generations, declaring that the time for denial and the time for delay has at last come to an end. The prime minister declares it a "day of national reconciliation", of "a new beginning" and of "partnership" and "respect".
- 2009 Victorian Attorney-General Rob Hulls announces the Victorian Native Title Alternative Settlement Framework allowing traditional owners to negotiate native title claims directly with government, with broader scope for agreements beyond native title including increased economic opportunities and environmental and cultural protection. The alternative framework comes into existence largely at the instigation and persistent advocacy of the Victorian Traditional Owner Land Justice Group.

What Aboriginal Victorians had to say

To provide a starting point for a conversation about self-determination, a range of Victorian Aboriginal people were asked what self-determination meant for them, what is needed for Aboriginal people in Victoria to be self-determining and what vision they had for Victoria in 20 years time.

Mindful that Aboriginal people are too often treated as a homogenous group, it is important to state at the outset that Aboriginal Victorians will have quite differing aspirations and visions for the future. There is no pretence that this snapshot of some preliminary interviews captures a “Victorian view”; clearly a diversity of opinions exist.

Nevertheless, some definite common themes emerged as well as some stark differences. We have tried to summarise the thoughtful and detailed responses in such a way as to fairly reflect the most common themes and views. The key themes are summarised below and discussed in more detail in the following section:

Key themes arising from discussions with Aboriginal Victorians

Key themes in the concept of self-determination

- equality and non-discrimination
- protection of cultural identity, language, heritage and culture
- education, health, housing
- capacity building and cultural space
- land and resources
- economic development and self-sufficiency
- meaningful consultation, participation in decision making, genuine partnerships.

What comes to mind when you think about self-determination?

- ***A proud, thriving, vibrant community expressing its cultural identity and unique status as first peoples***

The importance of respecting the unique status of Aboriginal and Torres Strait Islander people in Australia was a consistent theme. Different people described it in different ways; the common view was of Aboriginal people having distinct rights and responsibilities, but that this did not detract from rights held by non-Aboriginal people. It was not a scenario of rights held by one group at the expense of another.

It is not a question of there being two rules; different rules for different people. It doesn't mean a lessening of other rights but recognition that Aboriginal people have pre-existing rights that continue. Rights need to be enshrined and the argument that Aboriginal people are receiving special treatment needs to be rejected. Koori courts are a good example. People were up in arms saying that Aboriginal people were receiving special treatment. But, in fact, the way that the criminal justice system operates can be said to be a form of “special treatment” for Aboriginal people.

We need to be recognised as a separate people; as unique people with traditional rights. Although we are now expressing them in a contemporary way, our values and our sentiments do not change. We should be celebrated and recognised.

- ***Our community deciding its own direction for itself; it cannot be imposed***

One fundamental theme that emerged from our discussions was self-determination as a right to “determine priorities, direction and the path forward for economic, social and cultural development”. Some of the terms that people used were “empowerment”, “control of destiny”, “autonomy” and “authority to control”. Self-determination covered all aspects of control from partnership with government in developing policy and programs to service delivery by Aboriginal organisations to overseeing implementation of policy.

The first step is the capacity to live life the way you want. It entails respect and room for culture and history and unique ways of life.

It is important that outsiders understand that that community needs to decide its own direction for itself; it cannot be imposed. The community must oversee its own development, ranging from the setting up of organisations and determining who they are to represent and what they are to do; to agitating for land rights; to ultimately getting to say what’s going to happen on my land.

- ***Self-determination comes with tough responsibilities***

Vitality, the power to determine one’s own destiny and make decisions involves the tough issues of taking responsibility for actions, learning from mistakes and building knowledge, skills and capacity to exercise responsibility more effectively.

Self-determination comes with a huge cost and we need to think that through carefully. It is not just taking on the nice elements but involves really big challenges. We have to bluntly state, “There will be no sexual abuse, no violence and no mistreatment of children.” When we are truly self-determining, there will be nobody to blame anymore. We will need to be robust enough to deal with the criticism when it comes. The

detractors are abundant already and call self-determination a failed experiment. They say, “We gave them self-determination and look what they’ve done with it.”

We need to demonstrate the maturity needed to be self-determining. Self-determination is not just warm and fuzzy and is not just about cultural revival, important as that is. It is about taking responsibility for the big challenges and engaging with the big issues.

- ***Different people will have different aspirations***

One message that was clearly delivered is that Victorian Aboriginal people will have quite differing aspirations and do not speak with one voice. Traditional owners and non-traditional owners, people living on country and people living in urban centres will have different rights and responsibilities and will approach their roles in different ways. How the right to self-determination will be relevant to all and how it can be achieved without animosity between groups are important issues for discussion.

There is a misconception that all Aboriginal people are the same but the problem is that there are so many communities. You have traditional owners and you have community-based cooperatives that are competitive. It creates animosity and dislike in communities.

In Victoria, there are traditional owners and non-traditional owners who will have individual responses to the concept of self-determination. Self-determination may be exhibited in different ways including how people might interact with service providers.

- ***There is an important role for non-Aboriginal people too***

Non-Aboriginal people and institutions also have a significant role in achieving self-determination, not in the sense of “allowing” greater autonomy but in entering into respectful, collaborative partnerships. People described a vision where Aboriginal aspirations are part of mainstream Victorian life and where Aboriginal society and culture are cherished as enriching all Victorians.

Self-determination needs to be a celebration but we can't celebrate on our own. Non-Aboriginal people have to know us and value and respect us. Non-Aboriginal people generally have a very narrow portal into Aboriginal people's lives. There is no social engagement. There is servicing but not sharing.

- ***But, on the other hand, “Self-determination is an outdated cliché”***

Not everyone we interviewed considered that self-determination was relevant in contemporary Victoria. Some Aboriginal people were concerned that discussions about self-determination go back to battles of the past that have already been won and only reinforce disempowerment by always painting Aboriginal people in a negative light: as disadvantaged and incapable.

I am no longer restricted by the norms of 50 years ago. What is stopping us from being self-determining? Individual blockages are stopping us. Aboriginal community blockages are stopping us but, beyond that, I don't see any restrictions. The only restrictions are those that exist in all of us. It is not like the days when we weren't citizens in our own country. Now, the same laws bind us all. There is nothing stopping us, except from within the Aboriginal community.

We can't keep fighting the old battles based on that's what we are familiar with. It is well intentioned and well meaning but not needed. We don't want to be pigeonholed. We have different aspirations to our parents and grandparents. We are not separate but are integrated but distinct. Being Aboriginal is not the totality or our existence. Young Aboriginal people are taking jobs outside the Aboriginal community.

As each generation comes along, the cutting edge moves. The young are fighting different battles.

What is needed for Aboriginal people to be self-determining?

- ***Capacity to be self-determining***

A prominent theme that emerged from our discussions was the need to build up capacity of Aboriginal individuals and communities to be self-determining. A “brain drain” was described as a problem: Aboriginal expertise locked up in government and the best and brightest tied up in service delivery without the time or resources to concentrate on the big picture and long-term planning.

We need to develop planning tools. We need transferable skills. We need the capacity to express our rights of self-determination. We need to develop the individual.

- ***Room for long-term strategic planning***

Having the space, resources and institutions to develop a long-term vision was identified as a precondition for the types of collaborative relationships necessary for Aboriginal self-determination. The need for Aboriginal representative institutions with the resources to properly advocate for their constituency, undertake long-term strategic planning and enter into respectful relationships with government and the private sector was also identified.

There needs to be an internal assessment of capacity and vision. Not just the capacity to deal with mainstream government but to deal with the private sector. We need to develop our strategic thinking. At the moment, we're lacking education and knowledge.

Through the 70s model we became more complicit in government action. We became the gun that fired their bullets. ATSIC is a good example; it was never given the space to be representative. Our energy was funnelled into service delivery instead of advocacy. We have worked our bums off to meet need but we are still climbing the slippery slope to fulfil basic needs. We have spent 30 years arguing about increasing our budgets by a few per cent. We don't have the tools for the rules of engagement.

Self-determination is not being submissive. Instead, it is developing new ways of collaborative leadership. The pressure is to be immediate and interventionist. There is pressure from the voters on government to deliver. There is pressure on the bureaucrats to enact government policy. There is pressure on Aboriginal people to deliver needed services now. There is no model for unearthing and working towards aspirations for the future. We need a model that is sustainable and resourced well enough to drive a vision; one that isn't dependent on personality, one that can survive the new minister or the new bureaucracy.

- **The role of education**

The role of education was considered by all to be of paramount importance. While there was broad consensus on the vital role of culturally appropriate education for Aboriginal children that instils pride and provides cultural affirmation, there was no consensus on how this was to be achieved. Some advocated separate Aboriginal schools while others promoted mainstream schools bolstered by Aboriginal language and culture schools. Whatever the approach, Aboriginal control was explained to be crucial.

The education system needs an overhaul. As it currently stands, it is foreign to a lot of our kids so they miss out on the education. But the reality is that our kids need to be educated in the white system. They need to be able to deal with big business and understand their ways so they need education in their system. We want our kids to be the prime minister or the president of the republic. But they also need to be educated in our unique existence, our unique culture. We need to be able to rely on our own systems.

Our kids face hostility and oppression. They face an education system that embodies western culture and western knowledge from the time they are five years old until their tertiary education. They need the skill sets for dealing with the mainstream but, at the same time, the system does not build pride in their Aboriginality. There's no time or resources for cultural affirmation. In a sense, the system is another expression of terra nullius. There is no institutional basis for the dispersal of culture, knowledge or values.

We need Aboriginal schools. Our kids don't fit in. The methodology is all wrong. Our kids are told they are slow and they have problems but the system isn't right for them and doesn't take into account our ways of learning. In Aboriginal schools, we would need to meet the government standards but we could teach our kids about land, culture, heritage and language. It would need to be holistically designed and must involve family. The current system is not sufficient for our kids. Kids are embarrassed and shamed at their low levels of achievement at school, so they are too embarrassed to go for a job.

The importance of educating non-Aboriginal people about Aboriginal history and culture for relationship building was also stressed.

Education is a central requirement for Aboriginal and non-Aboriginal people. There needs to be a strong educational role for non-Aboriginal people that positions Aboriginal culture as central to Victorian life and identity.

Aboriginal history should be fundamental to every education system in Australia. There would be a focus on local history, on the traditional owners and their history and their culture. It would act like fluoride and there would be inter-generational change.

Self-determination covers a range of rights

A number of people noted how difficult it was to come up with a simple description of self-determination because it covers a range of rights and aspirations. Particular rights that were referred to were the rights to equality, cultural integrity, economic independence and identity.

Equality and non-discrimination

The two sides to equality are equal treatment on the one hand and the freedom from discrimination on the other. Unfortunately, an intergenerational inability to access services, reports of continuing racist attitudes and perceptions that Aboriginal people and culture are not valued were reported as continuing realities in Victoria.

Self-determination is exhibited through equality in terms of access and opportunity but also where governance and services are not imposed but instead fit with community principles and values.

Undercurrents of fear and racism continue to exist across Victoria and regional towns are especially racist. We need to educate non-Aboriginal people and disseminate correct information – “We’re not here to undermine you or take away your land but you need to appreciate our unique status.”

Cultural integrity

A vital aspect to self-determination is the right to cultural integrity. The first step was said to involve the capacity to live life “the way you want” with respect and room for culture and history and unique ways of life. It was again emphasised that cultural integrity will be different for different people and that, for example, people who don’t live on country will achieve cultural sustenance in a different way from those who do.

Our Aboriginality is still there and is growing and is growing for our kids. Culture is the key but it is evolving and changing. The degree to which people embrace their identity and culture is up to them. I am concerned about that but we are not going to go away.

For our community to survive, our cultural revival needs to be more intense, needs to be 24/7. We are always handing down our Aboriginality. We have to know our identity and we have to know our ancestors. There has been great dispossession in Victoria and our internal strength is the last element of our Aboriginality that cannot be removed – our spiritual integrity and our sense of community. We have the right to be who we are in our own country.

There is a hell of a lot of a drug culture coming to our kids. We need to be able to teach our kids to be proud of who they are and that they can drive their own lives. We need to nourish them so they know they don’t need drugs.

Economic development

Economic sustainability was frequently cited as a necessary requirement for self-determination. The Aboriginal economy in Victoria was described by one person as revolving around “Aboriginal misery” with desperate need for a strong financial base to give the freedom to make real choices. A number of people referred to NSW where 7.5 per cent of the state’s land tax was collected for 15 years as compensation for land lost to Aboriginal people in NSW and which is used to buy land and fund the NSW land council system. The issue of a fair return of land was also raised, keeping in mind that Victoria has the lowest proportion of Aboriginal-owned land in Australia.

I see self-determination as having total control over everything that we do. For the Aboriginal community, it would entail control over funding and every aspect to be an effective community. As things stand, government-funded organisations have to fulfil certain requirements and act according to guidelines that are externally determined. What is really needed is our own core funding so that we don’t have to rely on government funding or philanthropy.

We need economic development and a strong Koori business sector. We need to see our kids working as qualified tradespeople as well as professionals. The vision is of economic development across the entire spectrum – tradespeople through to professionals and through to small business.

We need to have sustainable economy with development at the local level. We need to get a proportion of the wealth. For example, we could get a proportion of permit fees. But they won’t let go of us. There is too much control and regulation. Funding for programs stops and starts and is uncoordinated. Unless you have bad statistics, you don’t get funding.

Identity

Expression of identity was consistently raised as fundamental to self-determination, especially in a state so heavily impacted by dispossession and child removal policies, and where half the Aboriginal population lives in Melbourne. Similarly, as a specific phenomenon in Victoria, challenges to Aboriginality from Aboriginal and non-Aboriginal people was repeatedly stated as a serious issue impacting upon people's ability to be self-determining. The right to be accepted and to not have to justify one's Aboriginality was described as integral to self-determination.

There needs to be more positive imagery of Aboriginal people in the media. We need to change the attitudes of white society. Media is the tough one, it challenges us all. There needs to be cultural awareness, cultural training and cultural competency.

*It's important to understand that you can have strength of identity without having to **live on** your own country. People are struggling with the concept that you have to live on traditional country to be a "real" Aboriginal person but you can live and work anywhere, so long as you know where you are from. You can visit and walk on country and be sustained that way. Others have no access to country and it is more difficult for them. They don't have that space to express themselves and can't walk on their country. Issues of identity for them are different.*

What is the role of government?

- **Genuine partnership: "participants not recipients"**

The need for a genuine partnership with all levels of government was frequently emphasised – where Aboriginal people have a genuine role in designing policy and programs through to their implementation. The need to have a share in the leadership of the state was paramount for some.

We need to create spaces for exercise of ownership. We do not want to take their place. We are saying to government, "Move over. Don't get off the stage but move over."

We want to be participants in program development. For too long, Aboriginal people have been an afterthought. Policy development happens first, then they ask, "What about the Aborigines?" We need to be first mention.

It is ensuring that cultural practices in government policies and services are what we want. At present, there are parts of government that pay lip service to Koori engagement but what we want is accountability and transparency in government and fair and equitable participation.

- **Involvement of Aboriginal people in government**

A number of people expressed the desire to see Aboriginal people as decision makers in all levels of government, whether as members of local government or dedicated seats in the Victorian or Federal Parliament or as heads of government departments. Similarly, the importance of Aboriginal people on boards of management of schools and hospitals and management committees was stated.

I would like to see dedicated Aboriginal and Torres Strait Islander seats in every level of government – federal, state and local. We want to be part of it and have a say over our own country.

- **Meaningful consultation**

Victoria has a range of forums for consultation with Aboriginal people, but the question is whether they are effective or meaningful. Four main concerns were raised: that consultation is restricted to peak bodies, when it should be with people at the grassroots level; that it is often driven by a particular agenda and is not broad based; that people may not have the confidence to participate; and finally, that feedback and follow-up are often inadequate. It was said that when it comes to consultation with Aboriginal people, process is everything and that story telling is central.

There needs to be more education for public servants on Koori history and society so that they appreciate consultation, partnership, and self-determination and the differences. There isn't enough thought given to how consultation can be made meaningful.

Consultation needs to be broad based. It's important that it's not tokenistic – not just "tick the box". Any particular organisation or Aboriginal advisory group of eight or so members doesn't bring everyone's point of view but the government assumes that if it has consulted the organisation or advisory group it can say that it has consulted. It's not adequate and Indigenous communities suffer the consequences.

The follow-up to consultation needs to be addressed too. The recommendations need to be delivered upon and thought given to what happens next. We don't get feedback, we don't even get acknowledged.

- **The relationship with service providers**

How should service providers who have Aboriginal clients incorporate the right to self-determination into their processes? Does self-determination mean that service provision should be undertaken by Aboriginal organisations? Concern was raised that Aboriginal services are expected to do what mainstream services do, but with far less funding. What responsibility do governments have to fund the implementation of self-determination when it comes to the provision of services that would otherwise be undertaken by the government?

- **And it's not just government, interaction with the private sector is important too**

A number of people noted the importance of respective consultative relationships with the private sector and non-government organisations as being essential to any expression of self-determination.

Recognition of self-determination in the Charter

Why include the right to self-determination in the Charter?

There was not unanimous agreement that self-determination should be recognised in the Charter. Supporters of its inclusion pointed to the strengthening of the concept and greater acceptance that may occur. Over time, it would become normalised and have the potential for systemic change that would impact on people on a day-to-day basis. An example was given of the impact of occupational health and safety standards that started as legislative prescriptions but now are part of life – there is no workplace anywhere that does not enforce the standards. Ideally, self-determination would become commonplace.

Self-determination needs to be given some protection and having it in the Charter means it will be more difficult to overturn. The concept of self-determination should not be left to the interpretation of politicians or public servants, but self-determined by the Koori community. For example, the Victorian Aboriginal Justice Agreement embodies agreed underlying principles developed jointly between the community and government but a new minister can immediately overturn it. While nothing is concrete, the more that self-determination can be solidified, the more sustainable it will be. Inclusion in the Charter will give us something to point to, and against which the actions of government and institutions can be benchmarked.

The native title alternative settlement framework is about empowerment: cultural custodianship, traditional ownership and economic development. But if self-determination were included in the Charter, governance of corporate entities, the operation of consultative bodies and negotiations with government could also be assessed. The recognition of self-determination in the Charter would provide a fabulous opportunity to introduce a higher level of accountability. If the native title settlement packages and the process of negotiation of the package could be assessed against the Charter, it would be a fabulous tool.

On the other hand, others felt that inclusion of self-determination in the Charter may lead to a perception of Aboriginal people in some way as “lesser” and in need of protection.

I don't see the advantage in having self-determination in the Charter. In fact, it is potentially disadvantageous. The message that it portrays is that we are so bereft of responsibility that we can't manage on our own. There needs to be robust debate within the community as to the incidents of self-determination. I accept that there needs to be a stronger commitment to various rights but not one that describes me as lesser.

Is it a question of enforcement? The importance of benchmarks

It is clear from these preliminary conversations that many of the specific rights that people expressed concern about are, in fact, protected by the Charter, including equality rights, protection of culture, and right to participate in public life. The real issue may be the importance of the enforcement of rights.

Implementation is the key. Having human rights benchmarks that influence engagement. We need to have collaborative engagement with the future. The Charter could provide guidance as to how to hold government and institutions, including local institutions, accountable.

Limitations to the Charter may leave people feeling disappointed.

People think that the Charter can do all sorts of things that it can't. The Charter doesn't give redress for breach of human rights. It would be nice if it had more teeth. Other legislation needs to come up behind so that rights can be enforced. For example, changes to the Equal Opportunity Act are needed, allowing for group claims rather than individual. The Charter also doesn't recognise economic, social and cultural rights. A lot of people are concerned that this failure to recognise these rights leaves people vulnerable.

Options for including a concept of self-determination in the Charter

The inclusion of the right to self-determination in the Charter might be achieved through a selection or combination of options including the four outlined below:

1. To have the right to self-determination specifically protected in the Charter

A right to self-determination could be protected within the Charter by entrenching the right in the list of rights protected. For example, this could be done by using the language that is part of international law in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights:

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.

In these terms, self-determination would be recognised as a right held by all Victorians even though it would have special significance for Aboriginal people.

Another option would be to have the recognition of the right to self-determination expressed in a way that emphasises its special importance to Aboriginal people. For example, using the Canadian protection of Aboriginal rights as a template:

The right to self-determination held by the Aboriginal peoples of Victoria is hereby recognised and affirmed.

2. To have several rights added to the Charter that would assist Aboriginal people in Victoria to exercise the right to self-determination

Rather than protecting a right to self-determination, the Charter could protect a cluster of rights that would assist in the exercise of the right to self-determination.

The Charter already contains several rights that have been identified as being key parts of the concept of self-determination, including:

- the right to equality before the law
- the right to protection of families and children
- the right to take part in public life
- cultural rights
- property rights
- the right to a fair hearing.

These rights could be extended to include other rights such as:

- the right to education
- the right to adequate housing
- a duty to consult
- the right to free and informed consent when the rights of Aboriginal people are being adversely affected.

3. To have a Preamble to the Charter that places self-determination as a key principle against which the rights within the Charter need to be interpreted

The Preamble to the Charter already contains recognition of the special place of Aboriginal people in Victoria:

This Charter is founded on the following principles —

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- *human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.*

However, it could be extended to include the right to self-determination. For example:

- *human rights, including the right to self-determination, have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.*

A preamble is used as a tool to assist interpretation of the Charter when there is ambiguity or contradictions. Including self-determination in the Preamble would mean that, in some circumstances, self-determination would be a guiding principle to aid judges, politicians and bureaucrats when interpreting what the Charter means in practice.

4. To have a mechanism that supports the enforcement of rights in the Charter that are central to self-determination

With some of the rights that are central to self-determination already included in the Charter, issues arise about the need for education, enforcement and monitoring.

A position such as that of a Social Justice Commissioner might be created to undertake a range of activities aimed at supporting the intention of the Charter to protect the rights of Aboriginal people in Victoria. These activities could include:

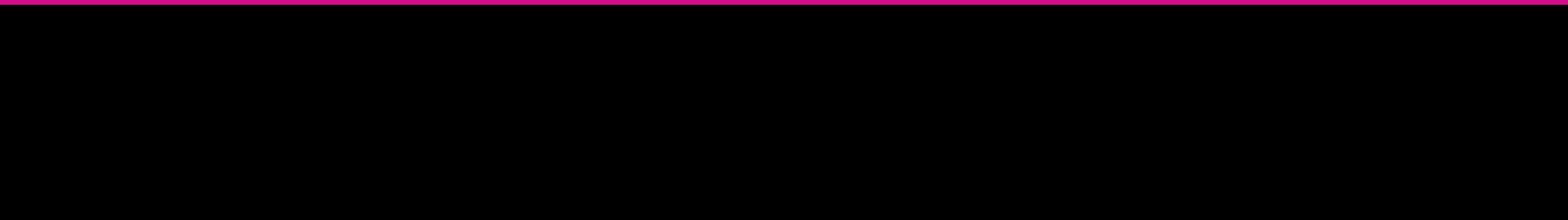
- facilitating discussions among Aboriginal people in Victoria about what self-determination means in practice
- working with government departments to educate them about the way in which the principle of self-determination can guide their work
- monitoring the policies and legislation to see if they are consistent with the right to self-determination
- identifying best practices in incorporating the right to self-determination in policies, processes and legislation.

Concluding comments

The inclusion of the right to self-determination in the Charter means that it becomes part of the dialogue of human rights. The experiences of other countries highlight the way that self-determination requires policy and constitutional protection in some form.

While influencing the activities of the Victorian Government, self-determination in the Charter would have no influence on the way in which the Federal Government develops policies that might impact on Aboriginal people living in Victoria.

However, inclusion in the Charter will raise awareness about the right to self-determination. It will provide an impetus for Aboriginal people to continue to discuss and define what the concept of self-determination should mean in practice. It would also require public sector staff and members of the Victorian Parliament to think about the concept of self-determination as they make policies and enact laws.



**Victorian Equal Opportunity
& Human Rights Commission**